



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 226 OF 2011**

**DANIEL GICHURU NJUGI T/A GICHURU & GICHURU ADVOCATES....PLAINTIFF**

**VERSUS**

**PAUL NYAGA KANYOI .....1<sup>ST</sup> DEFENDANT**

**HENRY ANGWENY ARAKA .....2<sup>ND</sup> DEFENDANT**

**CYRUS NJOGU MBURU .....3<sup>RD</sup> DEFENDANT**

**MARGARET WAITHERA NJUGI .....4<sup>TH</sup> DEFENDANT**

**JOHN NYORO GATHAYO .....5<sup>TH</sup> DEFENDANT**

**RULING**

1. The two Applications before me are dated 20<sup>th</sup> May, 2016 and 26<sup>th</sup> October, 2016.

2. In the Application dated 20<sup>th</sup> May, 2016, the Plaintiff is seeking for the following orders:

***a. That pending hearing and determination of this Application inter-partes this court do hereby order that an order of inhibition restricting the registration of any transfer, charge, lease, partition or any other instrument of whatever nature against the register of all that parcel of land known as Kajiado/ Kitengela/2988.***

***b. That the orders made on 15<sup>th</sup> July, 2015 dismissing this suit for want of prosecution be and is hereby set aside/discharged and this suit together with the conservatory orders issued in terms of prayer (b) hereinabove be reinstated.***

***c. That the costs of this Application be provided for.***

3. The said Application is supported by the Affidavit of the Plaintiff who has deponed that the Notice to Show Cause why the suit should not be dismissed for want of prosecution was not served on his advocate; that this matter was dismissed for want of prosecution on 15<sup>th</sup> July, 2015 ostensibly under Order 42 Rule 35(2) of the Civil Procedure Rules and that the reason as to why the matter was not fixed for prosecution since the year 2013 was because of the non-availability of an Environment and Land Court Judge in Machakos.

4. In response to the Application, the 1<sup>st</sup> defendant deponed that the Notice to Show Cause why the suit should not be dismissed was received by his advocate vide his postal address; that his advocate was aware that this matter was coming up for Notice to Show Cause on 15<sup>th</sup> July, 2015 and that it is a waste of time to reinstate this suit.

5. The 2<sup>nd</sup> Defendant deponed that the Plaintiff has not been diligent enough in prosecuting the suit; that the Plaintiff's intention is to put a caution on the whole 5 acres and that the Application should be dismissed.

6. The Application dated 25<sup>th</sup> October, 2016 is a replication of the Application of 20<sup>th</sup> May, 2016 save that the Plaintiff is seeking for an inhibition in respect to two parcels, namely Kajiado/Kitengela/90590 and 90591 which are a sub-division of the initial suit property.

7. The Plaintiff's advocate filed written submissions which I have considered.

8. Before I consider if the order of inhibition should issue, I will first consider if indeed the dismissal of the suit for want of prosecution was legal.

9. The record shows that on 15<sup>th</sup> July, 2015, Hon. Justice Lucy Njuguna dismissed this matter for want of prosecution.

10. It is trite that under the provisions of Order 17 of the Civil Procedure Rules, this Court, and the High Court, has the jurisdiction to dismiss any matter that has not been set down for hearing for a period of more than one (1) year.

11. The record shows that before this matter was dismissed for want of prosecution on 15<sup>th</sup> July, 2015, the matter had been mentioned before Mutende J. on 10<sup>th</sup> December, 2012 when the parties recorded a consent. One of the terms of the consent was that the matter was to be mentioned in forty five (45) days to confirm compliance with the consent orders.

12. The matter was never mentioned within the said forty five (45) days or at all until 15<sup>th</sup> July, 2015 when it was dismissed for want of prosecution.

13. Although counsel has submitted that the High Court did not have jurisdiction to deal with this matter, he has admitted that the matter was initially filed in the High Court.

14. Indeed, the present matter is in respect to land, and can only be heard and determined by the Environment and Land Court. However, it is true that until the decision by the Court of Appeal in the ***Karisa Chengo & Others vs. R 2015) eKLR*** case, the High Court judges were also dealing with land matters.

15. It is trite that because of the numerous numbers of cases that usually come up for dismissal for want of prosecution, courts usually serve parties with Notices to Show Cause by way of post.

16. The Notice to Show Cause herein shows that the address of the Plaintiff's former counsel, Tongoi & Co. Advocates is "*P.O. Box 572229 -00200 Nairobi*".

17. The firm of Tongoi & Co. Advocates has not sworn an Affidavit to deny that the Notice to Show Cause was ever served on its firm by post.

18. In the circumstances, and considering that the firm of Mbugua Ng'ang'a & Co. Advocates was not on record when the matter came up for dismissal, the Plaintiff cannot depone that his advocate was not served with the Notice to Show Cause.

19. The issue of whether the Notice to Show Cause referred to the correct provision of the law does not

arise. Suffice to say that the parties had notice that unless they show cause why the matter should not be dismissed for want of prosecution, the court was bound to proceed and dismiss the matter.

20. For those reasons, I do not find any reason to set aside the orders of 15<sup>th</sup> July, 2015. In the circumstances, I dismiss the Applications dated 20<sup>th</sup> May, 2016 and 26<sup>th</sup> October, 2016 with costs.

21. For avoidance of doubt, this matter stands dismissed.

**DATED AND DELIVERED AT MACHAKOS THIS 17<sup>TH</sup> DAY OF MARCH, 2017.**

**OSCAR A. ANGOTE**

**JUDGE**