



REPUBLIC OF KENYA

High Court at Nyeri

Civil Case 82 of 2003

ESTHER KABUI GITHINJI & ANOTHER..... PLAINTIFFS

VERSUS

REUL KIIRU KIBARIKU & 10 OTHERS..... DEFENDANTS

RULING

On the 9th September 2003, Esther Kabui Githinji and Chrispine Ngunjiri Githinji suing on their own behalf and on behalf of the estate of Isaac Githinji Rubiru (deceased) (*hereinafter referred to as the plaintiffs*) commenced suit by way of originating summons against Reul Kiiru Kibariku and 10 others (*hereinafter referred to as the defendants*). The plaintiffs sought orders that the titles of the defendants in respect of their parcels of land described in the summons, which land had been excised out of land reference No. Nyandarua/Olkalau South/2 (now extinguished by virtue of subdivision) which had given rise to the seven portions mentioned in the summons situated in Nyandarua district and occupied by the plaintiff be declared as having been extinguished by virtue of the plaintiff's *adverse possession* thereof and pursuant to the provisions of section 7 and 17 of the Limitation of Actions Act Cap 22 Laws of Kenya amongst other prayers.

The originating summons were served on the 1st, 2nd, 6th, 7th, 8th, 9th and 10th defendants on the 18th September 2003 and the 3rd, 4th and 11th Defendants on the 19th of September 2003. The defendant files their respective responses.

On the 22nd December, 2005 the 1st and 2nd defendants moved to court through Notice of motion dated 21st December 2005 for orders that the Originating Summons dated 8th September 2003 be dismissed for want of prosecution. The application was supported by the affidavit of Kigo Urugari. The grounds for dismissal were that the plaintiffs had not taken steps from the year 2004 to fix the matter for hearing and therefore failing to prosecute the suit. The delay was inordinate and inexcusable. The gist of the affidavit by Mr. Kigo Urugari was that nearly two years had lapsed before any action had been taken. No hearing date had been taken and the plaintiffs had gone to slumber.

On the 26th of October 2009 the application was placed before Justice Makhandia. The judge observed that the application had been served and an affidavit of service was on record. No papers in opposition to the application had been filed. He consequently allowed the application dated 21st December 2005 with costs.

On the 23rd September 2010, the plaintiff filed an application dated 22nd September 2010 for the

review stay set aside of the orders of the court dated 26th October 2009 or any other order dismissing the plaintiff's suit and or any other order ordering taxation of the Bill of Costs and subsequently to reinstate the plaintiff's suit including the originating summons for hearing and final determination.

The plaintiffs are not sure that the suit was dismissed but are meant to understand that the suit might have been dismissed on 26/10/2009 due to technical reasons including non-attendance or prosecution of the matter. The act of non attendance was not deliberate on the part of the plaintiffs as they were eager and anxious to prosecute their suit however their advocate had not been invited for the hearing of the suit. The court record shows that the affidavit of service was filed on the hearing date on the 26th of October 2009. The deponent of the affidavit of service, Mr. Gathiga Mwangi depones that he served a copy of the hearing Notice upon V.E. Muguku & CO advocates in Nyeri, S.K. Njuguna & CO Advocates Nyeri and Gathara Mahinda & CO Advocates in Nyeri.

I have looked at the hearing Notice dated 31st August 2009 and served upon to firm of Gathara Mahinda and Company Advocates on the 8th of September 2009 and do find that the same was received in protest as the advocate was no longer on record for the plaintiffs. A further perusal of the record shows that the advocate on record at the time of service of the hearing Notice was George N. Kimani and Co Advocates having filed their Notice of appointment on the 30th April 2009.

On the hearing date, the applicants who are 3rd and 11th respondent in the suit were represented but the plaintiffs were not represented as their advocate was absent.

The record clearly shows that the defendants/applicants served the hearing notice upon an advocate who was not on record.

This court finds that despite the failure to be served the plaintiffs have been so indolent to pursue their rights in this matter as they have not responded to the application dated 22/12/2003. They went to slumber in the year 2004 and were woken up by the defendants on the 20th of April 2010 when their advocate was served with a hearing notice dated 20/4/2010 and a Bill of Costs that was received under protest. The plaintiffs took another 3 months to move the court even after ascertaining that the application to dismiss their suit for want of prosecution had been allowed. The Notice of Motion dated 22nd September 2010 is not filed under certificate of urgency a fact that demonstrated that the plaintiffs are sleeping on their rights.

Having found the above it is my considered holding that genesis of notice of motion is the failure by the defendants to serve a hearing notice in respect of the application dated 21st December 2005 upon the firm of George N. Kimani & Co Advocates despite there being a Notice of Change of advocates indicating that the firm of George N. Kimani had replaced the firm of Gathara Mahinda on behalf of the plaintiffs. The hearing notice was received under protest due to the fact that latter firm was no longer acting for the plaintiffs.

Order 45 of the Civil Procedure Rules establishes the right of a party to apply for a review of a decree or order **upon discovery of new and important matter** or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the order was made, or on **account of some mistake or error** apparent on the face of the record or for **any other sufficient reason**. The application ought to be made without **unreasonable delay**. I do find that the plaintiff satisfy the requirement that such an order can be reviewed due to an error apparent on the face of the record as the court made an error in finding that there was service despite the record showing that the defendants served an advocate who was not on record.

On the issue of unreasonable delay, the plaintiffs came to know on the 20/4/2010 that application had been heard and disposed and that the costs were being assessed. The application was filed on the 23/9/2010 **five months** after the discovery of the order dismissing the originating summons for want of prosecution. I do find the delay of five months to make this application unreasonable. However, this court is not oblivious to the provision of **Article 50 of the Constitution** that provides for fair hearing. The

Article provides as follows;-

(1) *Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or if appropriate another independent and impartial tribunal or body.*

This court observes that a fair and public hearing means every person being offered the right to be heard by being informed of the date of the case, the place of hearing and the time when the suit would be heard. The applicant was not offered such opportunity. The right to be heard is so cardinal as enshrined in the Constitution that it cannot be easily taken away. The prejudice likely to be suffered by the defendants is not comparable to the prejudice suffered by the plaintiffs when their right to be heard was taken away by failure to serve the hearing notice.

The applicant succeeds in his application dated 29th September 2010 in the following term;-

1. The order of the court given on the 26/10/2009 and issued on the 18/11/2009 is hereby reviewed by setting aside the order dismissing the suit for want of prosecution.
2. All processes resulting from the dismissal of the suit for want of prosecution are hereby stayed.
3. The application dated 21st December, 2005 be scheduled for hearing within the next two months failure of which the originating motion dated 8/9/2003 stands dismissed.
4. Costs of the application to be borne by the plaintiffs due to the fact that they have delayed in carrying out principal steps to enable to matter to proceed. Orders accordingly.

Dated at Nyeri this 25th Day of January 2013

**A.O. OMBWAYO
JUDGE**