



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 156 OF 2010

ISAAC MBITI JOHN M'ITHANGATHA.....PLAINTIFF/APPLICANT

VERSUS

M'ITABARA M'IMUNYA.....DEFENDANT/RESPONDENT

RULING

1. The plaintiff applicant has filed an application dated 26.3.2019 seeking for orders:

- (i) *That this honorable court be pleased to reinstate the dismissed and abated suit hereof.*
- (ii) *That this honourable court be pleased to enlarge time and allow the applicant's to file an application to substitute the deceased defendant within 14 days.*
- (iii) *That this honourable court be pleased to give directions as to the hearing and determination of the main suit hereof.*
- (iv) *That the costs of this application be in the cause.*

2. The grounds in support are :

- (a) *That on 14th June, 2017 Hon. Justice Njoroge dismissed the suit for want of prosecution.*
- (b) *That the applicant's advocates visited the court registry to follow up the matter but the file could not be traced because of the aforesaid dismissal.*
- (c) *That the applicant's advocates are based in Nairobi and therefore could not easily access information relating to listing of the matters for hearing without prior notice.*

3. The application is supported by an affidavit sworn on 26.3.2019 by the applicant. The same is opposed through grounds of opposition dated 24th February 2020 that; there is no grant of representation exhibited: it is superfluous and waste of courts time. On the other hand, the respondent filed written submissions dated 29th April 2021 relying on **Waki Clearing And Forwarding Agents Ltd vs BOM Communications Spleins Ltd 2005 eKLR**, **Pauline Odhiambo Oando vs Chairman, Secretary Auditor and Organizers of Nyikwa Ramogi Welfare (2019) eKLR** and **Henry Kiptalam Bargetony vs Stanley A Ngetich (2013) eKLR**, **Muriithi Ngwenya vs Gikonyo Macharia Mwangi & 2 others 2018 eKLR** and **Kenya Farmers' Cooperative Union Ltd vs Charles Chargor (deceased) T/A Kiptabei coffee estate 2005 eKLR** on the proposition that the application falls short of the principles for both reinstatement of suit and enlarged of time.

4. The brief background of this matter is a suit was filed on 26th November 2010 seeking a permanent injunction and specific performance over land No. 183 Akirangondu adjudication section, which the plaintiff alleges he bought on 9th January 2009 but the defendant now allegedly deceased failed to transfer to him.

5. The plaintiff also filed an application dated 24th November 2010 seeking for temporary orders which were granted on 20th December 2010.

6. From the court records it appears the applicant never prosecuted the aforesaid application nor did he extract the orders.

7. Be that as it may the defendant filed a notice of appointment on 14.7.2011 and subsequently filed a defence on 1st August 2011 raising a defence of fraud/undue influence over the alleged sale agreement.
8. The defendant also raised a preliminary point of law that the suit offended section 8 of the Land Consolidation Act for lack of consent from the land adjudication officer.
9. The plaintiff replied to the defence on 19th June 2013 stating that he had a consent dated 12th August 2008. Thereafter the plaintiff's witness's statement and documents were filed on 27th September 2012.
10. Parties appeared before the court on 1.7.2013, 27.7.2013, 18.6.2014 and 25.9.2014 when the issue was raised as to whether the defendant was alive or not. The applicant undertook to establish the veracity of this concern.
11. On 4.11.2014 the court was informed the person who had allegedly died was not the defendant but the brother. That position was also communicated on 11.12.2014. Thereafter the parties took a hearing date at the registry by consent for directions.
12. On 3rd November 2015, only the defendant's counsel appeared and informed the court that his client had allegedly died in March 2015. The plaintiffs' counsel did not appear and has never given any explanation why he did not attend court. As a consequence the matter was stood over generally.
13. The parties did not take any action until the court issued a notice dated 5th May 2017 for 14th June 2017. This was slightly over two years after the last appearance. As admitted by the applicant the notice was sent to their known address Ms. Kurauka & Co. advocates of P.O Box 1786 – 00100. The applicants did not appear on the said date. The defendant appeared who applied for the dismissal of the suit for want of prosecution. The court acceded to that request and dismissed the suit.
14. Following the dismissal the plaintiff did not take any action for close to two years until 31st May 2019 when he filed the instant application.
15. Now from the application and the supporting affidavit the applicant has not stated when he came to make a follow up either in 2015, 2016, 2017 or 2018 and could not trace the court file.
16. Similarly no single letter has been exhibited to show whether there was a request or follow up for an allegedly missing file. Further it has not been demonstrated how such a file could be inaccessible. The applicant submits that he was unable to secure an early hearing date due to workload on the part of the then presiding judge. With respect to the applicant he cannot heap blame to the court and the registry solely without substantiating it as the record show otherwise.
17. Even assuming without admitting the notice was sent to the wrong address, the applicant has not satisfied the court as required under Order 13 of the Civil Procedure Rules that he exercised due diligence and fortitude to have his matter heard and determined expeditiously. The applicant and his counsel have not explained why there was inordinate delay in prosecuting the suit since 2015.
18. Again if the plaintiff was diligent in prosecuting his case and seeking to list it down for hearing, he would have known as a matter of fact the respondent died in March 2015 so as to take action within a year before the case could abate in 2016.
19. The applicant appears to have slept on his rights for close to four years so as to move the court for reinstatement and substitution of the defendant.
20. Even assuming the court was to reinstate the suit, it has not been suggested who the deceased defendant would be substituted with. There is no draft amended plaint attached suggesting who is to take over the suit. The plaintiff has not stated if he has sought to cite any of the deceased's surviving representatives for letters of administration.
21. The court cannot simply give orders in vacuum and in vain. The applicant prays the court gives directions on the mode of disposal of the suit yet gives no plausible or realistic way forward given the circumstances of this matter.
22. Whereas the court has discretion to grant the orders sought the facts herein are distinguishable from those in **Antony Waweru Miano vs Thuku Mugira (1982-1988) 1KAR 171** as relied by the applicant.
23. The applicant herein can only but blame himself for the delay, inaction and impracticality of the orders he is seeking before this court.
24. Unfortunately the suit abated in 2016 under order 24 rule 7 and no sufficient cause has been demonstrated for its revival or reinstatement and with which party as held by **Munyao Sila J in Bargetuny vs Ngetich 2013 eKLR.**
25. The delay in filing the application has not been sufficiently explained as held by D.K Maranga J as he then was in **Waki Clearing And Forwarding Agents Ltd vs BOM Communication Systems LTD (2005) eKLR.**
26. The upshot is that the application dated 26th March 2019 lacks merits and is dismissed with costs. File closed.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 29TH DAY OF SEPTEMBER, 2021 IN PRESENCE OF:

C/A: Kananu

Miss Nyaga for defendant/respondent

HON. C.K. NZILI

ELC JUDGE