



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Environmental & Land Case 98 of 2009**

**GRACE WANJIRU CHEGE.....PLAINTIFF/APPLICANT**

**VERSUS**

**JAMES NJUGUNA MWAURA.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**JONHN NDUNGU MWAURA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING.**

The Applicant filed an application dated 4/2/2013 seeking orders that;

1. The decree issued by this Honorable Court on 2/2/2012 ordering the dismissal of this suit be set aside.
2. The Plaintiff/Applicant be granted leave to reinstate the suit
3. The Court be pleased to vary orders on costs
4. All necessary and consequential orders or direction the court may deem fit and just to grant.
5. Cost of the application be in the cause.

The application is premised on the grounds that counsel for the Applicant was not duly served with the notice to show cause dated 21/12/2011 as to why the suit should not be dismissed. Further that there were no adequate measures taken to ensure that service was effected and as such the matter proceeded *ex-parte*. Also, the Applicant's matter is weighted as she was the registered owner of property known as L.R. No. Dagoretti/Kinoo/709 (*suit property*) prior to 12/2/2009 when the suit property was fraudulently, illegally and unlawfully transferred to the Respondents. Thus the dismissal of the suit will fortify the fraudulent actions of the Respondents and therefore it is in the interest of justice to reinstate the suit. Finally that the application has been made without undue delay and that the Respondents will not suffer prejudice if the orders sought are granted.

The application is supported by an affidavit sworn on 1/2/2013 by the Applicant. She deposes therein that she filed suit against the Respondents because the suit property was transferred to them fraudulently, without her knowledge and authority. It is her disposition that the land control board meeting, transfer instrument, valuation of the land for purposes of payment of stamp duty and the issuance of the title was all done on the same date – 12/2/2009. This in the Applicants view portrayed fraud coupled with the fact that she was not in the country on the said date and therefore did not attend the land board meeting – a

prerequisite of any transaction of controlled land. The Applicant also contended that she did not execute any transfer documents in favour of the Respondents.

The Applicant deposed that she lives and works in New York, USA and that she instructs her advocate to secure a hearing date to coincide with when she is in the country. Further that her advocate came to learn that the suit was dismissed on 11/12/2012 when securing a hearing date. Upon perusal of the court file they learnt that the court had issued a Notice to Show Cause why the suit should not be dismissed for want of prosecution dated 21/12/2011. From the Court record, it was indicated that M/s V.W. Maina Advocates could not be traced in the Corner House address. She deposed that indeed the said firm of advocates moved offices from Corner House to 5<sup>th</sup> Avenue Office Suites but that the said firm had left a notice on the door indicating the new address. The Applicant contended that it is for this reason that service of the notice was not effected to her advocate.

The Applicant deposed that she will suffer irreparable loss because the Respondents are carrying out construction on the suit property and that if the suit is not reinstated her right to be heard and chance to reclaim her property will be defeated. The Applicant prayed that until the suit is determined, the Court does reinstate the suit and issue an order restraining the Respondents from entering, constructing or committing any acts of waste on the suit property and an order directing the Respondents to remove construction material forthwith from the suit property.

The application was opposed by the Respondents who filed a Replying Affidavit sworn on 20/2/2013 by the 1<sup>st</sup> Respondent. The deponent gave in a chronological order the events of the matters since its inception. He deposed that the suit was instituted on 12/3/2009. The Respondents entered appearance on 25/3/2009 and the Defence and Counter-claim was filed on 29/5/2009. The reply to the Defence and Counter-claim was filed on 15/6/2009 and hence pleadings were closed on 30/6/2009. The Applicant's injunction for interlocutory relief was determined in July 2009. The Applicant changed advocates through a Notice of Change of Advocates dated 18/12/2009. It was his disposition that since July 2009, the Applicant has not taken any steps to progress the suit by setting it down for hearing, framing issues, filing witness statements or any other preparatory steps. Thus there has been a three year lapse without the Applicant taking any action to prosecute the suit.

The 1<sup>st</sup> Respondent deposed further that they are in the meantime being prejudiced by orders of maintaining status quo and they therefore cannot utilize the suit property despite having paid a valuable consideration of Kshs. 4 Million, and spent another substantial amount on building materials which are wasting on site. He deposed that the Applicant also lodged a caution against the Defendant's title at the Land's Registry which has restricted the use and disposal of the property. The deponent contended that the Applicant had not accounted for nor given any cause for the three year lapse that would warrant the lifting of the court's orders dismissing the suit herein. Further that it was the responsibility of the Applicant's advocate to notify the court of its present address by filing a Notice of Change of Address and as such it is unfair for them to blame their omission on the Court Process Server.

