



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC.CASE NO.156 OF 2017

GEORGE KAMAU NJONGE.....1ST PLAINTIFF/RESPONDENT

JANE NJERI MUKUNA..... 2ND PLAINTIFF/RESPONDENT

-VERSUS-

PATRICK KAGOTHO NJONGE1ST DEFENDANT/APPLICANT

ERASTUS NJOROGE KIARIE..... 2ND DEFENDANT/APPLICANT

RULING

The suit herein was filed on **14th October 2011** vide a **Plaint** dated **13th October 2011**, wherein the Plaintiff **George Kamau Njonge** sought for various prayers among them; an order that the Court be pleased to declare that the alleged sale of **LR.No.Limuru/Bibirioni/1310** by the 1st Defendant to the 2nd Defendant was **fraudulent, illegal, null and void** and hence order the cancellation of the title issued to the 2nd Defendant on the **25th May 2011** and the same be legally subdivided and individual titles issued as ordered by the **Limuru Succession Court**.

Simultaneous to the **Plaint**, was a **Notice of Motion** application filed under Certificate of Urgency which sought for temporary injunctive orders against the 2nd Defendant **Erastus Njoroje Kiarie**, to restrain him from interfering with the Plaintiffs occupation and use of a portion of **0.50 acres** from **LR.No.Limuru Bibirione/1310**, and or dealing with it in any other way until the suit was heard and determined.

Temporary injunctive orders were issued on the first instance and thereafter the **Notice of Motion** proceeded for interparties on various dates. The Court delivered a **Ruling** on **15th March 2013**, and directed that status quo should be maintained pending the hearing of the suit. The Court further noted that the Plaintiff and 1st Defendant are related and directed the parties to comply with Order 11 so that the issues raised by the parties can be addressed in the full trial.

Thereafter the Plaintiff filed two other applications to be allowed to file an Amended Plaintiff and enjoin four other parties. However, the said applications were dismissed vide a **Ruling** delivered by the Court on **6th December 2013**.

However, all this time as the parties engaged in various interlocutory applications, Summons had not been extracted and served upon the Defendants. The Defendants therefore did not file their defences.

This cat of failure to serve the Summons was brought to the attention of the Court on **24th March 2015**, when the Defendants applied to strike out the suit. The Court advised the Defendants to file a formal application and the matter was to be mentioned on **8th June 2015** for further directions.

Consequently, the Defendants filed a **Notice of Motion** Application dated **31st March 2015**, wherein they sought for an order that; **“The entire suit be struck off with costs to the Defendants/Applicants”**. The reasons for seeking the above orders were that.- **No Summons to Enter Appearance were filed together with the Plaint or at all as required by law. Further no Summons had been served upon the Defendants as required by law.**

The above is one of the application coming for determination today. The said application was slotted for mention on **8th June 2015**. However, before the mention date of **8th June 2015**, the Plaintiff fixed several mentions before the Deputy Registrar. Of significance to this **Ruling** is the mention of **7th May 2015**, wherein the Plaintiffs applied to be issued with fresh Summons. It was alleged that the Defendants’ advocates had been served with mention Notice and they failed to appear in Court. The Deputy Registrar after perusal of the Affidavit of Service was satisfied that the Defendants were duly notified of the said mention date and were absent. In the premises, the Deputy Registrar allowed the application for issuance of fresh Summons as prayed by the Plaintiff.

By issuing the said fresh Summons, on the face of it, the **Notice of Motion** dated **31st March 2015** was overtaken by events. Thereafter the Defendants filed a **Memorandum of Appearance** under protest on **17th June 2015** and also a **Notice of Motion** even dated seeking for orders that the **“Court be pleased to set aside the exparte orders issued on 7th May 2015 and the Summons to Enter Appearance issued on 7th May 2015 be struck off and invalidated”**.

The Defendants had alleged that the Court exercised its discretion irregularly and was bad in law as the said Summons were not issued as per the law. This application was slotted for hearing on **2nd February 2016**, and when the parties appeared in court, the same was rescheduled for hearing on **17th March 2016**. However, on **17th March 2016**, the Defendants/Applicants did not appear in court and therefore the **Notice of Motion** dated **12th June 2015** was dismissed with costs to the Plaintiffs. In essence, the **Notice of Motion** dated **12th June 2015** is not a pending application as it was dismissed with costs by the court on **17th March 2016**. Since the said application had sought to set aside the exparte orders issued on **7th May 2015**, and the said application was dismissed, then the said order of **7th May 2015** are still in existence and is a valid Court Order.

The said Order for issuance of fresh Summons invalidated the application dated **31st March 2015**, which was seeking to have the entire suit struck out for failure to take out Summons. The court directed fresh Summons to be issued though it was well after 30 days from the date of filing the Plaint.

The Court finds that the application dated **31st March 2015** has been overtaken by events and the Court will therefore have no option but to dismiss the said application with costs being in the cause.

The Court is also guided by the spirit of **Article 159 (2)(d)** of **The Constitution** which provides that;

“In exercising judicial authority, the Courts and tribunals shall be guided by the following principles”.

a)

b)

c)

d) Justice shall be administered without undue regard to procedural technicalities.

The Court has taken Notice of the fact that this is one of the matters that are over **5 years old** and should be concluded by end of this year. The Court had on **15th June 2017** advised the parties to desist from filing further interlocutory applications so that they can now set the main suit for hearing. The Constitution in **Article 159(2)(c)** of **The Constitution** provides that **'justice should not be delayed'**. By filing numerous interlocutory applications the determination of the main suit is being delayed and in turn justice is delayed and this goes against the spirit of Article 159(2)(c) of the Constitution.

Further, the Court is enjoined by the spirit of the overriding objective of the Civil Procedure Act to ensure that all matters brought before the Court are determined expeditiously, fairly, in an affordable manner and in a just manner. Refer to **Section 1A** of the **Civil Procedure Act**, which provides that:-

1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court

As provided by **Section 1B** of the **Civil Procedure Act**, the Court has a duty to facilitate the achievement of the above overriding objectives.

For the above reasons, the Court directs the parties herein to comply with Order 11 within the next **45 days** from the date herein and thereafter set the matter down for **Pre-trial Conference** before the **Deputy Registrar** of this Court and set the main suit for hearing.

In a nutshell, the application dated **31st March 2015** is **overtaken by events** and **is dismissed with costs being in the cause**. The **Notice of Motion** dated **12th June 2015** was **dismissed** by the Court on **17th March 2016** and **there was nothing to determine**.

It is so ordered.

Dated, Signed and Delivered at Thika this 13th day of April 2018.

L. GACHERU

JUDGE

In the presence of

No appearance for 1st Plaintiff/Respondent

No appearance for 2nd Plaintiff/Respondent

No appearance for 1st Defendant/Applicant

No appearance for 2nd Defendant/Applicant

Lucy - Court clerk.

L. GACHERU

JUDGE

Court – Ruling read in open Court in the absence of the parties.

L. GACHERU

JUDGE

13/4/2018