



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 535 OF 2013

MUNGAI NJOROGE PLAINTIFF

VERSUS

MAINA MUNENE 1ST DEFENDANT

BERNARD CHIORI MURAGE 2ND DEFENDANT

THE LAND REGISTRAR KIRINYAGA 3RD DEFENDANT

THE ATTORNEY GENERAL 4TH DEFENDANT

AND

JOSEPH NICHOLAS MURAGE 1ST INTERESTED PARTY

PETER WANJOHI MUNENE 2ND INTERESTED PARTY

RULING

On 21st March 2013, Justice P. Nyamweya delivered a ruling in this case on an application by the 1st interested party JOSEPH NICHOLAS MURAGE seeking to have the plaintiff's plaint herein dated 25th August 1978 struck out with costs to the interested party and that the inhibition order issued by the Court against the suit premises be lifted. In dismissing that application, Justice Nyamweya made the following order:-

“I hereby also order pursuant to the provisions of Section 1A, 1B, 3A of the Civil Procedure Act and Order II of the Civil Procedure Rules that the plaintiff herein takes the necessary steps to set this matter for hearing within 120 days of the date of this ruling, failing which the interested party and any other party shall be at liberty to apply for dismissal of the suit for want of prosecution”.

The Judge then ordered that since the subject matter is situated in Kirinyaga County, the file be transferred to this Court and by a letter dated 5th April 2013, this file was dispatched to this Court and the parties were notified to attend this Court on 17th June 2013 for directions.

Nothing appears to have been done by the parties and on 27th August 2013, the 1st interested party/applicant moved this Court by a Notice of Motion founded under **Order 2 Rule 15 (1) (a) and Order 24 Rules 4 (3) and 7 (1) of the Civil Procedure Rules and the Constitution of Kenya** seeking the

following orders:-

1. ***That this suit be dismissed for want of prosecution***
2. ***That the inhibition orders on the suit land be lifted, set aside and/or discharged***
3. ***That the costs of this application be provided for***

The application which is the subject of this ruling was supported by the affidavit of JOSEPH NICHOLAS MURAGE the 1st interested party/applicant and based on the grounds, inter alia, that:-

- a. ***On 21st March 2013, the Hon. Lady Justice Nyamweya ruled that the suit had abated against the 2nd defendant and directed that the plaintiff within 120 days from the date of her ruling take the necessary steps under the Civil Procedure Rules and set the matter down for hearing failing which the 1st interested party herein and any other party would be at liberty to apply for dismissal of the suit for want of prosecution***
- b. ***That 120 days from 21st March 2013 ended on 21st July 2013 and 160 days have now elapsed and the plaintiff has not followed the Court orders to set the matter down for hearing***
- c. ***The plaintiff has failed and/or neglected to have the suit heard and has not taken any step to further prosecute the suit since 21st March 2013***
- d. ***The suit was found to have abated against the 2nd defendant who is the registered owner of the suit land***
- e. ***The cause of action subsists solely as against the 3rd and 4th defendants who have no interest in nor nexus to the suit land.***

The plaintiff opposed the application and filed grounds of opposition thereto as follows:-

1. ***The application is frivolous, vexatious, bad in law and an abuse of the Court process***
2. ***The Court file herein was brought to Kerugoya from Nairobi High Court hence the delay in fixing the matter was not inordinate***
3. ***The plaintiff has a case with high chances of success***

On his part, the 2nd interested party filed a replying affidavit in which he deponed, inter alia, that the application seeks un-reasonable and selfish orders on the part of the applicant, that all the parties have at all times exhibited due diligence and interest in having the matter heard, the delay was not inordinate as the matter was transferred from Nairobi to Kerugoya and that there are issues for trial.

Submissions have been filed by the plaintiff and the 1st and 2nd interested parties which I have considered together with the pleadings herein.

Order 15 (1) of the Civil Procedure Rules empowers this Court to dismiss a suit for being an abuse of the Court process. In paragraph 14 of his supporting affidavit, the 1st interested party/applicant herein depones as follows:-

“That the plaintiff is blatantly taking undue advantage and/or abusing the Court process by refusing to adhere to, neglecting and ignoring the orders of the Court issued on 21st March 2013”

