



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 228 OF 2011

GEORGE KIARIE NGANGA PLAINTIFF

VERSUS

SAMUEL WATHANGA KARIUKI1ST DEFENDANT

WINFRED MUTHONI KARIUKI2ND DEFENDANT

JOHN MUTHEE NGUNJIRI t/a

TANGO AUCTIONEERS & GENERAL MERCHANTS3RD DEFENDANT

RULING

1. The Applicant who is the 1st Defendant herein has filed a Notice of Motion dated 2nd December, 2013 brought by way of Notice of Motion under the provisions of **Order 17 rule 2(1) and (2)** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**, seeking orders that the suit filed herein be dismissed for want of prosecution, and that the costs of this application be provided for.
2. The grounds for the application are that the Respondent/Plaintiff has not taken any step to prosecute the suit herein for over one year from the last court appearance and that the Applicant is suffering irreparable loss and damage for non-user of the suit property.
3. These grounds are attested to in a Supporting Affidavit sworn by the Applicant on 2nd December, 2013 wherein he deposed that the instant suit had proceeded for hearing of interlocutory application on 27th September 2012, where the court granted the Respondent temporary orders restraining the Applicant from undertaking any developments on the suit property; that subsequently on 4th October, 2012 this court delivered a ruling denying the Applicant herein a stay of execution of its earlier orders; that since then it has been over one year of inaction and the Plaintiff has taken to enjoying the temporary orders; that it is unconscionable to continue sustaining the suit and the temporary orders as the Respondent is no longer in occupation of the suit property and therefore has no conceivable interest to prosecute the suit. Further, the Applicant avers that the rental income from the suit property is the primary source of his family livelihood.
4. The application is uncontested despite service of the same to the Plaintiff/ Respondent herein.
5. The Application was argued before me on 3rd March, 2013. **Mr. Murimi**, the learned counsel for the Applicant submitted that the Respondent had not taken any step towards prosecuting the suit herein since 4th October 2012; Consequently, the Applicant has taken the liberty under **Order 17** to bring the instant application seeking for the dismissal of the suit for want of prosecution. Counsel urged the court to find that the suit is proper for dismissal.
6. Dismissal of a suit is a very drastic action to undertake and the same should be done with great

- caution. Therefore before going into the merits and demerits of the application this court has taken it upon itself to look into the mode of service of the application.
7. Firstly the Notice of Motion does not have a hearing date and the Affidavit of Service made by the Process Server is not accompanied by a Hearing Notice. Secondly, this court notes that the Application was served by courier and registered mail.
 8. This court has read the aforementioned Affidavit of Service and notes that the Process Server does not mention the attempts made to effect service upon the advocates for the Respondent and no reasons are given as to why the Applicant's counsel and or the process server opted to effect service by way of substituted service.
 9. This court has perused the court record at length and also notes that no leave of the court to serve by substituted service was sought by the Applicant. Nevertheless the application may have been received by the Respondents Advocates but failure to annex the Hearing Notice means that the Respondents Advocates did not have due notice of the date fixed for the hearing of the application which may then explain their absence.
 10. For the reasons aforesaid this court finds that there was no proper service effected upon the Respondents advocates. This court is disinclined to grant the orders sought for dismissal of the suit for want of prosecution.
 11. The Applicant is at liberty to set down the suit for hearing and final determination or alternatively to proceed to apply to court for the discharge of the injunctive orders granted herein to the Respondent.

CONCLUSION

12. The application is hereby disallowed.
13. The Applicant to bear the costs of the application.

It is so ordered.

Dated, Signed and Delivered at Nakuru this 12th day of May, 2014

A. MSHILA

JUDGE