The 1<sup>st</sup> Respondent deposed that they have not started developing the suit property as alleged by the Applicant and as a result, they continue to suffer substantial loss owing to orders enjoyed by the Applicant whereas she will not be able to compensate them. It was their contention that it is in the interest of justice that the suit that has not been prosecuted for over three years stays dismissed. The 1<sup>st</sup> Respondent deposed that the Applicant bailed out her alleged impostor who happened to be her own daughter and failed to prosecute with the consequence she was acquitted. Finally, they deposed that the Applicant has not come to court with clean hands as she attempts to obtain the court's discretion by misleading it.

This application was argued in court wherein both counsels made submissions in support of their urgings. From the Court records, the last action that took place was a Notice of Change that was filed on 8/1/2010. The suit was subsequently dismissed on 2/2/2012 two years after the notice of change of advocates was filed. The rules on dismissal of suits are clear on matters that are not prosecuted for a period of over one year. The Court has discretion pursuant to Order 17 Rule 2 of the civil procedure rules to dismiss a suit

for want of prosecution. It reads:

2. (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.*

The object of the Court's discretionary power to dismiss for want of prosecution is to remove congestion of files in court registries by getting rid of cases which are moribund or where parties have lost interest in the litigation. It is done to enable the Court disencumber itself of records where parties are no longer interested in prosecuting suits due to loss of interest. Per G.B.M. Kariuki in the case of **Jairus Lichungu v Nzoia Sugar Company Ltd (2006) eKLR**

The Applicant maintains that service of the notice to show cause was not effected upon the her advocates. As a result, there is no way herself or her advocates would be aware that the matter was scheduled for dismissal. From the court records it is indeed a fact that the notice did not reach the recipient, as the same is clearly indicated in the notice by the Court Process server. There is a note dated 19/1/2012, "*Cannot be traced in the given address.*" This is a clear indication that the notice did not reach the intended recipient. Order 17 Rule 2 presupposes service before dismissal. In this case the Applicant was not given an opportunity to show cause why the suit should not be dismissed.

Having looked at the position of the law, I now look at the conduct of the Applicant leading to the dismissal of the suit. I take issue with the fact that the Applicant obtained preservative orders and went to sit pretty on them and failed to prosecute the suit for 3 years before the Court embarked on its mission of decongesting its registry. It is not sufficient for the Applicant to state that she lives in New York and therefore the matter cannot be heard unless she is in the country.

If the Courts were to schedule matters at the exclusive convenience of the parties, then there is likelihood that matters would never be completed. It is also worthy to note that the Applicant is ably represented by counsel who upon given instructions represent clients in civil matters with or without their presence in court. Further, there is nothing that stopped the Applicant's advocates from notifying the court of their change of address. This court finds that there was laxity on the part of the Applicant to prosecute the suit herein.

Nevertheless, the duty of this court is to do justice to all the parties. The courts have held that despite of delay, the court should endeavor to do justice. **Invita v Kyumbu (1984) KLR 441**

*"The test to be applied by the courts in an application for dismissal of a suit The test applied by the courts in an application for the dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and, if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time. It is a matter in the discretion of the court."*

The Applicant avers that the suit property was fraudulently transferred to the Respondents. On the other hand, the Respondents aver that they are *bonafide* purchasers for value. These are competing interests which in the interest of justice should be heard and determined. In effect, I allow the Plaintiff's application in terms of prayers 1 and 2. Having determined that there was slackness on the part of the Applicant, I hereby direct that the costs of this application be borne by the Applicant. I also direct that both parties do comply with Order 11 of the Civil Procedure Rules within 30 days of the date of this ruling. Thereafter the Applicant shall set down this suit for hearing within 60 days upon compliance with Order 11 in order to expedite the determination of the matter.

Dated, Signed and Delivered this 22<sup>ND</sup> day of April 2013

**L.N. GACHERU**

**JUDGE**

In the Presence of:-

.....For the Applicant

.....For the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

..... Court Clerk