



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 118 OF 2006 (OS)

IN THE MATTER OF LAND PARCELS NOS. MWONGORI/SETTLEMENT SCHEME/35, 363-367, 568-573, 420-424

AND

IN THE MATTER OF AN APPLCIATION FOR THE DETERMINATION OF THE RIGHTS OR INTERESTS OF HEIRS OR CESTUI QUE TRUST

BETWEEN

KENNEDY MOMANYI MANYURA

Suing As The Legal Administrator To The

Estate of ManyuraMomanyi (deceased) APPLICANT

VERSUS

**TIMOTHY ONYINKWA MOMANYI 1ST
RESPONDENT**

**NEMWEL ACHWERI MOMANYI 2ND
RESPONDENT**

MORAA ONYINKWA 3RD RESPONDENT

**ANN NYAANGA ONYINKWA 4TH
RESPONDENT**

**JOHNSON SAMARERE SAMARERE 5TH
RESPONDENT**

RULING

1. The applicant Kennedy Momanyi Manyura brought this suit by way of Originating Summons dated 15th September 2006 seeking the following reliefs:

a. **THAT this honourable court be pleased to declare that the applicant is entitled to a portion of**

land comprised in LR. Nos. Mwangori/Settlement Scheme/363-367 registered in the names of the respondents being the resultant parcels of land upon the subdivision and transfer unto the respondents of LR No. Mwangori/Settlement/35 and any resultant parcels of land thereof upon the successive subdivision and transfer of the aforesaid parcels of land.

- b. THAT an order do issue directing that upon the finding and declaration that applicant is entitled to a portion of the aforesaid parcels of land that the titles be cancelled and a new title be issued to the applicant to the extent of his entitlement.**
- c. THAT a permanent injunction do issue restraining the respondents either by themselves, agents, servants, assignees from transferring, selling and or doing any act which is prejudicial to the applicant's interest in the aforesaid parcels of land and any resultant parcels thereof upon the successive subdivision and transfers till the applicant's right or interest is ascertained.**
- d. THAT this honourable court be pleased to declare that the parcels of land to wit LR Nos. Mwangori/Settlement Scheme/363-367 being the resultant parcels of land upon the subdivision and transfer of LR Mwangori/Settlement Scheme/35 unto the respondents and any resultant parcels thereof upon the successive subdivision is so registered in trust for the applicant.**
- e. THAT costs of this application be provided for.**
- f. Any other relief the court may think fit and just to grant.**

The suit by the applicant was defended by the respondents who filed separate replying affidavits on 27th October 2006 in response to the same. When the originating summons was filed, the applicant was represented by the firm of E. M. Orina & Co. Advocates while the respondents entered appearance and filed replying affidavits aforesaid through the firm of Oruru Gisemba & Co. Advocates. On 20th May 2008, directions were given that the originating summons shall be treated a plaint and the replying affidavits as defences and that the same shall be heard by way of viva voce evidence after the parties have done discovery. On 2nd July 2008, the suit was fixed for hearing on 29th October 2008. It is not clear from the record as to what happened on 29th October 2008 when the suit was supposed to come up for hearing. On 6th July 2009, the applicant filed a notice to act in person and thereafter filed a list of documents on 28th October 2009. On 8th April 2010, the applicant appointed the firm of M/s G. A. Mongare & Company Advocates to act for him in the matter.

2. On 27th May 2010, the court issued a notice to the parties to appear in court on 13th July 2010 and show cause why this suit should not be dismissed. On 13th July 2010, the matter came up for notice to show cause before Makhandia J. (as he then was) when neither the parties nor their advocates appeared in court to show cause why this suit should not be dismissed. In the absence of the parties, no cause was shown why this suit should remain subsisting and the court had no alternative but to dismiss the same. For some reason, the firm of G. A. Mongare & Co. Advocates who were acting for the applicant either forgot or were not aware that this matter had been dismissed by the court for want of prosecution on 13th July 2010 because on 24th March 2011, they listed the suit for hearing on 19th July 2011. When the matter came up before Makhandia J. on 19th July 2011, the judge notified Mr. Mongare who appeared for the applicant that the suit had been dismissed for want of prosecution on 13th July 2010 and as such could not be heard. On that day, Mr. Mongare informed the court that he was ready to proceed with the hearing of the case implying that the applicant was present in court.

