



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL SUIT NO 97 OF 2001 (O.S)

IN THE MATTER OF LAND PARCEL NUMBER KERICHO/KAPKATET/1390

AND IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT (CAP 22 LAWS OF KENYA)

TABELGAA CHEPNGENO TELE.....1ST PLAINTIFF

TABULE TELE.....2ND PLAINTIFF

VERSUS

KIPKOSGE ARAP TELE.....1ST DEFENDANT

SALLY CHEPKOECH MISK.....2ND DEFENDANT

PHILIP KIPLANGAT KORIR.....3RD DEFENDANT

R U L I N G

This Ruling is in respect of the Plaintiff's application dated 2nd February, 2010. By an originating Summons dated 28th November, 2001 the Plaintiffs filed a claim for adverse possession against one **KIPKOSGE TELE** in respect of land parcel number KERICHO/KAPKATET/1390.

While the suit was still pending the 1st Defendant caused land parcel number KERICHO/KAPKATET/1390 to be sub-divided into land parcels number KERICHO/KAPKATET 2334, 2335 and 2336 and transferred it to the 2nd and 3rd defendants herein. This necessitated the filing of an application to enjoin the 2nd and 3rd defendant in May, 2002.

In 2003 the Plaintiff sought to enjoin the Chairman of Bureti Land Control Board as well as the Land Registrar for frustrating the Plaintiff's claim. In May 2006 the Plaintiff filed an application seeking to declare the sub-division of land parcel number KERICHO/KAPKATET/1390 null and void. In the meantime the Defendants applied to strike out the plaintiff's suit on the grounds the subject matter of the suit had ceased to exist. The court however declined to strike out the originating summons and ruled the anomaly could be cured by an amendment. By an application dated 7th September 2007, the Plaintiff sought leave to amend the Originating summons to reflect the new parcel numbers and enjoin the 4th and 5th defendants. The Plaintiff's counsel then went ahead to amend the Originating summons on 15th October 2007 thus enjoining the 4th and 5th Defendants.

By another application dated 1st February 2010 the Plaintiff filed an application seeking leave to amend the Originating summons to enjoin the Attorney General. The application was heard by the Deputy Registrar who granted the orders sought. Subsequently, the further amended Originating Summons was filed on 23rd September 2010. The counsels then proceeded to take pre-trial directions in accordance with Order 11 of the Civil Procedure Rules.

On 22nd June 2016 the plaintiff's counsel filed an application to substitute the 1st plaintiff with her son John Kiprotich Ng'etich on the grounds that the 1st Plaintiff had advanced in age. When the application came up for hearing on 1st September 2016, the Plaintiff's counsel withdrew the application and made an oral application under Order 1 rule 10 and rule 25 of the Civil procedure rules to enjoin one John Kiprotich Ng'etich. The court directed that a formal application be filed. The plaintiff's counsel filed the application on 13th September 2016 and when it came up for hearing on 8th February 2017, a consent was recorded allowing the application.

The plaintiff's counsel then sought leave to file an application to enjoin the Land Control Board, land Registrar and Attorney General. He was granted 14 days to do so and the matter was set down for mention on 20th February 2017. On this date the plaintiff's counsel sought to reopen the application dated 1st February 2010 which had wrongly been placed before the Deputy Registrar, on the grounds that Justice G.B.M Kariuki had on 13th April 2011 set aside the orders of the Deputy Registrar and expunged the Amended Originating Summons filed on 23rd September 2010 from the record since the Deputy Registrar had no jurisdiction to entertain the application for leave to amend the Originating Summons.

Counsel for the Respondents opposed the request by Mr. Siele to revive the application dated 1st February 2010 for leave to amend the Originating Summons citing the reason that the same was superfluous since Justice G.B.M Kariuki had by his directions given on of 27th November 2011, requested the Plaintiff's counsel to serve the documents he had on the Respondents. On 12th February 2012 Justice Jeanne Gachehe delivered the ruling by Justice G.B.M Kariuki giving the following directions:

“The parities are also granted leave to file and serve on all the parties the amended pleadings within 21 days”.

Counsel for the Respondents submitted that this was not done. He further submitted that the parties subsequently appeared before Justice Waithaka on 22nd April 2013 and the judge directed that the parties comply with Order 11 within 30 days but the Plaintiff's counsel still did not comply. Counsel further submitted that Mr. Siele had failed to demonstrate diligence on his part as it had taken him 7 years to prosecute his application.

I have attempted to summarize the history of this matter in order to bring to light the role played by the Plaintiff's/Applicant's counsel in delaying the hearing of the case. Granted that there may have been valid reasons to file the numerous applications herein, I have no doubt in my mind that this matter could have been handled better. With utmost respect to the learned counsel for the Plaintiff/ applicant, he misapprehended the court's Ruling and directions given by my brother Justice G.B.M Kariuki way back in 2011 thus occasioning inordinate delay in prosecuting his client's case.

In my considered view his explanation is less than satisfactory. Nevertheless, I am alive to the fact that at the end of the day it is the elderly Plaintiff herein who will suffer injustice if her case is decided on technicalities and struck out. It is trite law that the mistake of an advocate should not be visited on his client and on that basis I am inclined to grant the application. In so doing I am fortified by the decision of the Court of Appeal in the case of **Belinda Murai & Others Vs Amoi Wainaina (1978) KLR 272 Per Madan JA** as he then was, cited with approval in **CA 18/2013 Richard Ncharpi Leiyagu Vs IEBC and others** where the learned judges of appeal describing what constitutes a mistake stated as follows:

A mistake is a mistake, It is no less a mistake because it is an unfortunate slip, it is no less pardonable because it is committed by senior counsel, though in the case of junior counsel the

court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door is not closed because the mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify it if the interest of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of the laws and adoption of a legal point of view which courts of appeal sometimes overrule..”

Furthermore in the case of **Philip Chemweno & Another Vs Augustine Kubede (1982-1988) KAR 103 at page 1040, Apalloo J.A** (as he then was) stated as follows:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made, that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, it is often said exists for the purpose of deciding the rights of parties and not the purpose of imposing discipline..”

In the current circumstances, the inconvenience caused to the respondents by the plaintiff’s counsel can be compensated by costs. In considering the Applicant’s application for leave to enjoin additional Respondents, I am enjoined to take into account the overriding objective of litigation as well Article 159 of the Constitution of Kenya which provides that justice shall be done to all, irrespective of status and without undue regard to procedural technicalities.

Accordingly, and in the exercise of the courts inherent powers under Section 3A of the Civil Procedure Act, I allow the application as prayed. The Plaintiff/ Applicant is given seven (7) days to file an Amended Originating Summons and serve the same upon the defendant’s advocates and intended defendants within fourteen (14) days from the date herein failure to which this order lapses.

I award the costs of this application to the defendant/respondents.

Dated, signed and delivered this 10th day of March, 2017.

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Jane M. Onyango

Judge

In the presence of:

1. Mr. Oboso for 1st Defendant.
2. Mr. Siele for Plaintiff/Applicants and Intended Plaintiff.