



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 2808 of 1990**

JOHN MACHARIA MWENDA.....PLAINTIFF

VERSUS

LUKA NJARARUHI KAMAU.....1<sup>ST</sup> DEFENDANT

SAMUEL KARUGA WANDAI.....2<sup>ND</sup> DEFENDANT

ESTATE OF D.K. GITAU.....3<sup>RD</sup> DEFENDANT

**RULING**

The defendants filed an application by way of Notice of Motion seeking to have the plaintiff's suit dismissed for want of prosecution. Lady Justice Sitati, was seized of this application and on 16th October 2009 made an order that the plaintiff's suit be dismissed for want of prosecution and costs of both the application and the entire suit be awarded to the defendants.

There are now two applications before me; one filed by the defendants/ applicants dated 12th February 2010 seeking orders that the plaintiff/ respondent be evicted from the suit property and deliver vacant possession to the defendants in respect of property known as LR.NO.4953/71/4 situate at Workshop Road, Thika, which property is registered in the names of the defendants/applicants herein. There is also a prayer for injunction to restrain the plaintiff whether by himself, his servants and or agents from entering, occupying, alienating, collecting the rental income and or proceedings, selling and or conducting any business whatsoever in or around or within the suit property, and that the Officer commanding Thika Police Division provide security in execution for these orders. There is also a prayer that the plaintiff do surrender and take account of all mesne profits arising from the suit property from May 1983.

The application is based on the following grounds;

- 1. The applicants are the registered proprietors of the suit property and their title is unchallenged thus exclusively entitled to the property.**
- 2. The suit was dismissed on 16<sup>th</sup> October, 2009 for want of prosecution.**
- 3. The respondent has continued to trespass on the applicant's property denying them quiet possession of the suit property.**

There is then the second application dated 22<sup>nd</sup> February, 2010 by the plaintiff seeking a stay of all further proceedings relating to the execution of orders granted on 16<sup>th</sup> October, 2009, and that the court reviews the orders made on the said date with a view to have the same set aside and the plaintiff's suit be reinstated for hearing.

In opposing the plaintiff's said application the defendants filed a replying affidavit dated 22<sup>nd</sup> March, 2010 stating the following grounds;

- 1. The plaintiff's suit was dismissed for want of prosecution.**
- 2. The plaintiff's reaction to the application dated 12<sup>th</sup> February, 2010 is an afterthought and brought in bad faith.**
- 3. An award of costs to the defendants by the plaintiff will not adequately cater for the prejudice suffered by the defendants.**

Both learned counsel have filed written submissions and cited some authorities which I have on record. Some salient issues arise from the record. As at the time the suit was dismissed there was a firm of advocates on record for the plaintiff. Unknown to the plaintiff, that advocate had been suspended but there is no evidence that the plaintiff had knowledge of the said suspension. There is also evidence that despite the fact that there was an advocate on record, the plaintiff was served in person and there is no reason advanced by the defendants why this was done.

That notwithstanding, the plaintiff denies any knowledge of such service. The application by the plaintiff admits that there was inaction on the part of the plaintiff. That admission in my view enhances the credibility on the part of the plaintiff.

It is now trite law that a mistake of counsel should not be visited upon the litigant. That is not to say that in all cases this should be the position. But where it is clear as in present case, that the plaintiff was not to blame for inaction then clearly, he should be given an opportunity to prosecute this suit. I note that the subject matter in this case is land and the plaintiff should be given the chance to pursue all

legal avenues available to him. Additionally, no serious prejudice has been shown shall befall the defendants if the dismissal order is set aside.

Having said so, the application by the defendants dated 12<sup>th</sup> February, 2010 must fall by the way side because it sought the execution of the orders that flowed from the said dismissal order. In the end the application by the defendants dated 12<sup>th</sup> February 2010 is hereby dismissed while the application by the plaintiff dated 22<sup>nd</sup> February 2010 hereby succeeds.

The plaintiff shall however, pay the costs occasioned by this application to the defendants. Orders accordingly.

***Dated, signed and delivered at Nairobi this 19<sup>th</sup> day of October, 2010.***

**A. MBOGHOLI MSAGHA**  
**JUDGE**