



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 190 OF 2015

(FORMERLY KERUGOYA ELC 52 OF 2013)

IN THE MATTER OF THE SECTION OF LIMITATION ACTION ACT

AND

IN THE MATTER OF REGISTERED LAND ACT

KIRANGI NYAMU.....APPLICANT

VERSUS

IRERI MBOGO.....1ST RESPONDENT

NGURI NTHAUTHO.....2ND RESPONDENT

GABRIEL NGAI.....3RD RESPONDENT

EDWARD IRERI.....4TH RESPONDENT

RULING

1. This suit has a chequered history. The Applicant filed an originating summons dated 25th February 2010 under **section 38 of the Limitation of Actions Act (Cap. 22)** seeking adverse possession of *Title Nos. Embu/Gangara/265, 266, 267 and 268* (hereinafter *the suit properties*).
2. The said originating summons was never prosecuted timeously in consequence whereof it was dismissed for want of prosecution on 10th December 2013. The Applicant then filed an application for review dated 29th January 2014 which was never prosecuted.
3. By a notice of motion dated 22nd September 2015 the 3rd Respondent sought an order of eviction of the Applicant from some of the suit properties. By a ruling dated 14th July 2017 the Hon. Justice Boaz Olao granted the said application.
4. The Applicant thereafter filed a notice of motion dated 15th March 2018 seeking a review and setting aside of the orders of eviction made on 14th July 2017. He also sought leave to prosecute his originating summons dated 10th December 2013.
5. When the said application was listed for hearing on 4th April 2018 the Applicant's advocate was absent. The said application was consequently taken out and the Applicant penalized to pay court adjournment fee and the 3rd Respondent's costs.
6. Without paying the court adjournment fee, the Applicant set down his said application for hearing on 14th May 2018. On the said date the Applicant's advocate failed to attend court once again. The Applicant was present though and he sought an adjournment on account of his advocate's absence. The court declined to grant an adjournment. Since the Applicant was unable to prosecute his said application, it was dismissed for want of prosecution under the inherent jurisdiction of the court.
7. There was a temporary calm in the proceedings until 16th January 2019 when the Applicant filed a notice of motion of even date seeking setting of the dismissal order made on 14th May 2018. The said application was brought under **Order 12 Rule 7 of the Civil Procedure Rules**. The said application was grounded upon the grounds set out on the face of the motion and supported by the Applicant's own supporting affidavit sworn on 16th January 2019.

8. The said application was filed by the Applicant in person even though he has an advocate still on record. The Applicant contended that his application dated 15th March 2018 was dismissed for non-attendance on the part of his advocate. Whereas it is true that his advocate was absent on the material date, the record shows that the Applicant was present and that he sought an adjournment. When the adjournment was declined the Applicant was unable to prosecute his application in consequence whereof it was dismissed for *want of prosecution* and not default of attendance.

9. The 3rd Respondent filed a replying affidavit sworn on 20th February 2019 in opposition to the said application. It was contended that the Applicant's suit was dismissed way back in 2013 and that he has never been diligent in the prosecution of the various applications he filed thereafter. It was contended that the Applicant had not explained the undue delay in filing the instant application dated 16th January 2019 and that he was unlawfully in occupation of the suit properties even though an eviction order against him was issued way back in 2017. He contended that the application was not merited and that it was merely a delaying tactic. He urged the court to dismiss the application.

10. The court has considered the Applicant's said application and the 3rd Respondent's affidavit in opposition thereto. The court has also considered the oral submissions of the parties who participated in the application. The court is far from satisfied that the Applicant has made out a case for setting aside the dismissal order made on 14th May 2018 for several reasons.

11. First, the Applicant's application dated 15th March 2018 was not dismissed for non-attendance on the part of the Applicant or his advocate. It was dismissed for want of prosecution. It is noteworthy that the said application was filed about 8 months after the orders it sought to challenge were made.

12. Second, the application of 16th January 2019 was filed more than 7 months after the dismissal order of 14th May 2018 was made. There was no legitimate explanation offered by the Applicant for such delay. That is surely not the conduct of a litigant who is anxious to prosecute his applications expeditiously.

13. Third, there is no reasonable explanation tendered by the Applicant on why he was unable to expeditiously prosecute his application dated 15th March 2018 which was dismissed for want of prosecution. The court is of the opinion that the Applicant has not been a diligent litigant at all and the multiplicity of applications he has been filing are merely a delaying tactic meant to keep alive a suit which was dismissed way back in 2013.

14. The upshot of the foregoing is that the court finds no merit in the Applicant's notice of motion dated 16th January 2019 and the same is hereby dismissed with costs to the 3rd Respondent assessed at Ksh.20,000/- to be paid within 30 days. In default of payment execution may ensue. The Applicant is also ordered to pay the court adjournment fee ordered on 4th April 2018.

15. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 27TH DAY of JUNE, 2019

In the presence of the Plaintiff in person; 3rd Respondent present in person and in the absence of the 1st, 2nd and 4th Respondents.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

27.06.19