



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT EMBU**

**E.L.C. CASE NO. 72 OF 2017 (O.S.)**

**EFUREITH IRIMA MBOGO.....PLAINTIFF**

**VERSUS**

**IBARA MWANIKI.....1<sup>ST</sup> DEFENDANT**

**PETERSON WAMBUGU.....2<sup>ND</sup> DEFENDANT**

**MWANGI MUTHINJI**

**ALIAS MOSES MWANGI MUTHINJI.....3<sup>RD</sup> DEFENDANT**

**KAHARIRI BURI KARUGU.....4<sup>TH</sup> DEFENDANT**

**JOSIAH WAMBUA SILAS**

**Alias JOSIAH KINYUA MUCHINA.....5<sup>TH</sup> DEFENDANT**

**DOUGLAS KIRINYU MATHENGE**

**Alias DOUGLAS KIRUNYU MWANGI MATHENGE.....6<sup>TH</sup> DEFENDANT**

**MOFFAT MURIITHI KANGI.....7<sup>TH</sup> DEFENDANT**

**RULING**

**A. INTRODUCTION**

1. By an originating summons dated 11<sup>th</sup> April 2017 and amended on 27<sup>th</sup> March 2018 brought under **Sections 7, 37 & 38** of the **Limitation of Actions Act (Cap. 22)** and **Order 37 Rules 7 & 19** of the **Civil Procedure Rules (the Rules)** the Plaintiff sought adverse possession of *Title Nos. Mbeere/Kirima/2231, 5046 & 5047* as against the Defendants. In the alternative, the Plaintiff sought a declaration that the Defendants were registered as proprietors of the suit properties on behalf of and in trust for her.

2. This ruling is in respect of two pending applications. The first application is the Plaintiff's notice of motion dated 15<sup>th</sup> February 2018 seeking interim orders of injunction against the Defendants pending the hearing and determination of the suit. The second application is the 7<sup>th</sup> Defendant's notice of motion dated 29<sup>th</sup> May 2020 seeking dismissal of the Plaintiff's suit for want of prosecution.

**B. THE PLAINTIFF'S APPLICATION**

3. By her notice of motion dated 15<sup>th</sup> February 2018 brought under **Order 1 Rule 10(2) & (4)** and **Order 40 Rules 1** of the **Rules**, the Plaintiff sought the following orders:

a. That the honourable court be pleased to order that Moffat Muriithi Kangi be enjoined in this suit as a Defendant.

b. That consequent to granting of prayer (1) above, the Plaintiff be granted leave to amend the originating summons to include the

said Moffat Muriithi Kangi as a Defendant in terms of the annexed draft amended originating summons.

c. That the 1<sup>st</sup> to 6<sup>th</sup> Defendants and the proposed 7<sup>th</sup> Defendant Moffat Muriithi Kangi either by themselves, their agents and or servants be restrained from selling, transferring, charging, alienating, leasing, threatening or any other way interfering with the Plaintiff/Applicant's quiet enjoyment, occupation and use of parcels of land Nos. Mbeere/Kirima/2231, Mbeere/Kirima/5046 and Mbeere/Kirima/5047 pending the hearing and determination of the suit herein.

d. The costs of the application be provided for.

4. The said application was based upon the grounds set out in the body of the motion and the contents of the supporting affidavit sworn by the Plaintiff on 15<sup>th</sup> February 2018. It was contended that the 7<sup>th</sup> Defendant was a necessary party because the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> & 6<sup>th</sup> Defendant had caused parcel No. 5047 to be transferred to him. It was further contended that the 7<sup>th</sup> Defendant had started interfering with the Plaintiff's peaceful occupation of the said parcel. The prayers for joinder of the 7<sup>th</sup> Defendant and amendment of the originating summons were granted on 21<sup>st</sup> March 2018 when the court directed that the prayer for interim orders shall be canvassed upon the 7<sup>th</sup> Defendant being served.

### **C. THE DEFENDANTS' RESPONSE**

5. The 6<sup>th</sup> Defendant filed a replying affidavit sworn on 9<sup>th</sup> May 2018 on his own behalf and on behalf of the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 7<sup>th</sup> Defendants. The said affidavit was filed in response to the amended originating summons and not specifically the application for interim orders. It is, however, relevant in so far as the Defendants denied the Plaintiff's claim for adverse possession. It was contended that it was the Defendants who were in occupation of the suit properties and not the Plaintiff. It was thus denied that the Plaintiff had enjoyed peaceful, continuous or exclusive possession of the suit properties.

