



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**CIVIL 108 B OF 2012**

**SIMON KARUIRU GITHUA.....1<sup>ST</sup> APPLICANT**

**MWANGI GITHUA.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**JAMES KAHANYA KARANJA.....1<sup>ST</sup> RESPONDENT**

**FREDRICK MUIRURI.....2<sup>ND</sup> RESPONDENT**

**TITUS NDOKA GATHUA.....INTERESTED PARTY**

**RULING**

***(Application to dismiss suit for want of prosecution; three years having lapsed since last activity; however court had issued an order staying the proceedings of the case pending the outcome of a related succession matter; the inactivity is therefore excusable as the plaintiff could not move the case owing to the stay; application dismissed)***

1. The application before me is that dated 4 September 2015 filed by the defendants and it seeks the following orders :-

*(i) That this Honourable Court be pleased to set aside, discharge or vacate the injunction orders issued to the applicants in the ruling delivered on 27 June 2012.*

*(ii) That this Honourable Court be pleased to dismiss this suit for want of prosecution.*

*(iii) That the costs of this suit be awarded to the respondents/applicants.*

2. The application is based on grounds inter alia that injunction orders were granted on 27 June 2012 and that it is now 3 years since the respondents took any step to have this case heard. It is the view of the applicants that the respondents have lost interest in the suit and the same should therefore be dismissed for want of prosecution.

3. Despite being served with the application and the hearing notice of the same, the respondents did not file any response and neither themselves, nor their counsel, made any appearance on the day of the hearing of this application.

4. I have gone through the record herein. The suit itself is an Originating Summons commenced on 29 March 2012. The applicants in the Originating Summons (who for ease of reference, I will refer to them as plaintiffs) sought orders that they be declared to have acquired by way of adverse possession, title to the land parcel Nyandarua/Olkalou South/70, subdivided into the land parcels Nyandarua/Ol Kalou South/2366, 2367, 2368 2376, 2377 and 2378, and they be registered as the proprietors of the same. Together with the suit, the plaintiffs filed an application for injunction seeking to have the defendants restrained from interfering with their possession of the suit land pending hearing and determination of the case. Interim orders were granted in the first instance on 29 March 2012, and they were continuously extended until 20 May 2013, when the parties entered into a consent to have the status quo maintained pending hearing and determination of the case. The case was seemingly connected to an ongoing succession cause being Nakuru High Court Succession Cause No. 497 of 2012 and on 22 May 2013, directions were taken that this case be stayed pending the hearing and determination of the said succession cause. Nothing much seems to have transpired in this case until the subject application was filed.

5. The application is premised upon the provisions of Order 40 Rule 7 and Order 17 Rule 2 (3). Order 40 Rule 7 is drawn as follows :-

*Order 40 Rule 7 :- Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.*

6. The whole of Order 17 Rule 2 is drawn as follows :-

*2. Notice to show cause why suit should not be dismissed [Order 17, rule 2.]*

*(1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.*

*(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.*

*(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.*

*(4) The court may dismiss the suit for non-compliance with any direction given under this Order.*

7. It will be seen from Order 40 Rule 7 that a party may apply to have discharged an order of injunction and under Order 17 Rule 2, a party can apply for the suit to be dismissed, if it remains unprosecuted for a period of one year.

8. It is claimed that the plaintiffs have not been keen in prosecuting their case and that they have lost interest in it. However, that is not what I see from the record. As I have mentioned, this suit was stayed on 22 May 2013 pending the hearing and determination of the succession matter. Nowhere in the supporting affidavit have the applicants informed me what may have transpired in the succession cause. I have no idea whether it was heard and determined or whether it is still pending. What is clear is that this suit was stayed awaiting the outcome of the succession cause and it was therefore necessary for the applicants to demonstrate that the succession matter has been finalized, but despite that, the plaintiffs have not moved the court. This the applicants have not done.

9. Given that this suit was stayed, I cannot hold the position that the applicant has lost interest in the matter. There clearly could not be any movement in the matter for the simple reason that the case was stayed. Neither can I discharge the orders of injunction as there was reason why the said orders were granted, and I have not been persuaded that those reasons no longer exist.

10. For the above reasons, I have no option but to dismiss this application. Since the plaintiffs did not oppose it, I make no orders as to costs.

11. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 31<sup>st</sup> day of October 2017.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of: -**

No appearance on the part of the litigants and their counsel.

Court assistant : Carlton Toroitich

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**