3. No further action was taken in the matter for over three (3) years until 20th February 2014 when the applicant brought an application by way of Notice of Motion dated 13th February 2014 seeking an order to set aside the order that was made herein on 13th July 2010 by Makhandia J. dismissing this suit for want of prosecution. This is the application which is the subject of this ruling. The applicant's application that was brought under order 12 rule 7 and order 17 rule 2 (2) of the Civil Procedure Rules, 2010 and sections 3A, 1A and 1B of the Civil Procedure Act was premised on several grounds. The applicant contended that he had appointed the firm of E. M Orina & Company Advocates to act for him on this matter but when he felt that Orina & Company Advocates were not up to the task, he engaged the firm of G. A Mongare & Co. Advocates to act for him in the matter in place of the said firm. The applicant

contended that Mr. G. A Mongare advocate who was the sole practitioner in the firm of G. A Mongare & Co. Advocates was thereafter appointed as a state counsel in the office of the Attorney General without notice to him. The applicant contended that when the court issued a notice to show cause on 27th May 2010 that was scheduled for hearing on 13th July 2010, Mr. G. A Mongare, advocate was already a state counsel and this explains why neither Mr. G. A Mongare nor him appeared in court on 13th July 2010 to show cause why this suit should not be dismissed. The applicant contended that if he had been served with the said notice to show cause, he would have appeared in court and showed caused why this suit should not be dismissed. The applicant urged the court to set aside the said order of dismissal so that this suit may be heard on merit.

4. The 1st respondent died between the time when this suit was dismissed and when the present application was brought by the applicant. The 2nd to 5th respondents changed advocates and appointed the firm of Momanyi Aunga & Co. Advocates to act for them in place of the firm of M/s Oruru Gisemba & Co. Advocates. On behalf of the 2nd to 5th respondents, the firm of Momanyi Aunga & Co. Advocates opposed the applicant's application through grounds of opposition dated 2nd May 2014. The respondents contended that the applicant's application is incompetent as there was no provision under the old civil procedure rules under which the suit was dismissed for reinstating a suit dismissed for want of prosecution. The respondents contended further that the applicant's application has been brought under the wrong provisions of the law and as such the same is fatally defective. The respondents contended that the applicant who has admitted in his affidavit that he did receive the notice to show cause issued on 27th May 2010 cannot at the same time claim that the same was not served upon him after failing to act. The respondents contended further that the applicant has not adduced evidence to prove that Mr. G. A Mongare advocate had been appointed a state counsel as at 13th July 2010 or that his firm of G. S Mongare & Co. Advocates was not served with the notice to show cause. The respondents contended that the applicant's application has been brought after inordinate delay and that the reinstatement of this suit will not serve any purpose because the property in dispute in this suit namely LR No. Mwangori Settlement Scheme/35 was sub-divided and transferred by the registered proprietor thereof during his lifetime and as such did not constitute his estate upon his death which could have justified the suit herein.

5. On 6th May 2014, I directed that the applicant's application be argued by way of written submissions. The applicant's advocates filed their submissions on 21st October 2014 while the respondents' advocates did so on 6th November 2014. I have considered the applicant's application together with the grounds of opposition filed by the respondents in opposition thereto. I have also considered the written submissions filed by the advocates for the parties. The following is my view of the matter. I am not in agreement with the submission by the advocates for the respondents that a plaintiff who had his case dismissed by the court for want of prosecution under order XVI rule 6 of the repealed Civil Procedure Rules had only one recourse namely, to file a fresh suit subject to the law on limitation of actions. I am of the opinion that a plaintiff who found himself in such a situation had in addition to the right to file a fresh suit, a right to apply for a review of the order under Order XLIV of the repealed Civil Procedure Rules and where the order was made ex parte, a right to apply for the setting aside of the same under Order L rule 17 of the repealed Civil Procedure Rules. The equivalent of the said provisions in the Civil Procedure Rules, 2010 are order 45 and order 51 rule 15. To that extent only, I am in agreement with the respondents' advocates that the applicant's application has been brought under the wrong provisions of the Civil Procedure Rules, 2010. The failure by the applicant to cite the correct provisions of the Civil Procedure Rules alone cannot however render the present application incompetent and a candidate for striking out. This court is enjoined by Article 159 (2) (d) to administer justice without undue regard to procedural technicalities.

