



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL SUIT NO.144 OF 2008 (OS)

IN THE MATTER OF L.P. NO. SOUTH THARAKA/TUNYAI 'A'/72

AND

IN THE MATTER OF ORDERS XXXXVI OF CIVIL PRECEDURE RULES AND
SECTION 38 OF THE LIMITATION OF ACTIONS ACT CAP 221 LAWS OF KENYA

BETWEEN

BERNARD MBURU NJIHIA.....PLAINTIFF

VERSUS

JULIUS GITHUI KARIANJAH.....DEFENDANT

RULING

This suit by way of Originating Summons is dated 17th October, 2008. The Originating summons posed the following questions for determination by the Court.

- 1. When did the plaintiff start occupying the L. P. No. SOUTH THARAKA/TUNYAI “A”.**
- 2. Has the said occupation of the plaintiff been open and uninterrupted for a continuous period of 12 years?**
- 3. Has the plaintiff developed the said land in question?**
- 4. Has the defendant ever occupied or built on the said piece of land?**
- 5. Has the plaintiff become entitled to be registered in the said parcel by virtue of adverse possession?**
- 6. Who should pay the cost of this Summons**

This ruling will not answer the above questions as it will strictly be confined to the determination of whether this suit should not be dismissed for non-prosecution in accordance with Order 17 rule 2 of the

Civil Procedure Rules, Cap.21, Laws of Kenya.

I find that notice was properly issued for the parties to show cause why this suit should not be dismissed in abeyance to Rule 2 of the Civil Procedure Rules Rule 2 states:

“1. In any suit in which no application has been made or step taken by either party for one year, the court may give Notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.”

According to court records this suit's file was handled by two judges. On 7.11.2008, the plaintiff, through a Mr. Lompo, appeared *ex parte* before the Hon. Justice W. Ouko, Judge, as he then was and temporary orders for injunction and inhibition were issued. The second time the record shows the file was before a judge was on 21.11.08 when the Hon. Justice Anyara Emukule, Judge, extended the orders granted on 7.11.2008 for 14 days. These orders were not extended further.

The record shows that on 15.3.2011, an employee of B. G. Kariuki, Advocates, went to the Registry and obtained a date for the hearing of the Chamber Summons to take place on 5th July, 2011. This was the last time any step had been taken by either party until on 17.2.2014 when I directed that notice be given in accordance with Order 17, rule 2, for the parties to show cause why this suit should not be dismissed. After I had given this direction, the plaintiff appeared in the Registry on 9.4.2014 and fixed the suit for mention on 2.7.2014. On that day, I re-issued my order that a notice be issued for the parties to show cause why the suit should not be dismissed in accordance with the provisions of Order 17 Rule 2 of the Civil Procedure Rules. I directed the parties to show cause why the suit should not be dismissed on 10.7.2014.

On 10.7.2014, the advocate representing the plaintiff told the court that the suit should not be dismissed as a clerk in the firm representing the plaintiff had gone to this court's Registry on 9.4.2014 and fixed a mention date for 2.7.2014. He did not give any other cause as to why the suit should not be dismissed. The appearance at the Registry was over 3 years after the plaintiff had last taken any step by appearing at the Registry on 15.3.2011. It was also almost two months after I had given directions that a Notice to show cause why the suit should not be dismissed, be issued to the parties.

The defendant's advocate countered that this suit should be dismissed and opined that the plaintiff had not shown any cause whatsoever as to why the suit should not be dismissed. He opined that the plaintiff was unwilling to prosecute his case as he was enjoying interim orders since he instituted the suit almost six years ago. He also suggested that the plaintiff was merely reacting to this court's directions issued on 17.2.2014 directing the parties to show cause why this suit should not be dismissed.

I have considered the submissions of the parties. It is true that from 15.3.2011 to 9.4.2014, neither the plaintiff and nor the defendant, had made any application or taken any step in this suit. This is a period exceeding 3 years. Order 17 rule 2 stipulates a period of 1 year. This inactivity, can, however, be cured by the parties showing to the satisfaction of the court why the suit should not be dismissed.

I am inclined, as the defendant seems to imply, to the position that the plaintiff by fixing a mention date at the Registry on 9.4.2014 was merely reacting to my directions made on 17.2.2014 that Notice be issued to show cause why the suit should not be dismissed. He, however, made his step over 3 years since he had taken his previous step. In my view, this is 3 years too late.

The plaintiff has not shown any cause, let alone to the satisfaction of this Court, that this suit should not be dismissed.

As the interim orders for injunction and inhibition granted on 7.11.2008 and extended for 14 days on 21.11.2008, expired years ago, and as such are non-existent, there should be no question, as suggested by the defendant, of enjoyment of non-existent orders by the plaintiff.

In the circumstances, this suit is dismissed. Costs are awarded to the defendant.

It is so ordered.

Delivered in Open Court at Meru this 23rd day of July, 2014 in the presence of :

Cc. Daniel

Gatare Ringera for Defendant

Lekoona for plaintiff – Absent

P. M. NJOROGE

JUDGE