



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

E.L.C CASE NO. 386 OF 2014

AGNES MUTHONI MWANGI

PETER NDEGWA MWANGI.....PLAINTIFFS/RESPONDENTS

-VERSUS-

PRISCILLA WANJERI GATHONI

PRIMO THUKU

SARAH WANGARI MBUGUA.....DEFENDANTS/ APPLICANTS

RULING

1. This is the defendant's Notice of Motion dated **16th December, 2014** seeking an order of this court to dismiss the suit for want of prosecution and costs thereof. The Application is expressed to be brought under **Order 17 Rule 2** of the Civil Procedure Rules.
2. The application is anchored on an undated Supporting Affidavit by **Charles Wahome Gikonyo**, advocate for the defendant/applicant filed on 18th December, 2014 on the grounds that this matter was last in court on 8th March, 2012 when an application dated **10th January, 2012** seeking to amend the Originating Summons came up for hearing. On that day, the plaintiffs were granted time to respond to the defendants grounds of opposition to the said application. Since then, no action has been taken on this file and the defendants contend that the plaintiffs are guilty of laches and inordinate delay.
3. On **22nd September, 2015** this court issued a notice to show cause why the suit should not be dismissed under **Order 17 Rule 2(1)** of the Civil Procedure Rules. When the notice to show cause came up for hearing, counsel for the defendants supported the dismissal but the 2nd plaintiff sought time to set down the matter for hearing stating that the delay had been occasioned by ongoing investigations by the police. The plaintiffs were directed to take a mention date in the registry within 30 days.
4. The plaintiffs complied with the court order and set down the matter for mention within the stipulated period. On that date, the court directed that the instant application be set down for hearing and the same came up for hearing on 10th May, 2016.
5. Counsel for the defendants' **Mr Wahome**, submitted that that the plaintiffs have failed to set down the matter for hearing notwithstanding the court's directions given on 8th March, 2012.

6. The application is opposed. The 2nd plaintiff on his behalf and that of the 1st plaintiff, filed a replying affidavit dated **4th December, 2015**. He deponed that during the pendency of the suit, the 2nd defendant had caused the suit property to be transferred to another party which necessitated amending their originating summons to include Sarah Wangari Mbugua. They urged the court to hear their case on its merit.

7. On 29th December, 2015 the plaintiffs filed a preliminary objection on the ground that the supporting affidavit to the instant application was not dated as required by law. The court directed that both the application and the Preliminary Objection be heard together.

8. During the hearing, both parties relied on their pleadings. In addition, counsel for the defendant relied on the authorities he had filed which I have considered.

9. Since a preliminary objection is capable of disposing off a suit, I will address it first. In his submissions, counsel for the defendants submitted that a Notice of motion need not be supported by an affidavit. He also invoked **Article 159** of the constitution. The plaintiffs also filed written submissions which I have also considered.

10. In the case of **Infocard Holdings Limited v Attorney General & 2 others**, [2014] eKLR the court declared an undated affidavit as defective as per **Section 5** of the Oaths and Declarations Act. In its finding the court associated itself with the finding in the case of **Charles Muturi Mwangi v Invesco Assurance Co. Limited Cause No. 128 of 2011** where it was held:-

“These are mandatory provisions. There is no discretion for this court to vary these provisions as these are statutory provisions with regard to what constitutes a valid disposition to matters before court. The omission to indicate the date of swearing of the affidavit attached to the application before the court renders the same defective.... The defect on the affidavit is not a mere technicality that can be addressed as under Article 159 of the Constitution. The undated affidavit violates a statutory mandatory provision and thus the striking out.”

11. Regarding the undated affidavit, I adopt the holding in the above case and uphold the objection by the plaintiff.

12. Regarding the application dated 16th December, 2014, the court having upheld the objection, sees no need to consider the application on its merit. From the court record, I have noted that directions have not been taken for the originating summons. To fast track this matter, directions will be on 8th November, 2016 in open court.

Dated, signed and delivered at Nyeri this 14th day of July, 2016

L N WAITHAKA

JUDGE

In the presence of:

Agnes Muthoni Mwangi - plaintiff

Peter Ndegwa Mwangi - plaintiff

Wahome Gikonyo for the defendant

Court assistant - Lydia