



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 116 OF 2012**

**JACOB KARI KAMONI ..... PLAINTIFF**

**VERSUS**

**EMILY CHERONO..... DEFENDANT**

**R U L I N G**

1. The defendant/applicant filed a Notice of Motion dated 14/4/2015 seeking to have the suit herein dismissed for want of prosecution. The applicant contends that the plaintiff has not taken any step towards the prosecution of his suit. This case was before court on 17/5/2013 when the court set aside an ex-parte judgment and granted the defendant/applicant leave to file and serve defence within 14 days.
2. The applicant contends that the pendency of this suit in court is causing her psychological torture and that the plaintiff is not keen to prosecute the same. She therefore seeks that the suit be dismissed with costs.
3. The applicant's application is opposed by the plaintiff/respondent through a replying affidavit filed in court on 29/7/2015. The applicant states that he instructed Mr. Gatune Advocate an Associate in the firm of Gacathi & Co. Advocates to file this suit on his behalf. The said Advocate moved from the firm of Gacathi & Co. Advocates to Nairobi where he took up employment at Invesco Insurance Company Ltd. He contends that he was not aware that Mr. Gatune had moved from the firm of Gacathi & Co. Advocates and that he is keen on prosecuting his case.
4. The plaintiff filed this suit on 28/8/2012. Hearing proceeded ex-parte after the defendant who was said to have been served neither entered appearance nor filed defence. A judgment was delivered on 20/3/2013 in favour of the plaintiff. The defendant/applicant filed an application seeking to set aside the ex-parte judgment and its consequential orders. This application was heard and a ruling delivered on 17/5/2013 setting aside the ex-parte judgment. The defendant was given 14 days within which she was to file and serve defence.
5. The defendant filed defence on 6/6/2013. Since that time this suit has not been fixed for hearing or any step taken towards the prosecution of the same until the present application was filed. There is no doubt that this suit has been pending without prosecution for over one year. Either party was at liberty to apply to court for its dismissal. The provisions under which this application is brought gives the court discretion to consider whether to dismiss or spare the suit depending on the reasons advanced for non prosecution of the same.
6. The plaintiff has stated that he was not aware that his advocate had left the employment of the firm of M/s Gacathi & Co. Advocates. When a hearing notice was served upon the firm of Gacathi & Co. Advocates, Mr. Gacathi appeared in court and explained that the file of the plaintiff had been given to

another law firm. He asked for adjournment which adjournment was granted. The plaintiff who had not filed a reply to the present application then went and engaged a lawyer who came and filed a notice of change of Advocate and prepared a replying affidavit which was sworn by the plaintiff/respondent and filed in court on 29/7/2015. Even though the plaintiff's Advocate was not in court during the hearing of this application on 17/9/2015 there was already a replying affidavit on record.

7. I have considered the lengthy of time this matter has remained inactive and the reasons given for non prosecution of this case. It is common knowledge that litigants who engage Advocates tend to think that it is the Advocate to do everything. They forget that it is their case and that they are duty bound to follow it up. This is a land matter involving ownership of a property. I am convinced that this is a matter in which parties ought to be heard and the dispute determined on its merits. This application is therefore disallowed.

8. I notice that neither the plaintiff nor the defendant have filed their list of witnesses and documents. Let parties file and exchange lists of witnesses and documents within the next 21 days after which either party can fix this suit for hearing as soon as the diary for 2016 is available. Costs of this application shall be in the cause.

It is so ordered.

Dated, signed and delivered at Kitale on this **5th** day of **October, 2015**.

**E. OBAGA**

**JUDGE**

**In the presence of Mr. Karani for M/s Kosgei for Applicant.**

**Court Assistant – Winnie.**

**E. OBAGA**

**JUDGE**

**5/10/2015**