



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
CIVIL CASE 3415 OF 1988

IRENE CYNTHIA WAYUA KATUA.....PLAINTIFF/RESPONDENT

VERSUS

JAMES MUTONGA MULINGE.....DEFENDANT/APPLICANT

RULING

1. This ruling concerns an application brought by way of Chamber Summons on behalf of the Defendant by the firm of M/s J.M. Njage and Company Advocates seeking **ORDERS:-**

1. ***THAT service of the application be dispensed with in the first instance.***
2. ***THAT this Honourable Court do issue an injunction against the Plaintiff/Respondent including her servants and/or agents employees or any authorized party whomsoever restraining them from alienating, erecting a fence, construction illegal structures or interfering with the Defendant's property known as L.R. No.7258/54 Gigiri until the hearing and final determination of the application/suit or in the alternative until further orders from this Honourable Court.***
3. ***THAT this suit be dismissed for want of prosecution or in the alternative, the orders made on 9th January 1989 be and are hereby discharged.***
4. ***THAT costs of this application be provided for.***

2. The application is expressed to be brought under Order 16 Rules 5 and 6, Orders 1,2,2A, 3 and 4 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, Order 50 Rule 7 of the Civil Procedure Rules, Section 3 of the Civil Procedure Act and all other enabling provisions of the law and is premised on the grounds that

(i) ***The Plaintiff/Respondent has illegally erected permanent structures on the Defendant's land and has deposited building materials on the suit (sic) without regard to the Defendant/Applicant's right of ownership of L.R. No.7258/54 Gigiri.***

(ii) ***That the Plaintiff/Respondent has without notice or authority interfered with the Defendant/Applicant's right of ownership of the suit property and continues to do so and in total violation of the orders made on 9th January 1989;***

(iii) ***The forceful encroachment into the Defendants/Applicant's property is wrongful and***

unlawful.

(iv) The Plaintiff has taken no steps to prosecute her case since 9th January 1989 and is misusing the orders obtained on the 9th January 1989 to deny the Defendant/Applicant the right of enjoying his property.

(v) The rule of law and provisions of equity are not being adhered to.

3. The application is supported by the affidavit sworn by the Defendant/Applicant **JAMES MUTONGA MULINGE** on 22/05/2008 in which he says that he is the registered owner of that property known as land parcel No.7258/54 Gigiri Nairobi (the suit property) as per annexure marked "JMM1" which is a copy of Certificate of Title showing that the title was transferred to the Defendant on 20/02/1986 under entry number 4 of the same date. On the 8/01/1988, the Plaintiff herein, **Cynthia Wayua Katua** registered a caveat on the said title, claiming a beneficial interest in the same. That is the last entry on the title. The Defendant says that the Plaintiff has been occupying the suit property vide a court Order made on 9/01/1989; and that since that order was made and since the filing of the suit in August 1988, the Plaintiff has taken no steps to set down the suit for hearing and that the pendency of the suit has greatly prejudiced and inconvenienced him and subjected him to enormous loss and damage. The Defendant says further that in the twenty (20) years since the suit was filed, the Plaintiff has misused and continuously to misuse the suit property to the extent of unlawfully and illegally constructing permanent structures on the suit property and leasing the same to third parties for gain. The Defendant says further that as a result of the injunctive orders issued on 9/01/1988, he has been unable to pay Nairobi City Council rates which stood at Kshs.1623843/70 as at 1/07/2007 and that the said amount continues to attract interest at the rate of 3% per month. The Defendant wants the Plaintiff injuncted against further developments and also wants the suit dismissed for want of prosecution

4. The Plaintiff filed a Replying Affidavit on the 26/05/2008 in opposition to the application and says therein that the Defendant's application was mischievous and only intended to frustrate the Plaintiff's case. She also says that the ownership of the suit property is at the core of her case, and that for that reason she cautioned the same on 8/01/1988. She also says that contrary to the Defendant's allegations of inactivity by the Plaintiff the suit has been in court on numerous occasions on applications filed by both parties and further that on two different occasions the court file had gone missing, necessitating constructions in June 1995 and November 2004. She also says that the Defendant has once in the past moved the court on a similar application to have the suit dismissed for want of prosecution and that at no time has the Defendant moved the court to have the suit determined on merit.

