



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

**AT NAIROBI**

**ELC NO. 565 OF 2007**

**BENSON OKIOGA MARIACHANA.....PLAINTIFF**

**VERSUS**

**NAIROBI CITY COUNCIL.....1<sup>ST</sup> DEFENDANT**

**SALLY KENDI GITONGA.....2<sup>ND</sup> DEFENDANT**

**RULING**

The Plaintiff filed this suit in the year 2002. The suit was transferred to the Environment and Land Division of the High Court in the year 2007 where it was assigned its current case number. It is not clear from the record as to what transpired in the matter between 2002 and 2007 when the same was transferred to the Environment and Land Division. The proceedings on record start from the year 2009. It appears as if the original court file got misplaced. When the matter came up before Sitati J. on 29<sup>th</sup> October, 2009 for hearing, she noted that the court file was incomplete. On 11<sup>th</sup> November 2009, the parties were given the liberty to apply for the reconstruction of the court file. This was not done until 16<sup>th</sup> February 2011 when the plaintiff's advocates made an application for the reconstruction of the court file. The court file was ultimately reconstructed on 12<sup>th</sup> April 2011. Between 12<sup>th</sup> April 2011 and 13<sup>th</sup> December 2014 when the plaintiff filed in court a list of witness, no action was taken in the matter save for a number of letters of invitation to fix a hearing date that were written by the plaintiff's advocates to the defendants' advocates. No hearing date was however taken.

From 13<sup>th</sup> February 2014 when the plaintiff filed the said list of witnesses, no further action was taken in the matter until 27<sup>th</sup> May, 2015 when the court on its own motion with notice to the parties dismissed the suit for want of prosecution.

What is now before me is the plaintiff's application which was brought by way of Notice of Motion dated 26<sup>th</sup> June 2015 seeking to set aside the said order of dismissal. The application was brought on the grounds that the plaintiff was always eager to have this case heard and determined but his attempts to set down the same for hearing was frustrated; initially, by the misplacement of the pleadings and thereafter by the loss of the court file. The plaintiff has contended that he was unable to show cause why this suit should not be dismissed because his advocate arrived in court late after the matter had been called out and dismissed. The application was opposed by the 2<sup>nd</sup> defendant through a replying affidavit sworn on 25<sup>th</sup> November 2015. In her affidavit, the 2<sup>nd</sup> defendant stated that the plaintiff was not keen to have this suit set down for hearing. The 2<sup>nd</sup> defendant stated that it would not be fair and just to have this suit hanging over her head while the plaintiff had shown lack of interest in prosecuting the same.

The Plaintiff's application was heard on 10<sup>th</sup> December 2015 when Mr. Kiplagat advocate appeared for the plaintiff while Mr. Karanja appeared for the 2<sup>nd</sup> defendant. In his submissions, Mr. Kiplagat relied entirely on his affidavit in support of the application. He reiterated that the delay in the prosecution of this suit was caused by the missing court file and that the plaintiff is still interested in prosecuting the same. Mr. Kiplagat submitted that this court should exercise its discretion in favour of the plaintiff. He submitted that suits should be sustained rather than being dismissed summarily. In support of this submission, he cited the case of **Stephen Kiutu Ngangavs. Stanley Kindiga & another (2015) eKLR**.

In his reply, Mr. Karanja relied on the affidavit of the 2<sup>nd</sup> defendant and submitted that the plaintiff had lost interest in this suit. He submitted that the court record shows that the plaintiff's attempts to set down this suit for hearing had been intermittent. Mr. Karanja submitted that the plaintiff had not placed any reliable evidence before the court to show that he was prevented from setting down the suit for hearing due to the loss of the court file.

I have considered the plaintiff's application together with the affidavit filed by the 2<sup>nd</sup> defendant in opposition thereto. From the history of this suit which I have set out at the beginning of this ruling, this suit has been pending in court for the last 14 years. The only serious attempt that was made by the plaintiff to set down the suit for hearing was in the year 2009 when the suit was set down for hearing on 29<sup>th</sup> October 2009 but could not proceed due to incompleteness of the court file which has no pleadings. The plaintiff did not make any other serious attempt thereafter to set down the matter for hearing. After being given the liberty to make an application to reconstitute the court file, the plaintiff took over one (1) year to file the application. Once the file was reconstituted on 12<sup>th</sup> April 2011, it took the plaintiff over 3 years again to take a step in the matter. There is no evidence before the court that the reconstituted file went missing again at any time between 12<sup>th</sup> April 2011 when it was opened and 27<sup>th</sup> May 2015 when this suit was dismissed for want of prosecution. Annexure "DKK2" to the affidavit in support of the application herein which is said to be a letter that was written by the plaintiff's advocates to the Deputy Registrar over the missing court file is not stamped as having been received by the court. Again, on the face of this letter, there is a remark "file available". This reinforces the 2<sup>nd</sup> defendant's contention that the plaintiff's claim that the reconstituted file went missing has no basis.

