



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 246 OF 2018**

**JOHN WAWERU MWANGI AND MARK MWAURA MWANGI**

**(Suing as the Administrators of the Estate of PETER JOHN MWANGI Alias**

**PETERGITHENGI (Deceased).....PLAINTIFF**

**VERSUS**

**DISTRICT LAND REGISTRAR, NAKURU.....1<sup>ST</sup> DEFENDANT**

**GEOFFREY KABURA NDUATI.....2<sup>ND</sup> DEFENDANT**

**RULING**

***(Notice to show cause why suit should not be dismissed; plaintiff having filed suit in the year 2009 and not listing it down for trial for a considerable amount of time; further directions given for compliance with pre-trials which were ignored; clear that plaintiffs have lost interest in the case; suit dismissed).***

1. This suit was commenced through a plaint which was filed on 6 May 2009, which is close to 10 years ago. The case was originally filed as Nakuru High Court, Civil Suit No.126 of 2009 before being given an ELC number after transfer to the Environment and Land court. The plaintiffs have filed suit on behalf of the estate of one Peter John Mwangi alias Peter Githengi (deceased). It is their position that the deceased was the legitimate owner of the land parcel Naivasha/Mwihiringiri Block 4/176 and they claim that the 2<sup>nd</sup> defendant fraudulently obtained title to it. In the suit, they wish to have orders inter alia for a cancellation of the title of the 2<sup>nd</sup> defendant and registration of their names as owners of the suit land.

2. I have not seen any evidence of service of summons to the 1<sup>st</sup> defendant, the District Land Registrar, Nakuru, but the 2<sup>nd</sup> defendant was served through an advertisement in the newspaper, and an appearance was entered under protest on the allegation that the 2<sup>nd</sup> defendant had already died by the time the case was filed.

3. Not much has transpired in the matter save that there was filed an application, being Nakuru High Court, Miscellaneous Application No. 61 of 2017, seeking reconstruction of the original file on the claim that the original file had disappeared. The application has never been argued, not that it is necessary, for the original file is present, and does seem to me to never have disappeared. A Notice of the dismissal of the suit for want of prosecution was issued by this court and the notice fixed for hearing on 27 June 2018. The file was however taken before the High Court rather than this court, and the High Court Judge (Mulwa J) referred the matter to this court for the hearing of the notice and scheduled it for 25 September 2018. On that date, Ms. Rahab Muthoni, counsel holding brief for Mr. Onyango, of the law firm of M/s Rachuonyo & Rachuonyo Advocates, on record for the plaintiffs, asked me to give a hearing date for the case. On perusing the file, I found that the plaintiff had not complied with Order 11 of the Civil Procedure Rules, 2010, despite orders having been made on 20 May 2014 by my predecessor Waithaka J, directing compliance within 30 days of the said day. Waithaka J on the said date, did indeed direct that if there would be no compliance within the time specified, the suit will be dismissed.

4. I did point out these directions to Ms. Muthoni, but nevertheless, I did give a further 30 days for compliance with Order 11, and also directed the filing of an affidavit by the plaintiffs to state their position on the alleged demise of the 2<sup>nd</sup> defendant by the time the case was filed. I further directed that if there was not going to be compliance, then it would be clear to me that the plaintiffs have lost interest in the suit, and reserved the discretion to dismiss the suit taking note of the fact that the case was filed in the year 2009.

5. An affidavit was filed by Mr. Onyango, counsel for the plaintiffs, basically stating that the plaintiffs have no knowledge of the claimed demise of the 2<sup>nd</sup> defendant. However, no witness statements were filed and no list of documents that the plaintiffs intended to rely on at trial

were ever filed. To date, none have been filed. On the mention date of 19 November 2018, Ms. Muthoni, did state that there was compliance as demonstrated in affidavits filed in the Miscellaneous Application No. 61 of 2017. I have looked at that record and all that is there is an application for reconstruction. There are no witness statements and no reference to any documents that the plaintiffs may wish to rely on during trial.

6. Upon consideration of the record before me, I am persuaded that this is a fit case for dismissal for want of prosecution. As I have earlier pointed out, this case was filed in the year 2009, now close to 10 years back. The plaintiffs have never bothered to follow the directions of the Court to comply with Order 11, and have never filed any witness statements or list of documents, despite such directions having been made in the year 2014, and despite the plaintiffs then being warned that non-compliance may lead to the dismissal of their suit. From 18 June 2014, when further directions were given by Waithaka J, the plaintiffs have not bothered to move the court to list the case for hearing. They might argue that they had their application for reconstruction of a missing file, but even that application has never been argued. In any case, as noted earlier, the original file appears always to have been available.

7. I gave a window to the plaintiffs to show that they are still keen with this suit by giving them a further 30 days to comply with Order 11. My orders were ignored. Yet again, nothing in compliance with the rules has been filed.

8. Pre-trial directions issued by a Judge should not be taken casually. According to Rule 27 of the Practice Directions on Proceedings in the Environment and Land Court, Gazette Notice NO. 5178 of 2014, parties are bound to adhere to any pre-trial directions issued by a Judge, and under Rule 28 (b) the Court has discretion to inter alia strike out pleadings for non-compliance with pre-trial directions. The two provisions of the law are drawn as follows :-

*27. Once pre-trial directions are issued by a Judge, every party shall be bound to adhere to the same. The Judge shall only grant a party one extension to comply, failing which the Judge may direct the case be fixed for trial or may make other appropriate orders as the circumstances of the matter may demand to enable the ends of justice to be met.*

*28. In addition to the matters contained in Order 11, Rule 3 of the Civil Procedure Rules, 2010, the following are the orders/directions that may be issued by a Judge during a pre-trial conference:*

*(a)...*

*(b) The issuance of an Order striking out pleadings or imposing costs or similar sanctions due to non-compliance with pre-trial directions and other timelines.*

*(c) – (l)...*

9. It is apparent to me that the plaintiffs have lost interest in this matter. If they were keen, they would have been quick and eager to comply with court orders. Their failure to comply has left this case hanging around the court shelves with no hope of being heard. The plaintiffs have not persuaded me that this is not a fit case for dismissal for want of prosecution and/or want of failure to comply with court orders.

10. For the above reasons, this suit is hereby struck out for want of prosecution under Order 17 Rule 2, and/or for failure to comply with court orders pursuant to the provisions of Rule 28 (b) of the ELC, Practice Directions, 2014. The costs will be to the 2<sup>nd</sup> defendant.

11. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 20<sup>th</sup> day of February 2019.**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of : -**

Mr. R.K Langat holding brief for Mr. Onyango for the plaintiffs.

No appearance for the defendants.

Court Assistant: Nelima Janepher.

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**