6. The 7<sup>th</sup> Defendant also filed a replying affidavit sworn on 22<sup>nd</sup> May 2018 on his own behalf in response to the application for interim orders. He stated that he bought parcel 5047 from the 3<sup>rd</sup> – 6<sup>th</sup> Defendants on 18<sup>th</sup> April 2017 for valuable consideration without notice of any prior claim by the Plaintiff. He further stated that he followed due process in obtaining a title deed and that he was in the process of developing his parcel of land. Consequently, he prayed for dismissal of the Plaintiff's application.

### **D. THE 7<sup>TH</sup> DEFENDANT'S APPLICATION**

7. By a notice of motion dated 29<sup>th</sup> May 2020 expressed to be brought under **Sections 1A, 1B & 3A of the Civil Procedure Act (Cap. 21), Order 17 Rules 1 & 2 of the Rules, and any other enabling provisions of the law**, the 7<sup>th</sup> Defendant sought dismissal of the Plaintiff's suit for want of prosecution. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the 7<sup>th</sup> Defendant on 29<sup>th</sup> May 2020. In a nutshell, it was contended that the Plaintiff had never taken steps to prosecute the suit since it was filed on 11<sup>th</sup> April 2017. It was further contended that the Plaintiff had also failed to take steps to prosecute her application for interim orders dated 15<sup>th</sup> February 2018. The court was consequently urged to dismiss the suit for want of prosecution.

### **E. THE PLAINTIFF'S RESPONSE**

8. The Plaintiff filed a replying affidavit sworn by herself on 29<sup>th</sup> June 2020 in opposition to the 7<sup>th</sup> Defendant's said application. It was contended that the suit had not been dormant since the date of filing and that the last ruling was delivered in the matter on 30<sup>th</sup> May 2020. It was further contended that she had taken steps in May 2020 to seek directions on the hearing of her application for interim orders dated 15<sup>th</sup> February 2018. Finally, she stated that the 7<sup>th</sup> Defendant had not demonstrated what prejudice he would suffer if the suit was allowed to go for full hearing hence it would be unfair and prejudicial to have her suit dismissed for want of prosecution. She, therefore, urged the court to dismiss the said application with costs.

### **F. DIRECTIONS ON SUBMISSIONS**

9. When the matter was listed for directions on 30<sup>th</sup> June 2020 it was directed that the two application on record shall be heard together. It was further directed that the said applications shall be canvassed through written submissions. The parties were granted 42 days to file and exchange their respective submissions. The record shows that the Plaintiff filed her submissions on 23<sup>rd</sup> July 2020 whereas the 3<sup>rd</sup> to 7<sup>th</sup> Defendants filed theirs on or about 17<sup>th</sup> September 2020.

### **G. THE ISSUES FOR DETERMINATION**

10. The court has considered the two applications, the affidavits in reply thereto and the material on record. The court is of the view that the following issues arise for determination:

- a. Whether the Plaintiff has made out a case for the grant of an interim injunction in terms of her notice of motion dated 15<sup>th</sup> February 2018.
- b. Whether the 7<sup>th</sup> Defendant has made out a case for dismissal of the suit for want of prosecution.
- c. Who shall bear costs of the two applications?

## **H. ANALYSIS AND DETERMINATION**

### **a. Whether the Plaintiff has made out a case for the grant of an interim injunction**

11. The court has considered the material on record and the submissions of the parties on this issue. The principles for the grant of an injunction were enunciated in the case of **Giella V Cassman Brown & Co. Ltd [1973] EA 358** as follows:

- a. An Applicant for an interlocutory injunction must demonstrate a prima facie case with a probability of success at the trial.
- b. An injunction will not normally be granted unless the Applicant demonstrates that he shall suffer irreparable harm which cannot be adequately compensated by an award of damages.
- c. Where the court is in doubt, it shall decide the application on a balance of convenience.

12. In her supporting affidavit, the Plaintiff stated that she utilizes the suit properties for the purpose of grazing her livestock. The Plaintiff did not exhibit any material such as an expert's report or photographs to demonstrate the current user of the suit properties. The alleged grazing of livestock on the suit properties does not necessarily constitute exclusive possession. There was no material on record to demonstrate that the suit properties were fenced or whether any measures had been taken to keep out other grazers or users. Some supporting reports or photographs would have been of assistance to the court given that the Defendants have denied that the Plaintiff has exclusive possession of the suit property.

13. As was held in the case of **Mrao V First American Bank [2003] KLR 125**, a *prima facie* case is more than an arguable case. The Applicant must place sufficient material from which it could be inferred that his rights have been violated. It was also held that it is not sufficient to merely raise issues worth of investigation. The standard of a *prima facie* was held to be higher than an arguable case. From the scanty material on record, the court is not satisfied that the Plaintiff has demonstrated a *prima facie* case with a probability of success. It must be noted, however, that this holding at the interlocutory stage is merely provisional and shall not bind the trial court.

