



REPUBLIC OF KENYA
IN THE LAND AND ENVIRONMENT COURT AT NYERI

HIGH COURT

CIVIL CASE NO. 82 OF 2003

ESTHER KABUI GITHINJI & ANOTHER..... PLAINTIFF

VS

REUL KIIRU KIBARIKU & 10 OTHERS.....DEFENDANTS

RULING

On the 25.1.2013, this court allowed the application dated 29.9.2010 in the following terms:-

- a. *The order of the court given on the 26.10.2009 and issued on the 18.11.2009 be reviewed by setting aside the order dismissing the suit for want of prosecution.*
- b. *All processes resulting from the dismissal of the suit for want of prosecution be stayed.*
- c. *The application dated 21.12.2005 be scheduled for hearing within the next two months failure of which the Originating Summons dated 8.9.2003 stood dismissed.*
- d. *The costs of the application was to be born by the Plaintiff.*

The application before court now is the Notice of Motion dated 21.12.2005. The applicants are Reul Kiiru Kibariku and Kigo Urugari, the 1st and 2nd defendants herein. They are seeking the dismissal of the Originating Summons dated 8.9.2003 for want of prosecution on grounds that the Respondents have taken no steps from 2004 and that no effort has been made to fix this suit for hearing.

The application is supported by the affidavit of Kigo Urugari who depones that *the Originating Summons dated 8.9.2003 was filed on 9.9.2003 and by 28th October, 2003 the replying affidavits were filed and the pleadings were therefore closed thereafter. The Plaintiffs thereafter went into a long slumber and did not take any action on this matter for nearly two years. She believes that the Plaintiffs have completely lost interest in this suit because the delay in taking action in this matter is inordinate and therefore it is only fair and just and in the wide interest of justice that this suit be dismissed.*

Two replying affidavits were filed, first on the 26.3.2013 deponed by the Plaintiff **Esther Kabui Githinji** stating *she has always been ready to prosecute her case but her previous advocates failed to list the case for hearing. That she has now taken serious steps toward ensuring that her case is ready for hearing and has filed witness statements and a list of the witnesses that she intends to call in the case. She has filed an application seeking to substitute the Fifth Defendant who died on 26th April, 2004 and also in the process of filing application for substitution in the High Court for the substitutes of the 2nd and 11th Defendants. She is keen in having the case concluded and in the circumstances the application dated 21st December, 2005 should be dismissed with costs.*

Another replying affidavit which was not respondent to, had been filed by **Geoffrey Mahinda** on

15.2.2006. He depones that the matter was fixed for hearing on 21.9.2004 but the court was not sitting. That on 26th November 2004 they received a letter from the Advocate for the 5th Defendant (Peterson Wachira Githaiga) advising them on the demise of their client. That he had written several letters to the Advocate of the family of the 5th Defendant inquiring on the progress of the succession matter which inquiries did not elicit any positive response.

That on realizing the said advocate's unwillingness to release the names of the administrators of the Estate of the 5th Defendant, on 24th September, 2005 Mahinda wrote to the Deputy Registrar High Court Nairobi to conduct a search, to confirm who were the administrators of the estate of the 5th Defendant and on 25th January, 2006, the court file was traced whereupon he procured a copy of the grant of representation. That the delay in fixing the matter for hearing had been occasioned by the demise of the 5th Defendant, as without substitution of parties, it would be an exercise in futility to proceed.

The applicant **submits** that it is now ten years since the Originating Summons herein was filed and therefore the **double O principle(O2)** does not apply. That the court has to act justly having regard to the principle of proportionality. The court has to level the playing ground for all parties in maintaining equal terms. The Overriding Objective has to be applied both ways to ensure litigation costs are low.

The third and fourth defendants support the application on grounds that the Plaintiffs filed the suit and went to sleep.

On his part the interested party argues that the respondents/plaintiffs went to sleep only to make up after assessment of costs.

The 6,7,8,9 and 10 Defendants have no problem with the orders entered on 26.10.2009 being set aside upon the plaintiffs paying them any costs assessed at Kshs 10,000/=.

The Respondents in their submission blame their previous advocate for letting them down and yet they have always been ready to proceed. They have taken several steps towards preparing the case for hearing. They have filed written statements and are in the process of substitution the deceased defendants namely 2nd, 5th and 11th defendants. Mrs. Lucy Mwai argues that a party should not be shut out from ventilating the case if she shows the willingness to proceed with the case.

This court finds that the plaintiff filed the Originating summons dated 9.9.2003 under Section 7,13,17 and 38 of the Limitation of Action Act. The Originating Summons was based on a claim of adverse possession.

The 3rd and 4th Defendants responded on the 2.10.2003 while the 6th Defendant filed a Replying Affidavit on 23.10.2003. In a nutshell by 28.10.2003 the Defendants had filed their documents in reply to the application.

I have perused the court records and ascertained that on 10.12.2003 the case was fixed for hearing on 21.9.2004 by the representatives of Sichangi and SK Njuguna and Kagwanja advocates.

I have also perused the file and ascertained that directions were never taken in compliance with Order XXVI Rule 3 D of the Civil Procedure Rules (Repealed) which was applicable then.

The application for dismissal of the suit was made before the taking of directions in the Originating Summons. I do find the explanation in the replying affidavit of Geoffrey G. Mahinda filed on 15.2.2008 and the affidavit of Esther Kabui Gathinji sufficient in the delay in prosecuting the case. The reason given by the respondent is that the 5th Defendant Peterson Wachira Githaiga had died, which information was availed to the Plaintiffs by the 5th Defendant's advocate at the time thus Mr Munyalo Muli. Mr Mahinda wrote several letters to the family of defendant but there was no response. He produced the letter dated 5.10.2004 by counsel acting for the 5th Defendant addressed to the firm of Sichagi & Co. Advocates. In the said letter Mr. Munyao Muli states:-

“We now act for the 5th Defendant who is now deceased. Enclosed herewith find a copy of

the death certificate. We are making arrangements for suitable substitution and would appreciate if this matter is kept in abeyance.”

M/s Gathara Mahinda took over the matter from Sichagi & Co. Advocates and wrote to Munyalo Muli & Co. Advocates on 26.11.2004 requesting for information as to whether the letters of administration had been procured. The said firm wrote reminders on 13.1.2005 and 14.4.2005 and finally wrote to the Deputy Registrar High Court on the 9.9.2005 who was able to trace the probate file in respect of the 5th Defendant and a copy of grant was availed to the Plaintiff on the 25.1.2006 after the filing of the application herein.

This court finds that the Plaintiffs have given a detailed explanation as to why they never prosecuted their Originating Summons by the 21.12.2005. The delay is excusable as the 5th Defendant had passed on hence the need to do substitution. The plaintiff have demonstrated that they were not asleep as they wrote several letters through Sichangi Advocate requesting for information which was later availed after the filling of the application.

Accordingly I dismiss the application dated 21.12.2005 with costs to the Plaintiffs.

SIGNED AND DATED AT ELDORET THISDAY OF..... 2015

ANTONY OMBWAYO

JUDGE

DELIVERED AND SIGNED AT NYERI THIS 6TH DAY OF FEBRUARY,2015

LUCY WAITHAKA

JUDGE