



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 68 OF 2013

CATHERINE WAMBILYANGA.....PLAINTIFF

VERSUS

JUSTIN SYOMBUA MUSYOKA.....1ST DEFENDANT

DANIEL KIOKO.....2ND DEFENDANT

VERONICA MUMBWA.....3RD DEFENDANT

MAXWELL OTTAWA MAERO.....4TH DEFENDANT

RULING

1. In the Notice of Motion dated 24th September, 2019, the Defendants are seeking for the following orders:

a) That this Honourable Court be pleased to review and set aside its orders of 13th day of March, 2018 dismissing the suit and proceed to hear the suit on its merits.

b) That the costs of this Application be in the cause.

2. The Application is supported by the Affidavit of the 3rd Defendant who has deponed that on 16th January, 2015, Kariuki J. delivered a Ruling directing that the matter herein be stayed pending the conclusion of Nairobi Succession Case No. 503 of 2013.

3. The 4th Defendant deponed that the succession cause was concluded on 28th January, 2019 and a Grant was issued; that it was therefore in error that this matter was dismissed on 13th April, 2018 before the conclusion of Nairobi Succession Cause No. 503 of 2013 and that his advocate never received the Notice to Show Cause why the matter should not be dismissed.

4. The 4th Defendant finally deponed that they are ready to conclude this matter on its merit and take further directions in view of the confirmed Grant in Nairobi Succession Cause No. 503 of 2013 and that it is in the interest of justice that the matter is heard on its merits. Although the Plaintiff was served with the Application, he did not file a response.

5. The record shows that this suit was commenced by way of a Plaint dated 29th August, 2013. In the Plaint, the Plaintiff prayed for an order of permanent injunction restraining the Defendants from trespassing on parcel of land known as plot number 17 and 18 on L.R No. 12719/479 in Syokimau (*the suit property*).

6. The Defendants filed a Defence on 11th November, 2013 in which they sought for the dismissal of the suit. The Defendants never filed a counter claim to the Plaintiff's suit. On 1st September, 2014, the Defendants filed a Notice of Motion dated 26th August, 2014 in which they sought for an order to have the suit struck out with costs.

7. The said Application was premised on the grounds that there was a pending succession cause number 503 of 2013 at the High Court in Nairobi dealing with the distribution of the Estate of the deceased and that the current suit is defective. In his Ruling dated 16th January, 2015, Kariuki J stayed this suit pending the determination of the Succession case in Nairobi High Court Succession Cause No. 503 of 2013.

8. The record shows that on 13th April, 2018, the court, on its own Motion, dismissed this suit for want of prosecution. Indeed, both the Plaintiffs and the Defendants advocates were served with the Notice to Show cause why the suit should not be dismissed by way of registered post.

9. It is true that this suit should not have been dismissed for want of prosecution in view of the orders of Kariuki J. However, the current Application for reinstatement of the suit should have been filed by the Plaintiff and not the Defendant. I say so because the suit 'belongs' to the Plaintiff. If the Plaintiff is not interested in reviving or prosecuting the suit, the same ought to be taken out of the judicial system by an order of dismissal.

10. Considering that the Plaintiff is not interested in the prosecution of the suit, even if the same is revived, it can only be dismissed once more for want of prosecution, which in my view is a waste of judicial time. That being so, I find the Application dated 24th September, 2019 to be unmeritorious.

11. For those reasons, the Notice of Motion dated 24th September, 2019 is dismissed but with no order as to costs. For avoidance of doubt, the suit stands dismissed.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 12TH DAY OF JUNE, 2020.

O.A. ANGOTE

JUDGE