5. The Plaintiff further says that following a ruling delivered by Dulu J on 11/05/2006, she fell out with her advocates then on record and that it took time for her and her advocates to reconcile their differences. She urges the court to find that the Defendants application lacks merit and to dismiss the same. She also says that if the application is granted as prayed, the Plaintiff, her two college going students and her sickly mother would have nowhere to go. On this last point the ruling by Dulu J disposed of the question of the school going children when he found that the two children were over 18 years and that as such they were not entitled to any protection unless they applied to the court for extension of such protection. There is nothing on record to show that such an application for extension of protection has been made either by the Plaintiff or the said daughters, nor is there evidence to show that the Plaintiff appeared against the said ruling.

6. The parties were heard on their application on the 28/05/2008, 18/06/2008, and on 24/07/2008. During the hearing each counsel reiterated the averments contained in their respective pleadings. Mr. Mitiambo who appealed for the Defendant contended that the Plaintiff had indeed lost interest in her case which was now 20 years old. He relied on **Kakamega HCCC No.83 of 1995 – Timothy Asomba Malova & Another –vs- Standard Chartered Bank** in which the court held that a litigant could not be forced to prosecute his case.

7. Mr. Mwaniki who appeared for the Plaintiff contended that the application as drawn is brought under the wrong rules. Commenting specifically on Order 16 Rules 5 and 6 of the Civil Procedure Rules, Mr.

Mwaniki argued that the Defendant had the option under Rule 5 to set down the suit for hearing an option that the Defendant had not exercised. He also contended that under Order 16 Rule 6, it is only the court and not the Defendant which should initiate the process of having the suit dismissed. Order 16 Rule 6 of the Civil Procedure Rules provides:-

“6. In any case not otherwise provided for in which no application is made or steps taken for a period of three years by either party with a view to proceeding with the suit, the court may order the suit to be dismissed; and in such a case, the Plaintiff may, subject to the law of limitation, bring a fresh suit.”

8. Mr. Mwaniki submitted that the Defendant had not demonstrated that the Plaintiff had not taken any action in the matter for upwards of three years. It would seem to me that the action envisaged by rule (6) is one of proceeding with the suit and not mere applications as the Plaintiff may have done. Mr. Mwaniki also contended that the prayer by the Defendant does not clearly ask for dismissal of the suit and that as such, the prayer should not be granted.

9. Mr. Mwaniki also contended that the Defendant had not demonstrated that the Plaintiff had done anything to warrant discharge of the injunctive orders made on 9/01/1989. He also said that as paragraph 15 of the Replying Affidavit clearly shows, the Defendant’s allegations that the Plaintiff had put up illegal structures on the suit property were totally untrue. In her paragraph 15 of the Replying Affidavit, the Plaintiff said-

“15. That the allegations made in the supporting affidavit are untrue and misleading.”

10. After hearing the parties, the court decided to visit the locus in quo. This decision was taken after the parties had shown a willingness to resolve the issues amicably. However, in the end, the Plaintiff failed to agree to meet the Defendant though she had said she would do so through her advocate. On the 18/06/2008, after some attempts by the Plaintiff to postpone or delay the visit to the site, the court visited the site and noted that indeed there were additional structures that had been put up on the suit property, with one of the buildings still undergoing construction. The court even found men at work on site. There was a garage being operated by Jim CAB; a new wall had been put up around the garage, and there was a new 3 roomed house going up but yet to be completed. At the end of the visit, the Plaintiff undertook to bring down that incomplete house, but she did not do so. The court is not sure that she has done so todate.

