REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 64 of 1991

LILIAN NJOKI MWANGI ……….…………PLAINTIFF

VERSUS

SAMUEL KARIUKI KARANJA

JOSEPH KIBUKU KARANJA…….…..DEFENDANTS

R U L I N G

Before me is an application by way of chamber summons dated 22nd January 2007 and expressed to be brought pursuant to the provisions of Order *1XB Section rule 4* of the Civil Procedure rules and Section 3A of the Civil Procedure Act. In the application, Lilian Njoki Mwangi hereinafter referred to as the applicant in the main seeks that this honourable court's order of 6th March, 2000 dismissing her suit for want of prosecution be set aside and the suit be reinstated for hearing on merits.

The history of the matter appears to be that way back in 1991, the applicant took out an originating summons against the two defendants seeking that she be declared to have acquired title to land parcel Number **Loc.12/Sub-Loc.4/1595** by way of Adverse Possession. She also sought a declaration that the first defendant's rights to and interest in the said parcel of land had been extinguished by Adverse Possession. A further declaration sought was that the 2nd defendant had acquired title to the said land parcel subject to the applicant's interest in and right to the said land parcel by Adverse Possession. Finally the applicant sought an order that the District Land Registrar, Murang'a District do delete the name of the 2nd defendant in the register of the suit land and instead thereof replace it with that of the applicant. The originating summons was duly served on the defendants who responded by filing the necessary papers in court in opposition to the application. Following various interlocutory applications by the respective parties to the suit which were heard and determined, the suit was eventually set down for hearing on 20th March 1998. On that date the matter came up before **Osiemo J.** and because of the absence of the applicant and or his counsel, the originating summons was stood over generally.

On 11th November, 1999, the 2nd defendant took out a Notice of Motion pursuant to the provisions of ***order XVI rule 5(c)*** of the Civil Procedure Rules seeking that the originating summons be dismissed for want of prosecution as the plaintiff had not taken any steps to prosecute the same since the last time it was in court as aforesaid. The application came before **Justice Juma** who entertained it and allowed it on 6th March, 2000. Accordingly as of this date the originating summons stood dismissed for want of prosecution.

It is this order of dismissal that the applicant is now asking me seven (7) years down the line to set

aside and ipso facto reinstate the suit for hearing on merit.

In support of the application, the applicant blames her lawyers for what has befallen her. The applicant claims that she entrusted her lawyer with the responsibility of prosecuting the case, that the failure to prosecute the case was caused by factors beyond her control, that she has a good case against the defendants, that it would be in the interest of justice for the case to be reopened and heard on merits and finally that she was not aware of the order of dismissal until the month of September 2006.

The application was opposed by the 2nd defendant, hereinafter referred to as the respondent. Through a replying affidavit, the respondent depones that the application is bad in law and unmaintenable as the applicant has sought to act in person when her lawyer on record has not withdrawn, that there is yet another application filed by the applicant seeking more or less the same prayers dated 14th May, 2003 that is still pending in court, that the applicant is not truthful in her assertions, that the applicant is guilty of inordinate delay and finally he depones that it would be improper and not in the interest of justice to interfere with the orders of dismissal aforesaid.

Mr. Mbuthia, Learned Counsel for the respondent submitted at length as to the incompetence of the application, lack of candour on the part of the applicant as well as on the issue of abuse of court process.

Having subjected the application, the supporting affidavit, the replying affidavit and the annextures thereto as well as oral submissions of respective parties to the application to careful and exhaustive examination, it is my judgment that the application is unmerited and it ought to be dismissed on the following four (4) broad grounds to wit; Lack of candour, abuse of court process, inordinate and unexplained delay in filing the instant application and finally public policy.

