



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL CASE NO.229 OF 1998**

**JOHN KIMANI MUNYAKA..... APPLICANT/PLAINTIFF**

**AND**

**KIBOI NG'ANG'A WAWERU.....RESPONDENT/DEFENDANT**

**RULING**

The applicant in the present application instituted this suit against the respondent in 1998 for a declaration that L.R. NOS.NYANDARUA/ MELANGINE/514 and 515 were acquired by the respondent as a trustee of the applicant, an order of permanent injunction to restrain the respondent from disposing of the two parcels of land and a further order that the parcels of land in question be transferred to the respondent.

Eight years after the filing of the suit and without setting it down for hearing for that period, the respondent moved the court, by a motion dated 15<sup>th</sup> September, 2006, to dismiss the suit for want of prosecution. Although the applicant filed a replying affidavit opposing the application and offering an explanation for not prosecuting the claim, his counsel failed to attend court on the day the application was set for *interpartes* hearing prompting the court (Musinga,J) to allow it, dismissing the suit for want of prosecution.

The applicant being aggrieved by the dismissal, has brought the instant motion seeking that the court reviews, reverses, vacates and/or sets aside the orders dismissing the suit and to reinstate the suit for hearing. The application which is expressed to be brought under the provisions of **Section 3A** of the **Civil Procedure Act, Order 44 rules 1 and 2** and **Order 50 rule 1** of the revoked **Civil Procedure Rules**, is based on the grounds that:

- i) the application seeking to dismiss the suit was not served on the applicant;
- ii) the date on which that application was slated for hearing was also not served;
- iii) the failure to set down the case for hearing was caused by the applicant's erstwhile advocates;
- iv) the case file was unavailable in the registry;
- v) the applicant is still keen to have the dispute determined on merit.

The application is opposed and the respondent had filed a replying affidavit to the effect that:

- i) the application seeking dismissal of the applicant's suit was duly served and indeed the applicant's counsel filed a reply and subsequently attended court to oppose it.
- ii) the court only dismissed the suit when counsel for the applicant failed to attend court;
- iii) even after the dismissal, it took the applicant three (3) years and four (4) months to seek the setting aside.

I have duly considered the rival arguments and the authorities cited by counsel for the respondent. The cited provisions of the revoked Civil Procedure Rules are inapplicable as the conditions for review of

orders under **Order 44 rules 1 and 2** aforesaid have not been satisfied. The application is clearly for the setting aside of the order of dismissal under the inherent jurisdiction of the court. In exercising judicial discretion to set aside an order, the court must be guided by the principle that in setting aside the order, it must do so on terms that are just to both sides. See **Maina Vs. Mugiria**, Court of Appeal NBI. Civil Appeal No.27 of 1982. See also **Shah Vs. Mbogo**, 1967 EA 116 cited by counsel for the respondent.

Taking the totality of the dispute into consideration including the events preceding the dismissal, it is clear to me that the applicant made some efforts to have the suit set down for hearing. For instant, on 23<sup>rd</sup> July, 2004 learned counsel for the respondent complained to Musinga, J that the suit had been listed five times in the past and each time the file would go missing at the registry. On 25<sup>th</sup> October, 2004, the respondent and not the applicant took the hearing date of 16<sup>th</sup> May, 2005.

On that day, the applicant was in attendance. When the matter came up again for hearing on 14<sup>th</sup> July, 2005, it was adjourned at the instance of the court as it could not be reached. The hearing was rescheduled to 21<sup>st</sup> November, 2005. There is no record for that date. Instead, one year later, on 19<sup>th</sup> September, 2006, the respondent brought the application for dismissal of the suit. That application was slated for 20<sup>th</sup> June, 2007 when counsel for the applicant attended but that of the respondent did not. However, on the new date (4<sup>th</sup> July, 2007), counsel for the applicant failed to attend hence the order of dismissal.

The instant application to set aside, as I have stated, was brought on 17<sup>th</sup> June, 2010 – three (3) years after the dismissal, no doubt a long delay, but the question that must be asked is whether despite that delay justice can still be done to the parties. See **Ivita Vs. Kyumbu** (1984) KLR 441.

From the history of this dispute which I have set out in the foregoing paragraph, it is clear that the applicant made some efforts albeit not aggressively. He has explained that there were days the court file would be unavailable in the registry, a fact confirmed by learned counsel for the respondent. His erstwhile advocate also contributed to the delay as the hearing was adjourned twice when he arrived late. All in all, I do not think the applicant can be described as an indolent litigant.

Finally in view of the shift in judicial philosophy following the promulgation of the Constitution, enactment of **sections 1A and 1B** of the **Civil Procedure Act** as well as the overhaul of the **Civil Procedure Rules**, the courts together with counsel are enjoined to administer justice without undue regard to technicalities. Bearing in mind that the dispute involves land, an emotive commodity in Kenya, justice would be served by setting aside the order of dismissal, reinstate the suit to be heard on merit and award costs to the respondent for the inconvenience.

The application is, in the result allowed with costs to the respondent. The orders dismissing the suit for want of prosecution and costs are set aside and the applicant is directed to set in motion pre-trial process and ensure that the matter is heard before October, 2011.

**Dated, Delivered and Signed at Nakuru this 2<sup>nd</sup> day of June, 2011.**

**W. OUKO**  
**JUDGE**