



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 233 OF 2019**

**KIBUE MUTUNGU HANNIEL.....PLAINTIFF**

**=VERSUS=**

**ISAAC GICHOHI MWANGL.....1<sup>ST</sup> DEFENDANT**

**CHARLES MUCHEMI KINGORI T/A**

**C. M. KINGORI ADVOCATES.....2<sup>ND</sup> DEFENDANT**

**CHIEF LAND REGISTERAR.....3<sup>RD</sup> DEFENDANT**

**ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. This is the Notice of Motion dated 28<sup>th</sup> April 2021 brought under sections 1A, 1B and 3A of the Civil Procedure Act; order 17 rule 2(1) and (3) of the Civil Procedure Rules 2010, and all other enabling provisions of the law.

2. It seeks orders:-

*1. That this honourable court dismiss the suit herein for want of prosecution.*

*2. The raising orders do issue vacating the conservatory orders issued on 24<sup>th</sup> October 2019 against the Chief Land Registrar prohibiting him from approving any transactions relating to LR NO.14225/8 (IR NO 61626).*

*3. The raising orders do issue vacating the temporary injunction orders issued on 24<sup>th</sup> October 2019 restraining the 1<sup>st</sup> defendant his agents or servants, or anyone claiming under him, from alienating, trespassing or interfering with the Applicants quiet possession of LR NO 14225/8 (IR NO 61626).*

*4. That raising orders do issue vacating the restriction orders issued on 24<sup>th</sup> October 2019 regarding the property known that pending the hearing and determination of the suit a restriction be and is placed on LR NO 14225/8 (IR NO 61626).*

*5. The costs of this application be provided.*

3. The grounds are on the face of the application and are set out in paragraphs (a) to (c).

4. The application is supported by the affidavit sworn by Isaac Gichohi Mwangi, the 1<sup>st</sup> Defendant/Applicant, sworn on the 28<sup>th</sup> April 2021 and a supplementary affidavit sworn on the 26<sup>th</sup> October 2021.

5. The application is opposed. There are grounds of opposition filed by the Plaintiff/Respondent dated 23<sup>rd</sup> September 2021 and a replying affidavit sworn by the Plaintiff/Respondent on 1<sup>st</sup> November 2021.

6. On the 27<sup>th</sup> September 2021, the court with the consent of the parties directed that the notice of motion be canvassed by way of written submissions.

7. The 1<sup>st</sup> Defendant/Applicant submission is that this application has been filed after one (1) year of abandonment of the suit.

8. Further that there has been inordinate, and inexcusable delay on the part of the Plaintiff in prosecuting this suit. He has put forward his case of **George Gatere Kibata vs George Kuria Mwaure & Another [2017] eKLR; Mwangi S. Kaimenyi vs Attorney General & Another, Civil Suit Misc. No 720 of 2009**. He prays that the application be allowed.

9. The Plaintiff's submissions are dated 15<sup>th</sup> November 2021. He submits that the court has discretion as to whether to dismiss the suit or not. He has put forward the cases of **Jason Mudaki Kivati vs David Kenyani Ongusu [2018] eKLR; Ivita vs Kyumbu 1984 KLR 441**.

10. He further submits that the 1<sup>st</sup> Defendant/Applicant filed this application and failed to serve it on him (the Plaintiff) for about five (5) months.

11. He further submits that the substratum of this suit has not yet been lost and justice could still be done to the parties despite the delay. He has also relied on the case of **Ceven Limited vs Erastus Gichuhi & 4 Others [2021] eKLR; Pkiech Chesimaya vs Limakorwai Achipa [2020] eKLR; John Harun Mwau vs Standard Limited & 2 Others [2017] eKLR**.

12. He further submits that the 1<sup>st</sup> Defendant/Applicant has not demonstrated that he will suffer prejudice if the suit proceeds to full trial. He prays that the application be dismissed.

13. I have considered the notice of motion and the affidavits in support. I have also considered the grounds of opposition, the replying affidavit, the rival submissions and the authorities cited. The issue for determination is whether this application is merited.

14. **Order 17 rule 2** of the Civil Procedure Rules provides that:-

*“(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.*

*(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.*

*(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.*

*(4) The court may dismiss the suit for non-compliance with any direction given under this Order.”*

15. I note that this application is dated 28<sup>th</sup> April 2021. It is not clear if the same was served on the Plaintiff/Respondent before he complied with order 11 of the Civil Procedure Rules.

16. I have gone through the court record. I find that the matter was fixed for mention on 17<sup>th</sup> March 2020. This court takes judicial notice that this is the period the court operations had been suspended owing to the emergence of Covid 19 pandemic. This matter only came up again on 12<sup>th</sup> April 2021.

17. On the 5<sup>th</sup> July 2021, when the matter came up before the honourable Deputy Registrar, Ms Njoroge for the Plaintiff confirmed that they had complied with order 11 of the Civil Procedure Rules.

18. Given this scenario I find that the Plaintiff ought to be given an opportunity to prosecute his case. In the case of **Jason Mudaki Kivati vs David Kenyani Ongusu [2018] eKLR**, the court held thus:-

*“.....The use of the term “may” means that the court may or may not dismiss a suit even in cases where no action has been taken by either party for a year but the decision will be made based on the circumstances of each case”.*

19. I find that the Plaintiff/Respondent has given a reasonable explanation as to the delay in prosecuting this suit.

20. I also find that no prejudice will be occasioned to the 1<sup>st</sup> Defendant if this matter is allowed to go to full hearing.

21. I find that this matter ought to go to full hearing so that all issues are resolved.

22. In conclusion, I find no merit in this application and the same is dismissed with no orders as to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED NAIROBI THIS 10<sup>TH</sup> DAY OF MARCH 2022.**

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**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Ms Njoroge for Mr. Waithaka for the Plaintiff

Ms Wambui for Ms Wachira for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

Steve - Court Assistant