11. Before I go into the merits of the application, it is necessary to go back down memory lane to the plaint that was drawn on 18/08/1988 and filed in court on the same day. The Plaintiff alleged that she cohabited with the Defendant at various places between October 1980 and August 1985 before the Defendant walked out on the Plaintiff but after the two had had two issues between them; that the two bought the suit property jointly but that through fraud, the Defendant had the suit property registered in his sole name; that the Plaintiff has lived on the suit premises since its purchase in 1986 and she sought among other reliefs, an order of injunction to restrain the Defendant, his servants, agents or otherwise from selling, disposing, alienating or otherwise dealing or interfering with LR No.7258/54 Gigiri Nairobi. On the 9/01/1989 the interim order of injunction issued on 19/08/1989 was confirmed by Akiwumi J (as he then was).

12. What is important for this application is whether the prayers sought by the Defendant in the circumstances of this case are merited. I shall first deal with the prayer for injunction. I note that though the Defendant has asked for such an order, he did not invoke the relevant Order 39 of the Civil Procedure Rules to give this court the power to grant the orders sought. Mr. Mwaniki who argued the application on behalf of the Plaintiff did not raise this anomaly but I do not think that the Order can be granted in the circumstances.

13. The next issue for determination is the applicability of Order 16 Rule 5 of the Civil Procedure Rules. The rule provides that if within three months after

(a) the close of pleadings; or

(b) Deleted by L.N.36/00

(c) The removal of the suit from the hearing list; or

(d) The adjournment of the suit generally, the Plaintiff, or the court of its own motion on notice to the parties, does not set down the suit for hearing, the Defendant may either set the suit down for hearing or apply for its dismissal.

14. Mr. Mwaniki argued that since the Defendant did not exercise the option to set down the suit for hearing, the suit should not be dismissed for want of prosecution. My view of this matter is that the primary responsibility for prosecuting any suit lies with the Plaintiff. A Defendant is not obliged to proceed to set down the suit for hearing, but he may do so. He should not be faulted if he does not choose to set down the suit for hearing but to apply to have it dismissed for want of prosecution. The Plaintiff, admits, though without saying so, that since 11/05/2004, she has taken no other step in the matter. She explains the delay by saying that she had a disagreement with her advocates without providing any evidence to support her allegation. Be that as it may, the fact remains that the Plaintiff has slept in comfort of the injunction while the Defendant suffers from the consequences of a pending suit that has literally put a noose around his neck.

15. The reason for the sleep on the part of the Plaintiff is obvious. She has taken the liberty during the pendency of this suit to construct illegal structures on the suit property and to give such properties to third parties at a fee. The Plaintiff had denied under oath that there were such structures on the suit premises but when the court went to the site, it found three additional structures standing thereon – a garage, a newly constructed wall inside the compound fencing off the garage, an extension on the main house which the Plaintiff alleged was being used by her children and a three-roomed house that was still under construction. There were men at work on that building. The Plaintiff perjured herself and as such she has not defended the application with clean hands. For these reasons, the Defendant's application must succeed on the main prayer of having the suit dismissed for want of prosecution.

16. Mr. Mwaniki contended that the application should not succeed because the same was brought under the wrong provisions of the law. In my view, this apparent defect is curable under Order 6 Rule 12 of the Civil Procedure Rules to the effect that no technical objection may be raised to any pleading on the ground of any want of form. Order 50 Rule 12 of the Civil Procedure Rules would also come to the Defendants rescues; even that no application shall be refused merely by reason of a failure to state the order, rule or other statutory provision under or by virtue of which any application is made. On the basis of the above, I find and hold that the Plaintiff has chosen to go to sleep over her case to the detriment of the Defendant and all because of the order of injunction that was granted to the Plaintiff on 9/01/1989.

17. In the result, I find that the Defendant has made out a case for the orders sought. Accordingly, the Plaintiff's suit which was commenced by plaint and filed in court on 18/08/1988 be and is hereby dismissed for want of prosecution. Costs of the application and of the whole suit shall be borne by the Plaintiff.

It is so ordered.

Dated and delivered at Nairobi this 17th day of October 2008.

R.N. SITATI

JUDGE

Delivered in the presence of:

Miss Namisi (present) for the Plaintiff/Respondent

Mr. Mitiambo (present) (present) for the Defendant