6. For the foregoing reasons, I would proceed to consider the application on merit. This suit was dismissed by the court of its own motion on 13th July 2010 for want of prosecution. Before the dismissal of the suit, the court issued a notice to the parties on 27th May 2010 to appear in court on 13th July 2010 and show cause why the suit should not be dismissed. The applicant has not come out clearly in his affidavit in support of the application as to whether the said notice to show cause was served upon him or upon his previous advocates. In paragraph 8 of his affidavit, the applicant has stated that on 27th May 2010, he received a notice to show cause from the court. In paragraph 9 of his affidavit, the applicant has

contended that neither his previous advocate G. A Mongare nor he was served with the said notice to show cause. The applicant has not stated how and when he came to learn that his suit had been dismissed for want of prosecution. The applicant has contended that as at 13th July 2010 when this suit was dismissed by the court for want of prosecution, his previous advocate Mr. G. A Mongare had ceased to practice as an advocate and had joined the office of the Attorney General as state counsel. The applicant has contended that this explains why there was no appearance on his behalf when the matter came up for notice to show cause on 17th March 2010. The applicant has contended that G. A Mongare advocate did not notify him of his movement to the office of the Attorney General and as such he could not take steps in time to safe guard his interest. The respondents have disputed the applicant's claim that G. A Mongare had joined the office of the Attorney General as state counsel as at 17th March 2010 when this suit was dismissed for want of prosecution. They have contended that there is no proof of that fact.

7. On my part, what I can say is that the court record does not support the applicant's contention that G. A Mongare Advocate was a state counsel on 17th March 2010 when this suit was dismissed for want of prosecution. The court record shows that on 24th March 2011, Mr. Ochwang'i advocate held brief for G. A Mongare Advocate and fixed this suit for hearing on 19th July 2011. On 19th July 2011, Mr. Mongare appeared in person before Makhandia J. for the hearing of this case when the judge informed him that the suit had been dismissed on 13th July 2010. If it is true that G. A Mongare had been appointed as state counsel as at 13th July 2010 and had ceased private practice, there is no way in which he could have appeared before the court a year later on 19th July 2010 for the applicant in the matter. In the circumstances, I am not persuaded by the applicant's contention that this suit was dismissed for want of prosecution due to the appointment of G. A Mongare advocate as a state counsel without his notice. The applicant has therefore failed to give good reasons why he failed to appear in court on 13th July 2010 to show cause why this suit should not be dismissed. He has also failed to explain why no action was taken in the matter with a view to prosecuting the same before its dismissal.

8. This court has a wide discretion to set aside an order made ex parte. The discretion must however be exercised judiciously. The applicant had a duty to satisfy the court that he deserves the exercise of this court's discretion. As I have stated above, the applicant has failed to give valid reasons for his failure to appear in court on 13th July 2010 to show cause why this suit should not be dismissed. The applicant has also failed to give any reasonable excuse for his failure to fix this suit for hearing before it was dismissed on 13th July 2010. The other reason that militates against the exercise of this court's discretion in favour of the applicant is the delay in bringing the present application. As I have stated above, the applicant has not disclosed when he had notice that this suit had been dismissed. From the record, I am of the view that the applicant was aware at least as at 19th July 2011 that this suit had been dismissed. On that day Mr. Mongare advocate who was appearing for the applicant informed the court that the suit was coming up for hearing and that he was ready to proceed when the court notified him that the suit had been dismissed on 13th July 2010. Mr. Mongare could not have been ready to proceed with the hearing if the applicant was not present in court. If he was not aware that the suit had been dismissed on 13th July 2010 he must have learnt it from the court on that day.

9. The applicant has not explained the delay of over 2 years in bringing the present application. I am in agreement with the respondents' advocate's submission that the delay in bringing the present application is inordinate. The applicant is guilty of laches and this court cannot exercise its discretion in favour of the indolent. This court's duty to do substantive justice must be tempered with the equally important public policy requirement that there should be an end to litigation. In conclusion, I find no merit in the applicant's application dated 13th February 2014. The same is dismissed with costs to the respondents.

Delivered, signed and dated at KISII this 19th of December, 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Mose L. for the applicant

N/A for the respondents

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE