



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 1336 OF 2007 (O.S)**

**(FORMERLY HCCC NO. 643 OF 2004 (O.S))**

**TERESIAH NJERI KAMAU** (Suing as the personal representative of  
**JOHN KAMAU GATHITU, deceased).....PLAINTIFF**

**VERSUS**

**JEMIMA WAITHIRA KAROKI** (Sued as the personal  
representative of **ANDREW KAROKI GATHITU**  
alias **KAROKI GATHITU, deceased).....DEFENDANT**

**RULING**

The plaintiff brought this suit by way of an Originating Summons dated 4<sup>th</sup> June, 2004 seeking an order that she be registered as a proprietor of a quarter share of all that parcel of land known as Ndumberi/Tinganga/T. 345. The Originating Summons was filed on 16<sup>th</sup> June, 2004. The defendant was served with the summons and filed a replying affidavit on 6<sup>th</sup> August, 2004 denying the plaintiff's claim in its entirety.

After filing the suit, the plaintiff took no action in the matter with a view to prosecuting the same for a period of 7 years. On 25<sup>th</sup> November, 2011, the court on its own motion issued a notice for service upon the parties to appear in court on 20<sup>th</sup> January, 2012 to show cause why the suit should not be dismissed for want of prosecution. The matter came up for the Notice to Show Cause on 20<sup>th</sup> January, 2012 before Mwilu J. (as she then was) when none of the parties appeared in court. Having satisfied herself that the parties were served with the Notice to Show Cause, Mwilu J. dismissed the suit for want of prosecution. As at the time the suit was being dismissed, it had remained dormant for over 7 years. From the record, the Notice to Show cause was served upon the plaintiff's advocates by Securicor courier.

Seven (7) years after the dismissal of the suit and 15 years after the suit was filed, the plaintiff has now moved the court with an application brought by way of Notice of Motion dated 29<sup>th</sup> October, 2019 seeking the setting aside of the said order of dismissal that was made on 20<sup>th</sup> January, 2012 and the reinstatement of the suit for hearing on merit. The application has been brought on the grounds that the plaintiff was not served with the Notice to Show Cause and that the plaintiff did not prosecute the suit because she was engaged in attempts to settle the dispute out of court with the defendant.

The application is opposed by the defendant through a replying affidavit sworn on 26<sup>th</sup> February, 2020. The defendant has denied that the plaintiff had engaged her in any negotiation with a view to settle the dispute amicably out of court. The defendant has contended that the application has not been made in good faith and that the same has been brought after unreasonable delay. The defendant has contended that she would suffer prejudice if the application is allowed.

When the application came up for hearing on 2<sup>nd</sup> March, 2020, the plaintiff's advocate Mr. Charagu relied entirely on the affidavit filed in support of the application. He submitted that his office was to blame for the plaintiff's failure to prosecute the suit. He urged the court to allow the application in the interest of justice because the plaintiff was threatened with eviction from the suit property by the defendant who had filed another suit against the plaintiff at Kiambu Law Court. Mr. Ndungu who appeared for the defendant left the matter to court.

I have considered the plaintiff's application together with the supporting affidavit. I have also considered the replying affidavit by the defendant and the submissions by the plaintiff's advocate. The following is my view on the matter. In the case of E. T. Monks & Co. Ltd. v Evans (1985) KLR 584 it was held that:

**“Public policy demands that the business of the court be conducted with expedition.”**

I am not satisfied that the plaintiff has put forward any valid ground that would justify the setting aside of the order of dismissal of this suit that was made on 20<sup>th</sup> January, 2012 after the suit had remained unprosecuted for over 7 years. I am not convinced that the plaintiff was not served with the Notice to Show Cause before the suit was dismissed. There is on record evidence that a Notice to Show cause was issued by the court and an indication that the same was served upon the plaintiff’s advocates by Securicor courier. I do not think that the court would have dismissed the suit unless it was satisfied that service of the Notice to Show Cause had been effected. I also doubt that the plaintiff would have been able to justify her failure to take steps in the suit for a period of 7 years even if she had attended court on 20<sup>th</sup> January, 2012 for the Notice to Show Cause. The only explanation put forward by the plaintiff for her failure to prosecute the suit is that she was pursuing an out of court settlement of the matter. The plaintiff did not place before the court any evidence of attempts that were made by her to settle the dispute out of court.

The plaintiff’s advocate submitted that there were succession proceedings in which the plaintiff had hoped that the dispute would be resolved. That to me is not a justification for failure to prosecute the suit for over 7 years. From the material placed before the court, the said succession proceedings were ongoing when this suit was filed. There was no justification for the filing of this suit if the plaintiff honestly believed that the dispute would be resolved in Kiambu Senior Principal Magistrate’s Court Succession Cause No. 126 of 2003 in which the plaintiff was involved as an objector as at the time she filed this suit. In any event, the plaintiff was at liberty to seek an order for stay of this suit pending the determination of the said succession cause.

I am in agreement with the defendant that she will be prejudiced if the orders sought are granted. The plaintiff’s case is based on an agreement that was made between the plaintiff’s and the defendant’s spouses in 1960s. In her reply to the application, the plaintiff stated that she was over 90 years old, and that she was weak and sick. I am of the opinion that it would not be possible to do justice to both parties in this matter if this suit that was filed over 15 years ago was to be reinstated for hearing.

For the foregoing reasons, I find no merit in the plaintiff’s Notice of Motion application dated 29<sup>th</sup> October, 2019. The application is dismissed with costs.

**Delivered and Dated at Nairobi this 5<sup>th</sup> Day of May 2020**

**S. OKONG’O**

**JUDGE**

**Ruling read through Microsoft Teams Video Conferencing platform in the presence of;**

N/A for the Plaintiff

N/A for the Defendant

C.Nyokabi-Court Assistant