



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ENVIRONMENT & LAND COURT
CIVIL CASE NO.178 OF 2008

MBURU KARERU & OTHERS.....PLAINTIFFS

VERSUS

FRANCIS NJOGU & OTHERS.....DEFENDANTS

RULING

On the 19/10/2003 Mburu Kareru, David Toboso and Joseph Muchoki suing on behalf of themselves and 60 others commenced a suit against Francis Njogu, Mburu Rebiro, Joseph Nduati, Daniel Kambo, Danson Mungai through the firm of Koome Mbogo by way of plaint dated 14/10/2003.

The plaintiffs brought the action on their behalf and on behalf of Members of Samar Squatters claiming that at all material times the defendants were officials of the Self-Help Group aforesaid and were registered as trustees for the benefit of the other members of the parcels of land known as **NGINDA/SAMAR BLOCK 1/300 – 302, NGINDA/SAMAR BLOCK 1/1434** and **NGINDA/SAMAR BLOCK 1/155** respectively whereon the plaintiffs reside. The defendants have in their possession the title deeds for the parcels of land aforesaid by virtue of their trustee status.

The plaintiffs claim that they have on several occasions requested the defendants to surrender the titles to facilitate survey and sub-division thereof but the defendants have refused to oblige. They for an order directing the defendants to surrender titles numbers **Nginda/Samar Block 1/300 – 302, 155 & 1434** and to execute the requisite transfers thereof.

The plaint was served and memo of appearance entered on 3/12/2003 by Wachira Nderitu, Ngugi & Co. Advocates and a statement of defence was filed by the defendant on the 21/1/2004.

On the 3rd of June 2004, the firm of Koome Mbogo & Co. advocates invited the firm of Wachira Nderitu Ngugi & Co. advocate to appear in the registry and fix a hearing date. The said invitation was received by the Nairobi High Court Central Registry on the 14/6/2004 and by Wachira Nderitu Ngugi advocates on 8/6/2004.

When the matter came before Justice Osiemo on the 4/12/2008 he ordered that the file to be transferred to the High Court of Kenya at Nyeri and be placed before the resident Judge on the 21/1/2009.

On the 21/1/2009, the representatives of the parties appeared in the registry and fixed the matter for mention on 1/4/2009 at 9.00 am before the judge.

On the 1/4/2009, the matter was mentioned before Justice Makhandia when Nderi appeared for the

plaintiff while Gathiga appeared for Ngugi for the defendant. Mr. Nderi intimated to the court of his client's wish to take a hearing date for the application dated 16/9/2008. On 28/4/2009, the application was fixed for hearing on 24/9/2009 and a hearing notice issued.

On the 24/9/2009, Mr. Nderi appeared for the plaintiffs while Mwangi held brief for Ngugi for defendants. Mr. Nderi informed the court that parties were attempting an out of court settlement and prayed for a mention on 27/10/2009 to record a settlement. Mr. Mwangi agreed with the statement of Nderi hence the matter was stood over to 27/10/2009 for mention to record a settlement.

On the 27/10/2009 there was no appearance by Nderi for plaintiffs and no appearance by Ngugi for defendants hence the matter was stood over generally. Therefrom, parties went to sleep until the 15/4/2014 when Kimani holding brief for Ngugi for applicant/defendant went to court registry and fixed the application dated 16/9/2008 for hearing on 21/5/2014 unfortunately, the application was not listed for hearing on the scheduled date.

On the 18/7/2014, the representatives of the parties appeared in the court registry and fixed the application for hearing on 30/9/2014 on which date M/s Ngotho appeared for Ngugi for applicant whilst Mr. Gikandi appeared, though late, for the respondent.

M/s Ngotho was ready to proceed, however, Mr. Gikandi was not ready to proceed as he was holding brief for the firm of Mbiyu Kamau that had just been appointed in July 2014. He intimated that the 1st and 2nd plaintiffs had passed on and therefore he needed new instructions. After listening to the issues raised by Mr. Gikandi, I ordered him to cause an affidavit to be filed and this was done on 14/10/2014.

The *gravamen* of the submissions by M/s Ngotho is that the suit was instituted on 19/11/2003 and the defendants entered appearance on 3/12/2014 and that the last time the matter was in court was on 26/7/2007. On the 16/9/2008 this application was filed for dismissal of the suit for want of prosecution. The case was initially filed in Nairobi and transferred to Nyeri in the year 2008. The plaintiffs at one time instructed the firm of Nderi & Kingori to act for them but later the said firm wrote to the defendant's lawyer informing them that the defendant had taken away their file. She stated that at one time the defendants were dealing with the plaintiffs themselves. She submitted further that the current advocates have come on record irregularly as Mbiyu Kamau & Co. advocates have irregularly been replaced by Gitonga, Kinyanjui & Co. and further submits that the plaintiff has been mischievous in replacing his advocates with interest to delay time. The death of the plaintiffs cannot explain the delay in prosecuting the matter as one of the plaintiffs, Mr. Joseph Muchoki Maina is alive and active, indeed he is the one who picked the file from Nderi & Kingori.

