



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 5580 OF 1990

FLORENCE WANGARI

GITHUNGO.....PLAINTIFF

VERSUS

**KAHAWA SUKARI LIMITED.....1ST
DEFENDANT**

**GERALD KINYUA MUCHEMI.....2ND
DEFENDANT**

RULING

The Plaint dated 20th October, 1990 seeks the Order of specific performance against the 1st Defendant and the Order to vacate and surrender the suit plot to the Plaintiff.

In short, according to the Plaint, it is averred that the Plaintiff and the 1st Defendant entered into a sale agreement of the suit plot in the year 1986, and the Plaintiff complied with all the conditions of the sale agreement. However, the 1st Defendant sold the suit plot to the 2nd Defendant in the year 1990 and hence the claims.

It is on record that the suit against the 2nd Defendant seems to have been withdrawn as the Plaintiff has not been making any effort to serve the 2nd Defendant and as indicated by Mr. Mwaniki for the 1st Defendant and Mr. Sitati for the Plaintiff, the suit against the 2nd Defendant has been withdrawn. Be that as it may, as per cursory glance at the record of this case, the Plaintiff has been unavailable to proceed with the matter. On 13th November, 2001, which date was fixed for hearing on behalf of the Plaintiff, the adjournment was sought from the Plaintiff that she was out of the country on medical grounds. The matter was before Hon. Aganyanya J. (as then he was) and he on reasons given in his ruling, dismissed the suit for want of prosecution. I would specifically note that on that date, the counsel for the Plaintiff was also not present and curiously the counsel for the Defendant was asked to hold the brief for

the Plaintiff's counsel.

After the said order of dismissal made on 13th November, 2001, the Plaintiff filed an application dated 23rd July, 2003 seeking to set aside the said order of ex-parte dismissal and to reinstate the suit. I would note the delay in filing the application.

This application has not been prosecuted due to non-service thereof on the Defendant even as at 12th April, 2011.

Eventually, the matter was heard on 26th May, 2011.

The application is supported by the affidavit sworn by the Plaintiff on 28th July, 2003. In the said affidavit, the Plaintiff avers that she was unable to avail herself on 13th November, 2001 because she had to report to her new job in United Kingdom where she had migrated on getting entry permit to work.

More serious is her averment made in paragraph 8 of the affidavit which states that she had come to Kenya temporarily upto 12th May, 2003 as she had to report back to Britain on that date. However, her affidavit is shown to have been sworn on 28th July, 2003 when she could not be present in the country as per her own averments made as aforesaid.

Only on that basis I should dismiss the application based on an invalid affidavit.

Apart from the aforesaid, the application lacks merit on the ground of delay in making the application which is not explained. Moreover, there is a total silence of the issue of absence of the Plaintiff's advocate on the date of hearing of the suit which was fixed by the Plaintiff.

Lastly, if the Plaintiff does not intend to proceed against the 2nd Defendant, proceeding with this suit against the 1st Defendant only, can be a fruitless effort in view of the pleading in the Plaintiff.

The upshot of all the above is that the application simply lacks merit and is there for dismissal. I thus dismiss the application dated 23rd July, 2003 with costs to the 1st Defendant.

Orders accordingly.

Dated, signed and delivered at Nairobi this 22nd day of **June, 2011**

K. H. RAWAL

JUDGE

22.06.2011