



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU**

**E.L.C. CASE NO. 146 OF 2015**

**FORMERLY 46 OF 2014**

**ITUMU MBUTEI ..... PLAINTIFF**

*VERSUS*

**NJERU IRERI ..... 1<sup>ST</sup> DEFENDANT**

**PETER MUGO IRERI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. By a plaint dated and filed on 29<sup>th</sup> November 2004, the Plaintiff sought various reliefs against the Defendants the main ones of which were a declaration that the Plaintiff was the rightful owner of *Title No. Embu/Gangara/764* and an order for cancellation of the name of the 2<sup>nd</sup> Defendant as proprietor and its substitution with the Plaintiff's name.
2. The said suit has been pending in court for the last 15 years despite having been partly heard since 2008. When the matter was listed for mention for directions on 16<sup>th</sup> March 2011 the Hon Justice Warsame directed that the suit should proceed from where it had reached since the proceedings had been typed.
3. The suit was consequently listed for hearing on 19<sup>th</sup> October 2011 when the Plaintiff informed the court that his advocate had withdrawn from the case and requested for time to engage another lawyer. Since then, the parties do not appear to have taken any concrete steps to prosecute the suit. The court consequently issued a mention notice for the parties to appear on 12<sup>th</sup> April 2017 for the purpose of taking directions on the hearing of the suit.
4. It is apparent from the record that there was no appearance by the parties on 12<sup>th</sup> April 2017. The court directed that the parties be served for further mention for directions on 15<sup>th</sup> June 2017. On 15<sup>th</sup> June 2017, none of the parties turned up in consequence of which the court issued a notice to show cause why the suit should not be dismissed for want of prosecution under **Order 17 of the Civil Procedure Rules.**
5. The said notice to show cause was listed for hearing on 13<sup>th</sup> July 2017 when Mr Kathungu appeared for the Plaintiff and requested for more time to put his house in order since the Plaintiff's former advocate had died about 3 years back. He also informed the court that the copies of typed proceedings were not very consistent. The said notice to show cause was consequently stood over to 26<sup>th</sup> September 2017.
6. On 26<sup>th</sup> September 2017, Mr Kathungu for the Plaintiff informed the court that the Plaintiff had closed

his case and that what was pending was defence hearing. He was, however, of the view that the suit should be heard *denovo*. He indicated that he wished to amend his plaint and that the Defendants wished to amend their defence to include a counterclaim. He stated that the Plaintiff's former advocate died in 2013 whereas the Plaintiff was all along waiting for communication from him.

7. The Defendant's advocates conceded that the suit was very old but decided to leave the matter to the discretion of the court. He had no objection to the suit being heard *denovo*.

8. The court has considered the record of proceedings herein and noted that the Plaintiff did not file any replying affidavit in response to the notice to show cause why the suit should not be dismissed for want of prosecution under **Order 17 rule 2 of the Civil Procedure Rules**. He chose to rely on a statement from his advocate to the effect that all along he was waiting for communication from his advocate on the hearing or further hearing of the suit. The court has also noted from the record that the firm of Joe Kathungu & Co Advocates came on record for the Plaintiff on 11<sup>th</sup> July 2017 despite the fact that the Plaintiff's former advocate died in 2013.

9. The court is not satisfied that the Plaintiff has been diligent in the prosecution of his suit. It was his obligation to prosecute the suit to its logical conclusion including following up with his advocates to take steps to conclude the suit. It is not a good explanation for the Plaintiff to simply state that he sat back and waited for his advocates to communicate even when his advocate had been deceased for about 4 years. See **Mukisa Biscuit Manufacturing Co. Vs Westend Distributors Ltd [1969] EA 696 and Ivita Vs Kyumbu [1984] KLR 441**.

10. In spite of the obvious lack of diligence on the part of the Plaintiff the court is inclined to give him one more chance to conclude the suit. I therefore make the following orders;

- a. The parties are hereby granted leave to amend their respective pleadings within 14 days. The Plaintiff shall have 7 days to serve his amended plaint whereas the Defendants may amend their defence and include a counterclaim within 7 days thereafter. The Plaintiff shall be a liberty to file a reply and a defence to counterclaim within 7 days of service.
- b. The parties shall thereafter file their witness statements and documentary evidence within 14 days after close of pleadings.
- c. The suit shall be mentioned on a date to be fixed on 16<sup>th</sup> November 2017 for the purpose of fixing a hearing date for the suit.
- d. The suit shall be heard *denovo* in accordance with the wishes of the parties.
- e. In default of compliance with orders (a) and (b) herein, the pleading of the party in default shall stand struck out without further order.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this **16<sup>th</sup>** day of **NOVEMBER, 2017**

In the presence of Mr Joe Kathungu for the Plaintiff and Mr Gekonge holding brief for Mr Njiru Mbogo for the Defendants.

Court clerk Njue/Leadys

**Y.M. ANGIMA**

**JUDGE**

**16.11.17**