As it has been consistently stated by our courts over the years it behoves a litigant seeking the discretion of the court in his favour to be candid and or truthful in what he states in inviting the court to exercise its discretion in his favour. The courts of law and indeed equity frowns upon litigants who exhibit singular lack of candour and are economical with the truth. I think the applicant is one such litigant. In her affidavit in support of the application and in her oral representations before me she categorically stated that she did not know that her suit had been dismissed for want of prosecution until sometimes in the month of September 2006 when she applied for certified copies of the proceedings. However in her supporting affidavit of the application dated 14th May, 2003, which is still pending in court, the applicant depones that she learned of the dismissal orders on 24th March, 2003. These positions are in my view irreconcilable and goes to show that the applicant is not ready to tell the truth. It is clear also from the record that after the order of dismissal aforesaid was made, the respondent had his costs taxed and thereafter commenced execution proceedings for the same against the applicant. Sometimes on 18th November, 2003 the applicant filed an application seeking that there be a stay of execution of decree pending the hearing and determination of the application and that she be allowed to liquidate the costs ordered by monthly instalments of Ksh.5,000/=. One of the grounds upon which the application was premised and which appears on the face of the application is that and I quote "**.…That the amount the subject matter in this suit is on costs upon dismissal of the applicant's suit for want of prosecution….."** And in the affidavit in support of the application, the applicant herein categorically stated on oath as follows:

"……**That on 6th March, 2000 this suit was dismissed upon the 2nd defendants application"** All these goes to show that the applicant had all along been aware of the dismissal of the suit contrary to her allegation that she only became aware of the dismissal sometimes in September, 2006.

The record also shows that the applicant did on 14th May, 2003 file an application in which she sought among other prayers; "**That the honourable (sic) be pleased to review its orders made on 6th March, 2000 dismissing this suit, in alternative and without prejudice to the foregoing the suit herein be reinstated…."** These are more or less the same prayers sought in the instant application. The said application has to date not been prosecuted. In my view this is a clear demonstration of the abuse of court process by the applicant. Litigants have no unlimited right to bring application upon application of

similar nature without prosecuting anyone of them. The effect of such scenario is to bog down the court process. That tendency must be nibbed in the bud. It does also appear from the record that sometimes in January, 2007, the applicant filed a Notice to act in person. That Notice was directed at her former Advocates who according to her were **Messrs Muraguri & Muraguri Advocates.** This is not the correct position however. According to the record, the lawyers who are on record for the applicant are **Messrs Ng'ang'a Munene & Co. Advocates.** Clearly as the Notice to act in person was directed at the lawyers who were no longer on record for the applicant, it is defective and of no legal effect. That being the case and **Messrs Ng'ang'a Munene & Co. Advocates** having formerly not withdrawn from acting for the applicant, the applicant could only have filed the instant application through the said firm of Advocates and not in person. For that reason again, the applicant is guilty of abuse of court process. The application as filed falls flat on its face therefore for want of competence.

The application is expressed to be brought under Order ***IXB rule 4*** of the Civil Procedure Rules. This order and rule cover situations where the plaintiff and or defendant is absent during the hearing of the suit. The suit herein was dismissed on a Notice of Motion taken out by the respondent due to the failure by the applicant to set down the originating summons for hearing within time. It was not therefore dismissed for want of attendance so as to bring the aforesaid order and rule in aid of the applicant.

If the applicant knew of the dismissal of the suit as early as 24th March, 2003, the court must ask why it has taken the applicant four (4) years to bring the instant application. The delay is certainly inordinate and unexplained. It is a principle of law that courts do not aid the indolent. In the circumstances of this case, it is clear to me that the applicant has nobody to blame for her woes other than herself. To blame her advocates for failure to notify her of the dismissal of the suit is in my view and as correctly submitted by counsel for the respondent, an afterthought and a futile attempt at buck passing. Their being failure by the applicant to explain satisfactorily the inordinate delay in filing the instant application deprives me of the need to exercise my discretion in her favour.

This matter has been lying in this court since 1991. The order of dismissal of the originating summons was made on 6th March, 2000. I do not think that public policy would favour the revival of a suit, seven (7) years down the line. It is in the interest of public policy that litigation at some point in time must come to an end. Litigants ought to know that it is not in the interest of public policy that litigation must continue endlessly even where it is hopeless to do so. In my view the applicant's journey of justice has hit a dead end. She must now be stopped in her tracks.

Accordingly the application dated 22nd day of January, 2007 and filed in court on 31st January 2007 is hereby dismissed with costs to the 2nd respondent.

Dated and delivered at Nyeri this 16th day of July 2007.

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M.S.A. MAKHANDIA

JUDGE