



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

Civil Case 4391 of 1991

1. Land & Environmental Law Division

2. Subject matter of the main suit – Land LR/Dagoretti/Ruthimiti/429

Later sub-divided to LR/Dagoretti/Ruthimiti 834 and LR Dagoretti/Ruthimiti 835

Specific Performance.

Sale of Land.

3. Application: Suit to be dismissed for lack of prosecution.

Dated 13 December, 2006.

4. Background:-

4.1 i) Plaintiff alleges sale agreement with defendant for land parcel LR Dagoretti/Ruthimiti/1429 (portion) 0.1709 dated 23.5.1989 for Ksh.160,000/-

ii) Plaintiff pays Kshs.95,000/- has balance of Kshs.65,00/- not paid.

iii) Files suit for specific performance – now read (3 years later) to complete transaction.

vi) Applies for leave to obtain land control board consent and is granted (Owuor J.)

v) Defence – no agreement because no land control board.

vi) Plaintiff files application to dismiss and struck out defence.

vii) Defendant claims written agreement a forgery. Document examination report proves this.

viii) Juma J. declines to dismiss and struck out defence (25.1.1996) because of trial issues.

4.2 Trial commences before Gacheche J. on 1.11.2000. Suit adjourned for further hearing on 2.11.2000. Advocate for plaintiff not available and adjourns suit to attend to magistrates court. Case stood over generally.

4.3 Defendant Application for suit to be dismissed for lack of prosecution.

- 4.4. Mbito J. fixes suit for hearing. (30.4.2002)
- 4.5 G.B. M. Kariuki J. Stood Over Generally in 2003.
- 5. Application of 13.12.2006
- 5.1 Suit be dismissed for lack of prosecution.
- 5.2 Advocate for plaintiff served (5.2.2007)

Non- appearance during hearing.

- 5.3 Order 9b r. 3 (a) civil procedure rules hearing of application proceeds.

Held

- a) That the plaintiff no longer interested in suit.
- b) Same and is hereby dismissed for lack of prosecution with costs to the defendant.

7. Case Law

8. Advocates

M/s S.M. Kinuthia for Mwicigi Kinuthia & Company Advocates for the Defendant/Applicant

M/s Meenye for Meenye & Company Advocates for the Plaintiff/|Respondent – Absent

DEBORAH ANYANGO MULAHA.....PLAINTIFF

VERSUS

SIMON MBURU GACHUHI.....DEFENDANT

RULING

1. Background of Application dated 13.12.2006

1. Deborah Anyango Mulaha a female adult and plaintiff herein alleged that she entered into a sale agreement to purchase land from the defendant Simon Mburu Gachuhi, known as LR/Dagoretti/Ruthimitu 429 on the 23 May, 1989. The consideration agreed upon was Ksh.160,000/-. It is unclear why the Plaintiff was paying bits and pieces of deposits of moneys to one John Waweru. This sum of moneys accumulated to Kshs.95,000/- There was still a balance of Kshs.65,000/- left to be paid.

2. The defendant attempted and did sell the portion of land. He subsequently subdivided the same land into two being LR./Dagoretti/Rithimiti/834 and LR/Dagoretti/Rithimiti/835. The plaintiff by now had filed suit (3 years later) seeking for the courts orders for specific performance. She then sort leave to obtain land control board consent and was granted (Owuor J. 16.3.1992). She sort restraining orders not to have the said properties further transferred to third parties.

3. Her main intent was to now deposit the balance of Kshs.65,000/- in court if the said Defendant refused to accept it. That the court transfers the land into her name.

4. The defendant entered appearance filed defence and stated that there was in fact no agreement as there was no land control board consent. The defence agreed he subdivided the suit land, sold one portion and retained another portion for himself. The plaintiff immediately applied for summary judgment and sought for the striking out of the defence on ground that a sale agreement had in fact been entered into and the defendant stood in breach of the said agreement.

5. This application came for hearing before Juma J. who on 25.1.1996 dismissed the plaintiff application because the defendant was able to subject the sale agreement to a document examiner and which document examiner declared and found the said agreement to be a forgery.

6. The suit was then set down for hearing on 1st November 2000 and again on 2nd November, 2000 when the advocate for the plaintiff proceeded to the magistrate's court at Milimani to hear cases. The matter stood over generally.

II. Application of 13.12.2006

7. The defendant applies to this court to have the suit dismissed for lack of prosecution. This application was dealt with by Mbitio J. who directed on 30.4.2002 that the suit be set down for hearing. The matter then was part-heard by Gacheche J. When the suit was last before court in 2003, G.B.M. Kariuki J. stood the matter over generally.

8. The defendant filed this application, which is the subject matter of this ruling dated 13 December, 2006 seeking that the suit be dismissed for lack of prosecution. The plaintiff advocate is still on record (Order 111 Civil Procedure Rules. He was served on 5.2.2007 with the application. On the day the suit was called up for hearing the plaintiff and her advocate were absent. Under Order 9b r 3 (a) civil procedure rules the application was heard ex parte.

III. FINDINGS

9. I am satisfied that the plaintiff is not interested in her suit. That a period of 3 years without any action on file is not required for the court's permission to dismiss a suit. A suit is automatically dismissed upon the Judges orders without notice to any of the parties (Order XVI civil procedure rules). If the suit is still within the Limitation of Action time a party may file a fresh suit.

IV. Conclusion

10. As it stands no action having been taken, this suit stands dismissed. The application of 13.12.2006 be and is hereby allowed with costs to the defendant of this application and the main suit.

Dated this 16th day of May, 2007 at Nairobi.

M.A. Ang'awa

JUDGE

Advocates:

M/s S.M. Kinuthia for Mwicigi Kinuthia & Company Advocates for the Defendant/Applicant - present

M/s Meenye for Meenye & Company Advocates for the Plaintiff/Respondent - Absent