



**REPUBLIC OF KENYA**

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

**ELC. NO. 599 OF 2015 (FORMELY CIVIL SUIT NO. 60 OF 2011)**

**JOSEPH KIBERA MBUGUA.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**KAMAU MBUGUA.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**HANNAH MUMBI MBUGUA.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**GORDON NGUONO OLANDO.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**RULING**

1. Kamau Mbugua, the 2<sup>nd</sup> Plaintiff, moved the court through the notice of motion dated 7<sup>th</sup> March 2018, brought under **Section “1A, 1B, 3A of the Civil Procedure Rules** and all other enabling provisions of the law”, seeking for the following orders;

- a. **“That this Honourable Court be pleased to certify this matter as urgent and service be dispensed with in the first instance.**
- b. **That pending hearing and determination of this application interpartes, this honourable court be pleased to set aside its orders dismissing this suit for want of prosecution.**
- c. **That this Honourable court be pleased to issue directions regarding the Plaintiff application dated 15<sup>th</sup> August 2014 and the pending ruling.**
- d. **That costs be provided for.”**

The notice of motion is based on the seven (7) grounds marked (i) to (vii) on its face and supported by the 2<sup>nd</sup> Plaintiff’s affidavit sworn on the 7<sup>th</sup> March 2018.

2. The application came up for hearing on the 20<sup>th</sup> March 2018 when counsel for the 2<sup>nd</sup> Plaintiff submitted that the application was unopposed and prayed for the orders sought.

3. The following are the issues for determinations;

- a. **Whether the Plaintiffs, specifically the 2<sup>nd</sup> Plaintiff has shown reasonable cause why he had not taken any steps to prosecute this suit for more than one year to the date the suit was dismissed for want of prosecution on the 21<sup>st</sup> March 2017.**
- b. **Whether the court had set the ruling in respect of the notice of motion dated 15<sup>th</sup> August 2014 to be delivered on notice.**
- c. **Who pays the costs of the application.**

4. The court has carefully considered the grounds on the notice of motion, the affidavit evidence tendered by the 2<sup>nd</sup> Plaintiff, the record and come to the following findings;

- a. That this suit was commenced by Joseph Kabera Mbugua and Kamau Mbugua, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs respectively, through the plaint dated 27<sup>th</sup> April 2011. The suit is against Hannah Mumbi Mbugua and Gordon Nguono Olando, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively. That the prayers sought are a declaration that the transfer of Kisumu/Fort-tenan/332 and 218 from the name of the late Mbugua Igwenya to the 1<sup>st</sup> Defendant and subsequent transfer of Kisumu/Fortenan/332 to the 2<sup>nd</sup> Defendant were fraudulent,

unlawful, null and void; cancellation of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's as proprietors of Kisumu/Fortenan/218 and 332 respectively; Permanent injunction against the 2<sup>nd</sup> Defendant over dealings with Kisumu/Fortenan/332 and costs.

b. That the court issued notice dated 7<sup>th</sup> December 2016 to show cause why the suit should not be dismissed for want of prosecution under **Order 17 Rule 2 of the Civil Procedure Rules** for 21<sup>st</sup> March 2017. Though the notice was served to the parties counsel, none appeared and the suit was dismissed on that date, the 21<sup>st</sup> March, 2017. The record shows that on the 25<sup>th</sup> September 2017, the counsel for the 2<sup>nd</sup> Plaintiff fixed the matter for mention on the 11<sup>th</sup> October 2017 after the court found no urgency had been disclosed in the certificate dated 20<sup>th</sup> September 2017. That another mention was fixed for 26<sup>th</sup> February 2018 when the court drew the counsel's attention to the dismissal order of 21<sup>st</sup> March 2017. That another mention was fixed for 24<sup>th</sup> July 2018 but before then, the notice of motion dated 7<sup>th</sup> March 2018 was filed and fixed for hearing on 20<sup>th</sup> March 2018 when the date for ruling was fixed as 25<sup>th</sup> July 2018 and later moved to today due to the earlier date falling within the court's annual leave.

c. That upon perusing the court record, it is apparent that the last time there was action taken towards prosecuting this suit was on the 5<sup>th</sup> May 2015 when the notice of motion by the 2<sup>nd</sup> Plaintiff dated 15<sup>th</sup> August 2014 was heard and the ruling set for 6<sup>th</sup> July 2015. There is no record whether the ruling was ever delivered, and if so, when. That by the time the notice to show cause dated 7<sup>th</sup> December 2016 was issued for parties to come to court on the 21<sup>st</sup> March 2017, a period of about one year, seven months and two days had lapsed. That as none of the parties appeared the court proceeded to dismiss the suit for want of prosecution.

d. That the claim by the 2<sup>nd</sup> Plaintiff that they had been waiting for the ruling that had been reserved to be delivered on notice is not supported by the record and hence is misplaced. The 2<sup>nd</sup> Plaintiff claim in ground (iv) that "...the Plaintiff had tried to get a date but the file was unavailable as it was pending for a ruling", is not supported by any copy of the correspondence done to the registry or by the registry. That if anything, the 2<sup>nd</sup> Plaintiff has failed to show whether he or his counsel attended the court on the 6<sup>th</sup> July 2015 which was the date set for the ruling and or what steps he took to have another date for the ruling set or fixed. That notwithstanding, the court takes the position that the registry equally failed to bring up the file to the trial Judge to prepare the ruling after the hearing of the 5<sup>th</sup> May 2015 and for that reason alone the dismissal order of 21<sup>st</sup> March 2017 is hereby set aside with no orders as to costs.

5. That following from the foregoing, the court allows the 2<sup>nd</sup> Plaintiff's notice of motion dated 7<sup>th</sup> March 2018 in the following terms;

**a. That the dismissal order of 21<sup>st</sup> March 2017 is hereby set aside and the suit reinstated.**

**b. That the court having noted that the ruling on the notice of motion dated 15<sup>th</sup> August 2014 set for 6<sup>th</sup> August 2014 was never prepared and delivered will proceed to prepare it for delivery on the date set for this ruling.**

**c. The 2<sup>nd</sup> Plaintiff do bear his own costs in this application**

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**

**DATED AND DELIVERED THIS 26<sup>th</sup> DAY OF September 2018**

**In the presence of:**

Plaintiffs 2<sup>nd</sup> Plaintiff present

Defendants Absent

Counsel None

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**