When the ruling by Nyamweya J. was delivered on 21st March 2013, the record shows that Mr. Mwangi was holding brief for Mr. Ojienda advocate for the plaintiff. Therefore the plaintiff was well represented by counsel and cannot claim to have been un-aware of the said ruling. Mr. Mwai who is now on record for the plaintiff has stated in his submissions that he only learnt of the said ruling on 5th August 2013 when he was requested by Kituo Cha Sheria to represent the plaintiff pro-bono. One would have expected that if indeed the plaintiff was not aware about the said ruling, he would have deponed as much in an affidavit or at least his then counsel Mr. Ojienda who was represented during the ruling would have deponed to that effect. All I have is the submissions by Mr. Mwai from the bar that ***“the plaintiff being a***

layman could not understand the rules of procedure”. It is instructive to note that even in these submissions, Mr. Mwai for the plaintiff does not offer any explanation when the plaintiff became aware of the ruling by Nyamweya J. dated 21st March 2013 (if indeed his then advocate did not inform him about the same) and what steps he took when he finally became aware of the said ruling. Litigation belongs to the party and not his counsel and if at all his counsel then acting let him down, nothing would have been easier than to depone to that fact.

The plaintiff states in his grounds of opposition that the file was brought to Kerugoya Court from Nairobi Court. That is true. The file was transferred to this Court from the High Court in Nairobi and the parties were directed to appear before this Court on 17th June 2013 for directions as is clear from the letter of the Deputy Registrar of the Court. So at least by June 2013, this file had been received in this Court and the parties were notified. The plaintiff did nothing to comply with the orders of Nyamweya J. dated 21st March 2013 and it was not until this present application was filed on 27th August 2013 (long after the 120 days as ordered by Nyamweya J.) that the plaintiff’s new advocate Mr. Mwai came on record on 18th September 2013. The 2nd interested party has also not offered any explanation as to why no action was taken in the matter until this application was filed by the 1st interested party. The 2nd interested party raises issues of fraud etc claiming that his family stands to lose their land. The more reason why he should have taken steps to have this matter set down for hearing.

Parties and their advocates are required to assist the Court in furthering the overriding objective of the **Civil Procedure Act** and **Rules** and this includes the **timely disposal** of the proceedings in Court. They should take all the necessary steps to safeguard the integrity of the Court and obviate actions likely to abuse its process. It is of course true that a party should not be punished for the mistake of his advocate but as I have stated above, there is nothing placed before me to suggest that there was any error or excusable mistake on the part of the advocate and my view is that if indeed there was such a mistake on the part of an advocate, as an officer of the Court, nothing would have been easier than for him to depone to that fact.

To my mind, there is no reasonable explanation given the plaintiff as to why the orders of Nyamweya J. dated 21st March 2013 were not complied with. The plaintiff has been evasive and has not told the Court when he indeed learnt about the orders if he did not learn about them on the day that they were delivered in the presence of his counsel. It was his responsibility to get on with the case – **FITZPATRICK VS BATGER & CO. LTD 1962 2 ALL. E.R. 657**. The delay on the part of the plaintiff is well established and is therefore inexcusable. Indeed the plaintiff only got out of his slumber when the present application was filed. I agree with the sentiments of Waweru J. in **COASTAL AQUACULTURE LTD VS NATIONAL BANK OF KENYA AND OTHERS H.C.C.C NO. 1455 of 1997 (2006 e K.L.R)** that Court orders must be obeyed and a party failing to comply with such orders must suffer the attendant consequences of such failure no matter how dire those consequences may be. As there was no satisfactory explanation given as to why there was no compliance with the clear orders of Nyamweya J. dated 21st March 2013, the Court can only conclude that there was un-willingness to comply with the same on the part of the plaintiff which is a clear abuse of the Court process.

That being my view of the matter, I make the following orders with respect to the 1st interested party’s application filed herein on 27th August 2013:-

1. ***This suit is dismissed for want of prosecution***
2. ***The inhibition orders on the suit land be lifted, set aside and/or discharged***
3. ***The plaintiff shall meet the costs of this application.***

It is so ordered.

B.N. OLAO

JUDGE

18TH JULY, 2014

18/7/2014

Before

B.N. Olao – Judge

Mwangi – CC

Mr. Mwai for Plaintiff – absent

Attorney General for 3rd and 4th Defendants – absent

Mr. Muraguri for Mr. Wachira for 1st Interested party – present

Mr. Mwangi for 2nd Interested party – absent

COURT: Ruling delivered this 18th day of July 2014 in open Court.

Mr. Mwai for Plaintiff absent

Mr. Muraguri for Mr. Wachira for 1st Interested party present

Attorney General for 3rd & 4th Defendants absent

Mr. Mwangi for 2nd Interested party absent

B.N. OLAO

JUDGE

18TH JULY, 2014