



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**E.L.C. CASE NO. 1419 OF 2009**

**(FORMERLY HCCC NO. 206 OF 1998)**

**STEPHEN GIKONYO GATHUNGWA ..... PLAINTIFF**

**VERSUS**

**RUARAKA SABUNI DEVELOPMENT COMPANY ..... 1<sup>ST</sup> DEFENDANT**

**NJOROGE KAMAU ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

In the application dated 17/8/2016, the Plaintiff seeks to have the judgement given on 25/2/2015 dismissing the suit set aside or varied and that the matter proceeds for hearing and determination. The Plaintiff avers that the decision to dismiss his suit was harsh and that the delay in prosecuting the suit was occasioned by the promises made by the officials of the 1<sup>st</sup> Defendant to deal with the matter out of court.

He filed suit in February 1998. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed their defences on 13/10/1999 and 25/5/1999. The Plaintiff depones in the supporting affidavit that he filed what he calls an intention to appeal in April 1999 when the court declined to grant him injunctive relief. He does not state whether he ever filed or pursued that appeal or what its outcome was. He attached copies of his advocates' letters dated 17/11/2000, 26/6/2001, 2/6/2010 and 6/12/2013 inviting the Defendant's advocates to fix a hearing date. He avers that he contacted the 1<sup>st</sup> Defendant in December 1999 in a bid to have this matter settled but that the 1<sup>st</sup> Defendant's officials informed him that they would attend to the issue once they traced their missing file. He also averred that he had some personal challenges at home which left him a troubled man and he could not pursue this matter. He does not disclose the nature of those challenges and the period when he suffered those challenges that made him unable to prosecute his claim.

Tom Maina Macharia, the 2<sup>nd</sup> Defendant's advocate swore the Replying Affidavit in opposition to the application. He deponed that the 2<sup>nd</sup> Defendant died in March 2012 and that he does not have instructions to act in the matter.

The Plaintiff had filed the application dated 24/11/2016 seeking to have the time for substituting the 2<sup>nd</sup> Defendant enlarged. In the ruling delivered on 21/9/2017, the court noted that the suit had been dismissed on 25/2/2015 and that the application seeking to set aside the order for dismissal had not been prosecuted. This is what may have jolted the Plaintiff to fix the instant application for hearing.

Where a suit is dismissed, the court may set aside or vary that order upon just terms. The court has to consider the reasons for the failure to prosecute the matter. This suit was filed in 1998. The Defendants were served and they filed their defences in 1999. The case was given a new number when it was transferred to the Environment and Land Court.

The Plaintiff claims that he was negotiating with the officials of the 1<sup>st</sup> Defendant to settle the matter out of court. No evidence of such negotiations was exhibited.

The Plaintiff's claim is for possession of plot numbers 201 and 202 which he claims he bought from the 1<sup>st</sup> Defendant in June 1986. He averred in the plaint that the 2<sup>nd</sup> Defendant trespassed on the suit premises and commenced construction of a permanent structure on it.

The suit was dismissed following service of a notice to show cause in February 2015. It was transferred to the ELC by consent of the parties on 15.11.2016. There was no activity in the file from June 2010 when the Plaintiff invited the other parties to fix a hearing date until the suit was dismissed in 2015. Prior to that, the only other activity on the file was an invitation to fix a hearing date which was received by the High Court registry on 4/7/2001. This means the Plaintiff was indolent for more than ten years and did not take steps to prosecute his case until the 2<sup>nd</sup> Defendant died.

The court is not satisfied that it should grant the orders sought by the Plaintiff. The application dated 17/8/2016 is dismissed.

**Dated and delivered at Nairobi this 30<sup>th</sup> day of August 2018.**

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. Kiragu for the Plaintiff

Mr. Muoki holding brief for Mr. Macharia for the 2<sup>nd</sup> Defendant

Mr. V. Owuor- Court