14. Since the court is not satisfied that the Plaintiff has satisfied the first principle for the grant of an injunction, it shall not be necessary for the court to consider the other two principles. The court is further of the opinion that the Plaintiff's application ought to fail for another reason. The material on record shows that the Plaintiff has not been a diligent litigant. It has been said that equity aids the diligent and not the indolent. The Plaintiff's supporting affidavit states that the 7<sup>th</sup> Defendant started fencing parcel 5047 in December 2017. She did not file the application for interim orders until 19<sup>th</sup> February 2018. Even upon filing the application she was not keen on prosecuting her application for interim orders for another two years. The Plaintiff only moved to prosecute the application after the 7<sup>th</sup> Defendant successfully applied for removal of the restriction which had been irregularly registered against parcel 5047. The court is of the opinion that such indolence disentitled the Plaintiff from the equitable remedy of injunction.

### **b. Whether the 7<sup>th</sup> Defendant has made out a case for dismissal of the suit for want of prosecution**

15. The court has considered the material and submissions on record on this issue. The 7<sup>th</sup> Defendant sought dismissal of the suit on the basis that the Plaintiff had failed to prosecute it for the past three (3) years or so. The Plaintiff disputed that the suit has been dormant all along. She pointed out that the last ruling in the matter was delivered on 30<sup>th</sup> May 2020. She further contended that one year had not lapsed since the matter was in court hence she was of the opinion that the application had been filed prematurely.

16. The principles to be considered in an application for dismissal of a suit for want of prosecution were succinctly set out by Chesoni J (as he then was) in the case of **Ivita V Kyumbu [1984] KLR 441** as follows:

**“So the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the Plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the Plaintiff's excuse for the delay and that justice can still be done to the parties notwithstanding the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time. Where the Defendant satisfies the court that there has been prolonged delay and the Plaintiff does not give sufficient reason for the delay the court will presume that the delay is not only prolonged but it is also inexcusable and in such case the suit may be dismissed. To put it in the words of Salmon LJ in *Allen Vs McAlpine*, at p 561 as a rule, when inordinate delay is established until a credible excuse is made out, the natural inference would be that it is inexcusable. It is an all time saying, which will never wear out however often said that, justice delayed is justice denied.”**

17. So, the primary test is whether or not the delay is prolonged and inexcusable and if justice can still be dispensed in spite of the delay. The court has noted that suit is about 3 years old. The court is aware that due to the existing backlog at the Environment and Land Court at Embu the court has always given priority to older suits. The court only started admitting suits which are 3 years and older for hearing with effect from January 2020. The court is further aware that since the outbreak of the Covid-19 pandemic in March 2020 the Judiciary has scaled down its operations. In the premises, the court is not satisfied that there has been undue delay on the part of the Plaintiff in prosecuting the suit.

18. Even if the court had found that the Plaintiff was guilty of prolonged delay, the court would still have considered whether justice could be done in spite of the delay. The court would also have considered whether the 7<sup>th</sup> Defendant and the other Defendants would have suffered

prejudice by allowing the suit to be heard on merit. So far, there is no evidence of what prejudice, if any, the Defendants may suffer if the suit were to proceed to full hearing. The court is thus not satisfied that the 7<sup>th</sup> Defendant has made out a case for dismissal of the Plaintiff's suit for want of prosecution under **Order 17** of the **Rules**.

**c. Who shall bear costs of the applications**

19. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohammed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. Since both applications have failed the court is of the opinion that the appropriate order to make is for costs to be in the cause.

**I. CONCLUSION AND DISPOSAL ORDER**

20. The upshot of the foregoing is that the court finds no merit in the Plaintiff's notice of motion dated 15<sup>th</sup> February 2018. The court also finds no merit in the 7<sup>th</sup> Defendant's notice of motion dated 29<sup>th</sup> May 2020. Consequently, both applications are hereby dismissed. Costs of both applications shall be in the cause. It is so ordered.

**RULING DATED** and **SIGNED** in Chambers at **EMBU** this **24<sup>TH</sup> DAY** of **SEPTEMBER 2020** and delivered via Microsoft Teams platform in the presence of Ms. Rose Njeru for the Plaintiff, Mr. Ombachi for the 3<sup>rd</sup> – 7<sup>th</sup> Defendants and in the absence of the 1<sup>st</sup> & 2<sup>nd</sup> Defendants.

**Y.M. ANGIMA**

**JUDGE**

**24.09.2020**