



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 91 OF 2010

INTEGRATED DEVELOPMENT PROGRAMME COMPANY

LIMITED.....PLAINTIFF/APPLICANT

VERSUS

PAUL ITOTIA DAVID (*as personal representative ad litem of*

MBATHA NZINGA (*deceased*).....1ST DEFENDANT

MBUKONI HOLDINGS LIMITED.....2ND DEFENDANT

AND

PHILIP KISANYA MWELI.....1ST INTERESTED PARTY

JANE MUSIMBI CHANERA.....2ND INTERESTED PARTY

JOSEPHINE NJERI KABITAU.....3RD INTERESTED PARTY

DOROTHY KAVINYA WAMBUA.....4TH INTERESTED PARTY

BERNARD BARASA WAFULA.....5TH INTERESTED PARTY

IDAH GATHONI MWENDA.....6TH INTERESTED PARTY

BEATRICE NJOKI NGANGA.....7TH INTERESTED PARTY

JOEL LUMBASI LUTOMIAH.....8TH INTERESTED PARTY

ROBERT NJERE OMUSONGA.....9TH INTERESTED PARTY

CHARLES ELIUD MWANGI MURIITHI...10TH INTERESTED PARTY

RULING

1. In the Notice of Motion dated 18th January, 2018, the Plaintiff is seeking for injunctive orders in the following terms:

- a. That the Honourable Court do grant orders of injunction restraining the 1st Defendant/Respondent by himself, his agents and/or servants from trespassing into, alienating, sub-dividing and/or interfering in any manner with the land Title No. L.R. No. 12751/634 pending the inter-parte hearing of this Application and/or final determination of the suit.
- b. That the Honourable Court be pleased to set aside the Ruling and/or order made on 30th June, 2017 dismissing the Plaintiff's suit.
- c. That costs of this Application be provided for.

2. The Application is supported by the Affidavit of the Plaintiff's advocate who has deponed that after filing this suit in the year 2007, the High Court granted the Plaintiff injunctive orders on 29th March, 2007; that the matter came up for hearing on several occasions when the same did not proceed because the court was not sitting; that between the year 2013 until October, 2016, land cases filed at the Machakos High Court could not proceed because there was no ELC Judge and that the matter was dismissed by the court without involving him or the Plaintiff.
3. According to the Plaintiff's advocate, his clerk found the matter had been cause-listed on 9th May, 2017 and requested an advocate to hold his brief; that the said clerk did not make a follow-up of the matter to find out what had happened in court on the said date and that all efforts were made to fix the matter.
4. The Plaintiff's counsel deponed that the Interested Parties, who derive their interest in the suit land from the Plaintiff, were not served with the Application for dismissal and neither was the 2nd Defendant. Counsel deponed that the mistake of counsel or the employees of the firm should not be visited on the innocent client and that the Application should be allowed.
5. The 5th Interested Party deponed that the Interested Parties were joined in the suit on 7th December, 2011; that they own plots in L.R. No. 1275/634 which is the suit land; that they learnt in utter shock that the suit was dismissed for want of prosecution and that their advocate on record should have been served with a hearing notice before the matter was dismissed.
6. In reply, the 1st Defendant deponed that after four (4) years of inaction by the Plaintiff in prosecuting the suit, he filed an Application for dismissal of the suit; that the Application was served on the Plaintiff's advocate who acknowledged receipt and that the suit was procedurally dismissed for want of prosecution.
7. In the Further Affidavit, the Plaintiff's Managing Director deponed that the prayer for injunction is premised on the Defendants' Counter-claim and an answer thereto; that it is not true that there was inaction in prosecuting the suit and that the Plaintiff was condemned unheard. Both the Plaintiff's and the Defendants' advocates filed written submissions which I have considered. I have also considered the authorities filed by the parties.
8. This suit was commenced on 12th March, 2007. In the said Plaintiff, the Plaintiff averred that it entered into an Agreement of Sale with the Defendants for the purchase of L.R. No. 12715/634; that as at 31st October, 2003, the full purchase price had been paid to the 1st Defendant and that the 1st Defendant unlawfully entered into a Sale Agreement dated 30th June, 1998 with the 2nd Defendant in respect to the same land. The Plaintiff sought for a declaration that the purported sale of L.R. No. 12715/634 to the 2nd Defendant by the 1st Defendant was unlawful and that he is the lawful purchaser.
9. The Defendants filed a Defence and Counter-claim on 8th June, 2007. In the said Counter-claim, the 1st Defendant prayed for a declaration that the Sale Agreement between the 1st Defendant and the Plaintiff had been rescinded and the deposit paid forfeited. The Plaintiff then filed an Answer to Defence and Counter-claim. The Interested Parties later on joined in the suit.
10. Before the Defendants filed the Application dated 24th October, 2016 for the dismissal of the suit for want of prosecution, the record shows that the matter had been slated for directions on 13th May, 2015. However, on the said date, nothing seems to have transpired.
11. Although it is true that there was no ELC Judge in Machakos between the year 2012 and 2016, High Court Judges used to hear and determine land matters. It was not until August, 2015 that the Court of Appeal stopped the High Court Judges from hearing land disputes (*See Karisa Chengo & 2 others vs. Republic (2015) eKLR*). That explains why Justice Kariuki, a Judge in the High Court, used to hear land matter in Machakos until May, 2015. The Plaintiff's contention that there was no ELC Judge to hear the matter before it was dismissed for want of prosecution on 30th June, 2017 does not therefore hold.
12. Although the Plaintiff's advocate was duly served with the Application dated 24th October, 2016, together with a hearing notice, there is no evidence that the Interested Parties were notified of the hearing of the Application to dismiss the suit. Indeed, considering that the Interested Parties had a distinct advocate from the Plaintiff's advocate, their advocate should have been served with the said Application. The Interested Parties having not been served, I shall reinstate the suit.
13. For those reasons, I allow the Application dated 18th January, 2018 with no order as to costs. The orders of this court will only be applicable if this suit is fixed for hearing within ninety (90) days from the date of this Ruling, excluding the days the court will be on vacation.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 23RD DAY OF NOVEMBER, 2018.

O.A. ANGOTE

JUDGE