When this suit came up for Notice to Show Cause on 27<sup>th</sup> May 2015, none of the parties appeared in court. In the absence of any cause shown as to why the suit should not be dismissed, the court proceeded to dismiss the suit in the absence of the parties notwithstanding. This court has inherent power to set aside or review its orders made ex parte or in the absence of the parties. The power is discretionary and must be exercised judiciously for the purposes only of ensuring that justice is done to the parties. A party seeking to have the court's discretion exercised in his favour must demonstrate that he deserves the exercise of such discretion. From what I have set out above, I am not persuaded that the plaintiff deserves the exercise of this court's discretion in his favour. The plaintiff had not taken any serious steps to fix this suit for hearing for a period of over 4 years as at the time he was served with the Notice to Show Cause why the suit should not be dismissed. The plaintiff did not also appear before the court to show cause why the suit should not be dismissed. No reasonable explanation has been given by the plaintiff's advocates why they failed to appear in court on time when the matter came up for the Notice to Show Cause. I don't think that it is sufficient for an advocate to simply say that he arrived in court after the matter had been dealt with by the Judge. There must be an explanation as to why he did not come to court in time assuming that he actually appeared in court on that day. The plaintiff has not given any reasonable explanation in the present application why this suit has been listed for hearing only once for the last 12 years.

For the reasons given above, the plaintiff's application would in normal circumstances be a candidate for dismissal. However, I have perused the pleadings filed herein and noted that the parties have raised very serious issues to be tried by the court. In their statement of agreed issues, the parties have framed a total of 10 issues for determination. There are allegations of fraud which borders on criminality. I have noted that the 2<sup>nd</sup> defendant acquired the suit property when she was a minor of eight (8) years. The 2<sup>nd</sup> defendant is said to have executed a lease before an advocate on 17<sup>th</sup> October 2001 at that age. I have noted from

the material on record that the advocate who is said to have witnessed the signature of the 2<sup>nd</sup> defendant had disowned his purported signature in the document. He had also denied preparing the lease which is attributed to him. These are some of the issues which the court will have to interrogate at the trial. As I have stated earlier, the court's discretion to set aside or review the order made ex parte should be exercised to ensure that justice is done. I am of the view that this court's duty to ensure that justice is dispensed without unreasonable delay must be tempered with the equally important tenet of the rule of law that requires that as much as is practically possible, a party should be heard before a decision prejudicial to him is made. As I have stated above, the plaintiff has raised serious issues in his plaint filed herein. If the dismissal of this suit is allowed to stand, the plaintiff who claims to have lost a parcel of land through fraud would lose the opportunity to ventilate the grievances he has against the defendants who are said to have defrauded him. The doors of justice would have been closed on him while he may be a victim of lethargy on the part of his advocates. In the case of, **Richard Nchapi Leiyangu vs. IEBC & 2 others, Civil Appeal No.18 of 2013**, the Court of Appeal stated that: **"The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent power to dismiss suits; this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice."**In view of the nature of the plaintiff's claim and the issues raised therein, I am inclined to give the plaintiff another opportunity to prosecute this suit.

In the final analysis and for the foregoing reasons, I will allow which I hereby do, the plaintiff's application dated 26<sup>th</sup> June 2015 with costs to the 2<sup>nd</sup> defendant assessed at Kshs.15,000/= payable forthwith. The plaintiff shall set down this suit for pre-trial case conference and thereafter for hearing within a period of twelve (12) months from the date hereof failure to which the suit shall stand dismissed with costs to the defendants without any further reference to the court.

**Dated and Delivered at Nairobi this 3<sup>rd</sup> day of June, 2016**

**S. OKONG'O**

**JUDGE**

**In the presence of**

Ms. Cheruiyot for the Plaintiff

N/A for the Defendants

V. Owuor Court clerk