

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC. SUIT NO. 485 OF 2013

ELIZABETH NGAYAO NZENGE.....PLAINTIFF

VERSUS

DANIEL MAKAU WAITA.....1ST DEFENDANT

JOSEPH WAITA MBUVI.....2ND DEFENDANT

ANASTACIA MBELE WAITA.....3RD DEFENDANT

RULING

The Defendants filed the application dated 30/3/2017 seeking to have the suit dismissed for want of prosecution; or in the alternative, dismissed for want of jurisdiction.

This suit was filed under certificate of urgency on 23/4/2013. The Defendants contend that after the Plaintiff's application dated 20/4/2013 was dismissed on 28/10/2014, the Plaintiff has not taken any steps to prosecute the matter for over 3 years. The 1st Defendant swore the affidavit in support of the application.

The Plaintiff's counsel attended court on 28/6/2017 and asked for more time to respond to the application for dismissal. The Plaintiff was granted time and directed to file and serve her response within 14 days. The application was fixed for hearing on 26/7/2017 but could not proceed and was put off to 12/10/2017. That date was taken in the presence of the Plaintiff's advocate. The Plaintiff's advocate did not attend court on 12/10/2017 and the application was argued *ex-parte*.

The Defendant submitted that the Plaintiff had filed an Originating Summons Number 11 of 2017 seeking division of the matrimonial property and therefore has lost interest in this case.

The court has looked at the Plaintiff's replying affidavit sworn on 20/7/2017. She blames the inaction on her previous advocate who she states kept advising her that they were yet to secure a date for the hearing of her suit. She was surprised when she was served with the instant application seeking to dismiss her suit while all along she believed the suit had not taken off due to unavailability of hearing dates. She admits at paragraph 13 of her affidavit that she filed suit for the division of matrimonial property which is pending for mediation.

The court is of the view that no useful purpose will be served by maintaining this suit yet the Plaintiff has commenced proceedings for the division of matrimonial property which are pending for mediation. The suit property will form part of the matrimonial property to be divided. The 1st Defendant is the Plaintiff's estranged husband while the 2nd and 3rd Defendants are his parents.

The court allows the Defendant application and dismisses the suit. This being a matrimonial dispute, each party will bear its own costs.

Dated and delivered at Nairobi on 14th December 2017.

K. BOR

JUDGE

No appearance for the Plaintiff & Defendants

Mr. V. Owuor- Court Assistant