



**COPY**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 168 OF 2010 (OS)**

**IN THE MATTER OF : PARCELS OF LAND KNOWN AS PLOT NO. KILIFI/KIJIPWA/361**

**IN THE MATTER OF: LIMITATION OF ACTIONS ACT CAP. 22 LAWS OF KENYA**

**BETWEEN**

**IBRAHIM JUMBALE NYAMAWI ..... PLAINTIFF**

**AND**

**CAROLINE MUMBUA MALINDA ..... DEFENDANT**

**RULING**

[1] This matter come for hearing of the Notice of Motion dated 30th April, 2013 on 14th May, 2013. Mr. Omollo advocate held brief for Mr. Gikandi advocate. Mr. Omollo said that he had not filed his reply and that he Mr. Gikandi was out of office for two weeks and he requested for a further 14 days to do so. Mr. Sitonik advocate had no objection and the court granted Mr. Gikandi the time. He requested the case to be fixed for 24th June, 2013 for hearing the application.

On 24th June, 2013 Miss. Olouch advocate held Mr. Gikandi's brief. She said that Mr. Gikandi had not filed his reply. The reason given was that he was involved in Nairobi High Court Succession 52 of 1979 the Estate of Mbiyu Koinange. She asked for a further two (2) weeks for Mr. Gikandi to file his response. Mr. Munyithia advocate objected the adjournment. He argued that Mr. Gikandi had been given two weeks on 14th May 2013 and had not filed the response.

I granted Mr. Gikandi the two weeks to file his response and ordered that dates were to be taken in the registry. The parties attended the registry on 3rd July, 2013. They took a date for hearing of the Notice of Motion. Mr. Mutua attended the fixing for M/s. Gikandi & Co and fixed the case on 30th April 2013. A date was fixed for hearing on 6th August, 2013.

[2] On 6th August, 2013 Mr. Kabebe Advocate held brief for Gikandi & Co. while Ms Keroringi Advocate held brief for Apollo Muinde Advocate. Mr. Kabebe Advocate said that this matter had escaped Mr. Gikandi's attention as he was involved in Nairobi Succession Cause 327 of 1981 Estate of Mbiyu Koinange and Malindi Election Petition Number 12 of 2013 and No. 8 of 2013 at Mombasa. Mr. Kabebe advocate apologized to the court and to the respondent. The court was told that Mr. Gikandi takes full responsibility and was remorseful. He requested for a further five (5) days.

Ms Keroringi advocate vehemently opposed the application for adjournment. She said she was prepared to proceed with her application to strike out the plaintiffs suit for want of prosecution.

I analysed the previous adjournments and their reasons. I stated that I should have dismissed the matter were it not a claim of adverse possession. I said if I did so I would have caused more misery to the plaintiffs. I ordered, the applicant to file his reply within five (5) days failing which the originating summons stood dismissed with costs to the respondents.

[3] Mr. Gikandi advocate did not file his response within the five days granted by the court. The five days ended on 11th August 2013. Mr. Gikandi advocate did not file his clients affidavit until 16th September, 2013 one month five days out of time. There was no application for extension of time. The filing was without leave of the court. By the time the reply was filed the suit already stood dismissed at close of courts business on 11th August 2014. This was so because of the court orders of 6th August 2013. This court became functus officio then and the only application the court could entertain was for revival of the suit and thereafter an application for extension of time. None of these applications are filed and/or is before me to consider.

[4] I was urged to consider provisions of Article 159 (d) of the Constitution and Order 1A and 1B and allow the parties to tender their evidence. I am afraid I do not find Article 159 (d) of any assistance to the plaintiffs. The respondents have not raised any technical objections here. They merely restated that the suit was dismissed by operation of a court order. The court order applied because the plaintiffs who had been indulged by the court on two other previous occasions failed to comply with court orders.

Section 1A and 1B mandates parties and their advocates to assist the court and to comply and obey court orders to facilitate the overriding objective of the Act and rules to be achieved. As earlier demonstrated, it is indeed the plaintiffs who have on more than three occasions disobeyed and failed to comply with court orders. The aforesaid sections IA and IB can hardly afford any help or relief to the plaintiffs. The suit having been dismissed as earlier stated. I find myself unable to make any further orders. The respondent is of course within his rights to pursue the decree and other orders pursuant to the dismissal of the suit. It is so ordered.

**Dated and delivered in open court at Mombasa this 18th day of September, 2014.**

**S. MUKUNYA**

**JUDGE**

**18.9.2014**

In the presence of:

Mr. Khatib advocate for Mr. Gikandi advocate for the plaintiff'

Mr. Wangalwa advocate for Apollo Muinde Advocate for the defendant.