



REPUBLIC OF KENYA

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

Civil Suit 2347 Of 1995

PETER MUTURI GITAU PLAINTIFF

VERSUS

WAIRIMU NGUGI NJUGUNADEFENDANT

RULING

By a chamber summons application dated 20th February, 2006, the plaintiff moved the court for an order to

“have the orders of 4th June, 2003, dismissing the suit and all subsequent orders, be set aside and the suit be reinstated for hearing”. He also prayed for costs to be in the cause”.

The reasons for the application included the fact that the application which dismissed the suit for want of prosecution, **“was made without notice to the plaintiff/applicant,”** as the hearing notice of the said application was served on the plaintiff’s counsel without a hearing date. That because of the dismissal of the suit, the defendant is now selling the land to the third party before the dispute is resolved, yet the land belonged to the defendant’s late husband and there is a succession cause in Thika Magistrate’s court which has not been resolved.

The plaintiff’s application was not responded to, despite the same having been served on counsel for the defendant/respondent on 23rd January, 2006.

However, on request by the defendant’s counsel, I exercised a discretion and allowed him to respond to the submissions of the plaintiff’s counsel, basing his arguments on the documents already filed in the court file, and not on any new facts.

Counsel for the plaintiff urged the court to set aside the order dismissing the suit because the hearing notice served on his firm did not have a hearing date, that is why he did not appear in court.

He annexed such a hearing notice to his client’s affidavit in support of the application.

Mr. Kaai for the defendant submitted that the suit was dismissed on 4th June, 2003, by Mibto, J, as he then was. Mr. Kaai made the following submission in court on that day,

“the application is served. The defendant is wrongly sued. Summons not served until 1998. No action taken for 1 year. She (defendant) not the personal representative of the registered owner”.

The court made the following order,

“In view of the above, suit hereby dismissed with costs for not disclosing a cause of action against the defendant and or for non-prosecution.”

Mr. Kaai contended that the Notice of Motion application for dismissal of the suit was served. He referred court to an affidavit of service sworn by his court clerk Joseph Munene Kimathi, on 4th June, 2003, filed in court the same day.

I confirmed that the said affidavit was in fact in the court file having been filed on 4th June, 2003.

Mr. Kaai referred to yet another affidavit of service sworn by Kairithia Joseck, a court clerk of Mr. Kaai. He averred that he served a Notice of Taxation dated 28.10.2004, upon Kiarie Mwangi & Co. Advocates for the plaintiff. Attached to the affidavit of service was the Notice of Taxation/Accounts, to the advocate for the defendant coming up for hearing on 16th February 2005. The Deputy Registrar signed the notice on 28th October, 2004.

I scrutinized the court file and confirm that such an affidavit of service plus the attached notice, is in fact in the court file.

Further submissions were made by Mr. Kaai to the effect that the plaintiff has not been anxious to prosecute this suit. That he is asking for the re-instatement of the suit after the same was dismissed almost 3 years ago!

He also referred the court to the replying affidavit filed by the defendant in response to the suit filed by way of Originating Summons, in which she dined being the owner of the suit premises.

Again I scrutinized the court file and found the defendant’s replying affidavit dated 26th August 1998, filed in court on 31st August, 1998. In it the defendant denied having sold the suit premises to the plaintiff and putting him in possession. In paragraph 5 thereof she averred,

“That I did not have locus to sell the piece of land in question as the same was not and even now registered in my name.....”.

In para 10 of the same affidavit he averred,

“that the owner of the said piece of land is dead and I am not to personal representative..... “.

In the court file is also a copy of the green card which shows that the land was registered in the name of the defendant’s husband. No evidence was attached to show that she was the legal representative of her late husband’s estate, yet there is further evidence to show that the plaintiff was aware of a Succession Cause to the estate of the deceased pending in Thika Magistrate’s Court. There is no evidence in this court to show who petitioned for the grant.

Going back to the plaintiff’s application, I find that the same has no merit as there is evidence in the court file to show that the plaintiff’s counsel was served with both the application for dismissal and the notice of taxation. Furthermore, I find that the plaintiff’s suit was “**void ab initio**,” as the same was filed against the respondent, who was neither the registered proprietor, nor the legal representative in law, of her late husband’s estate. For these reasons, I decline to set aside Judge Mbito’s dismissal order of 4th June,

2003, and any subsequent orders issued thereafter.

Finally, I proceed to dismiss the plaintiff's application dated 20th February 2006, filed in court on 21st February, 2006.

Dated at Nairobi this 7th day of April, 2006.

JOYCE ALUOCH

JUDGE