



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**Civil Case 38 of 2006**

**JAMES KARIUKI MURETE .....APPLICANT**

**V E R S U S**

**NICHOLAS NGUTHI KIVINDA ..... RESPONDENT**

**RULING**

The Plaintiff herein filed an Originating Summons on 8/5/06 seeking a declaration that he has acquired adverse possession of property **LR NTHAWA/GITIBURI/2444**. He later filed an application for injunction which was granted and which was to remain in force pending the hearing and determination of this suit. Those orders were granted on 26/9/07.

The originating summons was thereafter fixed for hearing on 13/2/08. On that date, counsel for the Plaintiff/Applicant applied for an adjournment saying that his main witness was not in court. The adjournment was granted. The matter was rescheduled to 9/7/08 for hearing.

On that date counsel for the 2 defendants were in court but counsel for the Plaintiff was said to be unwell. The matter was therefore put off. No other date was taken and so on 6/1/2010 counsel for the 2<sup>nd</sup> defendant filed the Notice of Motion dated 6/1/2010 seeking the dismissal of the entire suit for want of prosecution. That is now the application which is the subject of this ruling.

According to the applicant the Respondent has failed to take any action in the matter for 1 ½ years and the only inference that can be made is that he is no longer interested in the matter hence the prayer for dismissal.

The Plaintiff/Respondent has nonetheless told the court that he is still interested in pursuing his case. He annexed to his replying affidavit 4 annexures which are letters inviting the defendant to the registry to take a hearing date. One of the letters is actually from the defendant. Some of these letters are stamped to show that they were received by the opposing counsel. It is not clear however whether the parties met at the registry to take dates. One of the annexures marked '**WNK3**' indicates that the parties were informed that the court diary was full.

I have considered the application along with the rival affidavits and the submissions in court by all counsel herein. It is instructive that on the 2 times the matter came up for hearing it was counsel for the plaintiff who caused the same to be adjourned. There is no time when counsel for the defendants have applied for an adjournment. Their anxiety that the matter is dragging can therefore be understood more

so when one notes that the plaintiff has injunctive orders against the defendants. It would be in his interest if the matter was delayed.

I have looked at the annexures however and although there is no record in the court file to show that the parties showed up to take hearing dates, the defendant/Applicant should have taken a hearing date Exparte and served the plaintiff. That way, they would be having a firmer footing to stand on. It is not lost to me that it is the plaintiff's prime duty to ensure that his case is heard and hearing dates given but in this case, that drive has been glaringly lacking. When a plaintiff fails to move the court to hear his case while he safely has injunctive or stay orders, the defendant has cause to worry. This is what seems to be happening in this case. If at one point the court dairy was full, then, with due diligence, the plaintiff should have ensured that he got a date when the new diary was received.

I am not convinced that the plaintiff has done his best in the circumstances. As stated earlier however, this is a land matter, the plaintiff claims to be living on the suit premises with his family. If I dismiss the suit, I am certain that the plaintiff will still come to court for orders of setting aside etc. Let me not dethrone him from the seat of justice at this time. Let him nonetheless wake up and realize that he cannot be allowed to perpetrate injustice to the defendants by delaying the matter while at the same time enjoying the injunctive orders.

In the interests of justice therefore, I decline to dismiss this suit for want of prosecution but any further laxity on the part of the plaintiff will lead to the vacation of the orders of injunction he is enjoying.

I dismiss the application dated 6/2/2010 with costs in the cause.

**W. KARANJA**

**JUDGE**

Delivered, dated and signed at Embu this 9th day of June 2010.

**In the presence of:-**

Ms Kimani for Mr. P. N. Mugo for Respondent.

**W. KARANJA**

**JUDGE**