



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC CASE NO. 194 OF 2017**

**(FORMERLY HCC 9/13)**

**JOSEPH MUTURIA.....PLAINTIFF**

***VERSUS***

**SAIFAT ENTERPRISES LIMITED.....1<sup>ST</sup> DEFENDANT**

**GEOFFREY KANGORIA KINOTI.....2<sup>ND</sup> DEFENDANT**

**ARBI ALIMOHAMED MUSSANI.....3<sup>RD</sup> DEFENDANT**

**VIASHLA INVESTMENT LIMITED.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. The application dated 2.11.2017 seeks the following orders:

(i) That this honourable court be pleased to dismiss this suit for want of prosecution.

(ii) That in the alternative this honourable court be pleased to vacate the *exparte* interim orders of injunction granted on 27.2.2013 and dated 28.2.2013 and the plaintiff be ordered to provide an undertaking as to damages in terms of mesne profits in favour of the 4<sup>th</sup> defendant

(iii) That costs of this suit and this application be paid by the plaintiff.

2. The grounds supporting the application are:

(i) That the plaintiff has not taken any steps to actively prosecute the matter in court.

(ii) That the defendant has been greatly prejudiced by the lack of proceedings in the matter to enable her vindicate her rights.

(iii) That the delay in prosecuting the matter is a denial of justice to the defendant and contrary to the overriding objective of the court.

(iv) That in the interest of justice, there ought to be finality in litigation.

3. One Muketha Gitonga has filed a supporting affidavit where he avers that plaintiff obtained *exparte* orders of injunction and inhibition way back on 27.2.2013 awaiting the inter-partes hearing of the application dated 25.2.2013.

4. The defendant avers that plaintiff has never taken any steps to prosecute the said application and hence it should be dismissed.

5. Further, this deponent contends that no steps have been taken in the prosecution of this suit for the last two years and hence the case should also be dismissed for want of prosecution.

6. Finally, the deponent avers that 2<sup>nd</sup> defendant died and hence the case against him has abated.

7. The application has been opposed via the replying affidavit of the plaintiff (Joseph Mutura). He avers that he has always endeavored to prosecute the suit and that the record is prove of this contention.

8. Plaintiff also avers that both advocates of the parties have since filed and exchanged their submissions and that what remained was for the court to give a date for ruling.

9. As regards, the prosecution of the suit, plaintiff avers that the matter was in court before Judge Mabeya on 27.6.2017 when the same was transferred to the ELC court.

10. On the issue of death of 2<sup>nd</sup> defendant, plaintiff avers that he learnt of this death in the month of October 2017, and that he has been making efforts to file a citation against the widow of 2<sup>nd</sup> defendant.

### **Determination**

11. I have taken into consideration the record of the court and the affidavits filed herein. It is not in doubt that plaintiff obtained exparte orders in terms of prayer 2 and 5 in the application dated 25.2.2013. Prayer 2 was an order of inhibition in respect of land reference no. 7918/555 pending the hearing and determination of the application. Prayer 5 was an order of injunction against 4<sup>th</sup> defendant (present applicant), restraining the latter from dealings in the aforementioned parcel of land but the order was to last until the determination of the application or until further orders were given by court.

12. The lifespan of the application of 25.2.2013 is a classic example of how cases stall and clog the court's systems due to a lackluster attitude of the litigants and their advocates (in this case, read plaintiffs side). On 27.2.2013, plaintiff obtained the temporary orders of inhibition and injunction against the present defendant. On 27.7.2013 the court gave directions on how the application was to be prosecuted. Submissions were to be filed within 14 days starting with the plaintiff. That order was not complied with.

13. On 26.2.2014, the court allowed plaintiff to file his submissions within 30 days. That order was not complied with. It is also noted that the interim orders were not extended.

14. On 16.7.2014 plaintiff was again given 30 more days to file their submissions. Again this order was not complied with.

15. The applicant has therefore not laid any basis of filing submissions almost two years after the order of 16.7.2014 (note that plaintiff's submissions were filed on 1.4.2016). I therefore consider such submissions as not properly filed before the court and I disregard the same. It is apparent that the application of 2013 has remained in existence for the last five or so years but in a lifeless state. The present application is hence merited in so far as the earlier application is concerned in view of the fact that interim orders of injunction and inhibition were not extended as from 16.7.2014.

16. On the issue of dismissal of the suit, plaintiff has not presented himself as a vigilant litigant. He has not cited any single instance when he took steps to have the matter fixed for hearing. The matter must have landed before Judge Mabeya on 26.6.2017 as a result of the court's initiative of breathing life into inactive/dormant matters, as the date of 27.6.2017 was not taken by any of the parties.

17. Nevertheless, I will give the plaintiff a chance to prosecute the case on condition that the same will not be adjourned at the instance of the plaintiff on the date scheduled for hearing.

18. On the issue of 2<sup>nd</sup> defendant, plaintiff avers that he learnt of the death of 2<sup>nd</sup> defendant in October 2017. One year later, there is no evidence that there is any progress to substitute the said defendant. Pursuant to provisions of order 24 rule 4 (1) and (3) this suit is marked as abated as against the 2<sup>nd</sup> defendant.

19. **Final orders:** The application dated 2.11.2017 is allowed in the following terms;

**(1) The application dated 25.2.2013 is dismissed with costs to 4<sup>th</sup> defendant.**

**(2) The interim orders issued on 27.2.2013 and extended thereafter are hereby discharged.**

**(3) The suit against 2<sup>nd</sup> defendant is hereby marked as abated.**

**(4) The matter is to be listed down for hearing and shall not be adjourned at instance of Plaintiff.**

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 13<sup>TH</sup> FEBRUARY, 2019**

**IN THE PRESENCE OF:-**

C/A: Kananu

H.G gitonga for plaintiff/respondent

Kimaita holding brief for Gikunda A. for 4<sup>th</sup> defendant/applicant

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**