She capped her submissions by stating that *Article 159 of the Constitution of Kenya* provides that justice should not be delayed and that justice is not for the indolent.

Mr. Akech on his part submitted that his firm had just been appointed and that Article 159 guides the court not to unduly rely on technicalities. He relied on the affidavit filed on 14/10/2014. He gives the reasons for delay in prosecuting the matter on misunderstanding between the plaintiffs and his advocates amongst being their first advocate, Koome & Mesa, who were acting pro-bono. He argues that no prejudice will be suffered by the applicants/defendants and that this is a land matter that should be concluded on merit.

This court agrees with Mrs Ngotho that there has been a delay by the plaintiffs in prosecuting the suit which was stood over generally on the 25/7/2009 when the honourable justice Ang'awa ordered that no hearing date to be taken until the issues of order 1 rule 8 and 12 of the Civil Procedure Rule are sorted out. The suit was transferred to Nyeri on 4/12/2008 whilst the application herein was filed on the 3/10/2008 and served upon the Mburu Kareru on the 26/11/2008. All this was done before the suit was transferred to Nyeri and at all this material time the firm of Koome Mbogo and Company was on record. There was change of advocate and the firm of Koome Mbogo was replaced by Koome and Mesa advocates who were later replaced by the firm of Nderi & Kiingati advocates who were appointed on

31/3/2009.

Nderi & Kingati filed a replying affidavit on 31/3/2009 explaining the delay in prosecuting the matter. The respondents explanation on the delay is that they were represented by Koome Mbogo on Pro Bono basis until 22/3/2007 when the firm of Koome Mbogo joined up with Messa to form the firm of Koome & Mesa . The applicants had been referred to the firm by the Kituo cha sheria.

On the 11/1/2009, the firm of Koome & Mbogo wrote to Kituo cha Sheria expressing inability to attend as they were actually engaged in winding up of the firm.

The respondents engaged a new advocates firm in the name of Koome & Mesa in the place of Koome Mbogo and company advocates on the 31/3/2009 and strangely on the same date appointed the firm of Nderi & Kingati advocates.

The notice of change of advocate filed by Nderi & Kiingati is dated 13th March 2009 whilst the notice of change of advocates of Koome & Mesa is dated 22/3/2007 implying that M/s Nderi & Kiingati were instructed earlier. It appears that the firm of Koome & Mesa abandoned the matter altogether after taking up the same from Koome Mbogo & Co. advocates.

On the 30/9/2009 the plaintiffs through Mr. Joseph Muchoki Maina took away his file from Nderi & Kiingati advocates. However, Nderi & Kiingati did not formally apply to cease acting.

On the 21/7/2014, the firm of Mbiyu Kimani & Co. advocates fled a Notice of appointment of advocates as if the plaintiffs were acting in person.

On the 9th of October 2014 the plaintiffs filed Notice of withdrawal of advocate from acting and appeared to suggest that they were acting in person.

On the 15/10/2014 the plaintiff/respondent Joseph Muchiki Maina appointed M/s Gitonga Kinyanji & Co. advocates to act on his behalf.

The respondent has been represented by a record of 6 firms namely;-

1. ***Koome Mbogo & Company Advocates***
2. ***Koome Mesa & Company Advocates***
3. ***Nderi & Kiingati & Company Advocates***
4. ***Mbiyu Kamau & Company Advocates***
5. ***M/s Gitonga, Kinyanjui & Company Advocates***

The respondent has twice withdrawn instruction from the advocates and appeared to be acting in person upon withdrawal. He withdrew instructions from Nderi & Kiingati on 30/9/2009 and from Mbiyu Kamau & Co. advocates on 9/10/2014. The respondents through Joseph Muchoki have alleged that the delay in prosecuting the suit has been due to misunderstanding between them and their advocates.

This court finds that the respondent have delayed in prosecuting the suit herein. They have not explained the cause of the delay between 25/7/2007 and 16/9/2008 when he application for dismissal for want of prosecution was filed. The misunderstanding appears to have began more than 5 months after the application was filed. The respondent has not explained what happened that caused the delay between 25/7/2007 and 16/9/2008 more than one year after the last step was taken.

The respondents behavior after the application was filed further contributed to the delay in prosecuting the application dated 16/9/2008. By changing his advocates more than 4 times and sometimes taking away the file from the advocate, the respondent caused a delay to justice and therefore breaching the principles of Natural Law that justice should not be delayed. Mr. Joseph Muchoki Maina has been active in the matter but in a negative way thus delaying the course of justice. I agree that the respondents have been indolent in prosecuting the suit between 25/7/2007 and 16/9/2009. The issue of

the death of the other parties does not assist the remaining petitioner/respondent in explaining the delay because they died after the application was filed.

Lastly this court finds that the delay has prejudiced the applicant as some of the parcels of land have been transferred hence status quo has changed.

This court is satisfied that there has been intentional, inordinate and inexcusable delay on the part of the plaintiffs which delay is likely to inhibit fair trial as some of the parties have even died.

The upshot of the above is that the application dated 16/9/2008 is allowed and the suit herein is dismissed for want of prosecution.

Dated, signed and delivered on 6th day of November 2014.

A. OMBWAYO

JUDGE