



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**Civil Case 78 of 2001**

**NDUNGU KAMOCHE.....PLAINTIFF**

**Versus**

**MUTHONI GITHAE.....DEFENDANT**

**RULING**

The application before the court is a notice of motion under section 3A of the Civil Procedure Act and order 40 Rule 6,7 and order 17 rule 2(3) dated 1st May 2011 wherein the applicant seeks:

- 1. to set aside interim orders given on 10th March 2009 and extended on 30th March 2009 inhibiting the registration of any dealing with Land reference Number MAHIGA/KAMOKO/149**
- 2. The caution lodged on 14th June 2002 and prohibitory order lodged with the land registration Nyeri on 29th May 2009 be removed.**
- 3. That plaintiff be evicted from the suit land.**
- 4. Case be dismissed for want of prosecution.**

The grounds upon which the application is grounded as set out on the face of the application are

- 1. That the originating summons was filed in 2001.**
- 2. That on 3rd March 2009 the plaintiff filed an application under certificate of urgency seeking orders inhibiting the registration of any dealing with land reference MAHIGA/KAMOKO/149 which were granted on 3rd March 2009 till the hearing and determination of the suit.**
- 3. That the plaintiff thereafter went into a long slumber and have not taken any action on this matter.**
- 4. That its is over 2 years now since any action has been taken.**
- 5. That the plaintiff have completely lost interest in this suit after realizing that the defendant issued with certificate of confirmed grant dated 19th April 2002 in the estate of MUTHONI GITHAE deceased mother of the title holder herein THIONG'O KING'ORI GITHAE was registered the sole proprietor of L.R. NO. MAHIGA/KAMOKO/149 (absolutely in HCC SUCC. NO. 9 of 2000 at Nyeri.)**
- 6. That the delay in taking action in this matter is inexplicable and inordinate.**

**7. That the plaintiff/respondent have not taken any action to prosecute this suit for the last two years nor has he invited us to fix a hearing date.**

**8. That no effort has been made to move this suit by the plaintiff/respondent and therefore it is only fair and just and in the wider interest of justice that this suit be dismissed.**

**9. That caution was lodged against the above land title Reg. No. MAHIGA/KAMOKO/149 by NDUNGU KAMOCHE the plaintiff/respondent herein on 14th June 2002 claiming purchasers interest which is not justified as he has failed to move the court for hearing in the past 25 months.**

**10. That the plaintiff is a mere trespasser to the 3rd defendants land.**

The application is supported by the affidavit of THIONG'O KING'ORI sworn on 10th May 2011 in which the same states that the originating summons was filed in 2001 and that on 3rd March 2009 the plaintiff filed an application under certificate of urgency seeking order inhibiting the registration of any dealing with the suit land which order was granted on 3rd March 2009 till the hearing and determination of the suit. That the plaintiff thereafter went into a long slumber and has not taken any action on this matter.

That the plaintiff have completely lost interest in this suit after realizing that the defendant was issued with certificate of confirmed grant dated 19th April 2002 in the estate of MUTHONI GITHAE deceased mother of the title holder herein THIONG'O KING'ORI GITHAE who is the (sole herein) in L.R. NO. MAHIGA/KAMOKO/149 (absolutely in HCC SUCC. NO. 9 of 2000 at Nyeri

it is further deponed that the caution was lodged against the above title by NDUNGU KAMOCHE the plaintiff/respondent herein on 14th June 2002 claiming purchasers interest which is not justified as he has failed to move the court for hearing in the past 25 months.

The application was opposed by the plaintiff/respondent through a replying affidavit sworn by NDUNGU KAMOCHE on 8th December 2011 in which the same deponed that instead of the applicant giving him his peace of mind to concentrate on this case he began to file other cases in various courts to distract his attention. That in 2006 the applicant caused his arrest and arraigned in court where he was charged with three counts of making documents without authority which case was concluded with his acquittal on 16th August 2010. that during the said period of time the applicant caused his arrest and charged in Othaya Criminal Case No. 337 of 2006 which proceed to his conviction on 27th September 2006.

The respondent subsequently filed Othaya PMCC No. 66 of 2007 claiming damages from the respondent and the same was in court until 7th July 2011 when the applicant's application therein dated 21st April 2011 was dismissed.

He further stated that between a period of 2006 and 2011 he had been in and out of prison as a result of the applicant's harassment and that the applicant has not given him a chance to concentrate on this case.

On 18th January 2012 the parties herein agreed by consent that this application be determined by way of written submission which have now been filed before me.

Before looking at the said submissions I need to set out the issues before this court for determination arising out of the application herein:

**i. The applicant seeks to set aside order issued on 10th March 2009 and extended on 30th March 2009.**

**ii. The caution lodged on 14th June 2002 and prohibiting order lodged with the land registration Nyeri on 29th May 2009 be removed.**

*iii. The plaintiff be evicted from the suit land.*

*iv. Suit be dismissed for want of prosecution.*

I will therefore start by dealing with the setting aside of the orders granted by Lady Justice M. Kasango on 29th May 2008. From the records of the proceedings herein I have noted that on 30th March 2009 the said order were extended by consent of the parties herein until the hearing and final determination of the suit herein.

Having been extended by consent does this court therefore have powers to set aside the said orders?

To my mind a consent is a contract between the parties in a suit and the same can only be set aside by consent or if the parties satisfy the court that the said consent was obtained by way of fraud or that unless factors exist such as would entitle a court to set a contract aside. I therefore hold that the applicant has not laid before the court sufficient material to set aside the consent order herein since the same is not tainted with fraud mistake or ignorance of material facts. I therefore find no merit on prayer 1 of the application herein.

Issue number 2 deals with the prayer for the removal of the caution lodged on 14th June 2012 and prohibiting order lodged with the land registration on 29th May 2009. I have looked at the record of the proceedings herein and note that from the record of the proceedings before justice Makhandia the application dated 3rd March 2009 extended the order of prohibition by consent as stated. On the issues of the removal of the caution the applicant has not followed the correct procedure in respect thereof and therefore I am unable to make any finding on the same.

Can this court order the eviction of the respondent from the suit land by way of an interlocutory application?

I am afraid to state that since the rights of the parties have not been adjudicated upon I cannot at this stage of the proceedings order the eviction of the plaintiff from the suit land and therefore prayer number 3 of the applicant's application also fails.

The last issue as to whether the plaintiff's suit should be dismissed for want of prosecution. I have looked at the submissions by the parties herein and the affidavit in reply by the plaintiff/respondent and is of the considered opinion that this is a matter which ought to be fixed for hearing and determination on its merits. The respondent has given account as to why he was unable to prosecute the suit herein together with supporting documents and having taken into account the fact that the applicant also had the option of fixing the suit down for hearing and order having been made by Lady Justice M. Kasango that the suit be heard on priority basis and the same having not done so it will not therefore be in the interest of justice to dismiss the suit for want of prosecution.

I would also agree with the submissions by the respondents advocate that the defendant/applicant submissions are based on the merits of the originating summons which at this stage is not before this court and therefore leave the said issue to the attention of the judge who shall hear the same as direction therein had been given.

I therefore find no merit on this application herein and dismiss the same costs to be in the cause.

I further order the plaintiff to fix the originating summons herein down for hearing within the next 90 days from the date herein .

Dated and delivered at Nyeri this 1st day of October 2012.

J. WAKIAGA  
JUDGE

Mr. Kimani for Muguku for the appellant

Mr. K. Wachira for the Respondent

J. WAKIAGA

JUDGE