



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MILIMANI LAW COURTS**

**ELC CASE NO.1125 OF 2013**

**FRANCIS KARUMWA GATHEKA.....PLAINTIFF**

**=VERSUS=**

**KAHINDO K KAMUNGELE & ANOTHER.....DEFENDANT**

**RULING**

1. This is a Ruling in respect of a Notice of Motion dated 25<sup>th</sup> January 2018. The application is brought under the provisions of **Order 2 Rule 15 (1) (a), (b), (c), and (d)** and **Order 51 Rule 1** of the Civil Procedure Rules as well as Sections 2A, 1B, 3, and 3A of the Civil Procedure Act. The application seeks dismissal of this suit and a declaration that the suit stands dismissed.

2. The plaintiff who is the respondent in this application is the registered owner of LR No.209/11296/193 which is adjacent to LR No.209/11296/192 which is registered in the name of Kahindo Kataliko Kamungele who was the first defendant in this case but the plaintiff has since withdrawn the suit against him. The suit against the first defendant was withdrawn as he is said to have re-located to the Democratic Republic of Congo and the plaintiff seemed to be unable to serve him through Foreign Service Procedures.

3. The second defendant /applicant is the son of the first defendant and is the one residing on his father's property. The applicant had made an application to court seeking dismissal of the plaintiff's suit for want of prosecution. The application was fully heard but the prayer for dismissal was not granted. The court however in a ruling delivered on 9<sup>th</sup> November 2017 directed that the plaintiff do take summons to enter appearance and have the same served upon the first defendant within a period of 60 days and thereafter have the suit fixed for hearing within six months. Failure to comply with the timelines would mean the suit stood dismissed without any further re-course to court.

4. The applicant now contends that since there was no compliance with the timelines given by court, the suit stood dismissed and that the withdrawal of the suit against the first defendant after the deadline given could not cure or sustain the suit. The applicant further argues that in any case, as the suit against the first defendant has been withdrawn there is no cause of action against him as he is not the registered owner of the property which is in his father's name and he cannot be made to shoulder the burdens of his father.

5. The respondent opposed the applicant's application based on a replying affidavit sworn on 30<sup>th</sup> July 2018. The respondent contends that the applicant's application is pre-mature as the court had directed that a hearing date be fixed within 6 months which period had not lapsed as at the time the present application was filed. The respondent further contends that the applicant had initiated negotiations for an amicable settlement and that during those negotiations, he re-constructed the boundary fence which was the cause of this suit and that prayers (a),(b) and (d) of his claim had been spent. He therefore argues that the applicant is estopped from claiming that there is no cause of action against him.

6. I have considered the applicant's application as well as the opposition to the same by the respondent. I have also considered the submissions by counsel for the parties during the hearing. This suit had remained unprosecuted for some time. When an application for striking it out was made, the court spared it from dismissal but gave strict conditions to be met. As the cause of non-prosecution appeared to be non-service of summons upon the first defendant, the court directed that summons were to be taken out and served upon the first defendant within 60 days. Though there is evidence that summons were applied for and obtained within the period set, there was no service of those summons. The respondent prepared a notice of withdrawal of suit which was dated 22<sup>nd</sup> December 2017 but was filed in Court on 23<sup>rd</sup> January 2018.

7. M/s Nyaboke for the applicant argued that the withdrawal of the suit against the first defendant was done outside the period of 60 days. According to counsel, the 60 days period expired on 8<sup>th</sup> January 2018. I do not agree that the period of 60 days expired on 8<sup>th</sup> January 2018. **Order 50 Rule 4 of the Civil Procedure Rules** provides as follows:-

***“Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of***

***December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act:***

***provided that this rule shall not apply to any application in respect of a temporary injunction.***

8. The Plaintiff had the option to proceed with his suit against the first defendant or not to. In this case, he exercised his option to withdraw the suit and therefore he was not caught up with the 60 days set by the court. The withdrawal was done before the expiry of the 60 days. The issue which then need to be addressed is whether the plaintiff's suit is maintainable in the absence of the first defendant who is the registered owner.

9. The initial plaint only cited the first defendant. The applicant herein who is the second defendant was brought in after amendment and this was because of difficulty in serving the registered owner of the suit property. It is the registered owner of the suit property who put up the wall which was the cause of this suit. The first defendant is not a joint owner of the property which is adjacent to the plaintiff's property. The mere fact that he lives on the property does not make him liable to shoulder the burden which is associated to the ownership of the property. There is an argument by the respondent's counsel that the applicant is the one who built the offending wall and that he is the one who initiated negotiations and that therefore he is estopped from denying that he is a wrong party. I have looked at the correspondence annexed to the replying affidavit of the respondent. There is no indication that the instructions came from the applicant. The correspondence was copied to "**client**" and client in this sense does not mean that they referred to the second defendant who is the applicant. The correspondence may have been referring to the first defendant who is the registered owner of the property.

10. The respondent having withdrawn his suit against the registered owner, the suit against the applicant has no basis. I proceed to allow the applicant's application with the result that the suit against him is hereby struck out with costs. The applicant shall have costs of the struck out suit as well as the application herein.

It is so ordered.

**Dated, Signed and delivered at Nairobi on this 18<sup>th</sup> day of September 2018.**

**E.O.OBAGA**

**JUDGE**

In the presence of;-

M/s Motabori for Plaintiff/Respondent

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**