



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 399 OF 2013

LALY FARM LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

THE HON. ATTORNEY GENERAL.....1ST DEFENDANT

CHIEF LAND REGISTRAR.....2ND DEFENDANT

DISTRICT LAND REGISTRAR- NAKURU.....3RD DEFENDANT/ APPLICANT

PRIMEWAYS COMPANY LIMITED.....4TH DEFENDANT

JOHN KARIUKI NJUGUNA & JOHN KINYANJUI THEURI T/A

KINYANJUI NJUGUNA & COMPANY ADVOCATES.....5TH DEFENDANT

RULING

1. This is the 4th and 5th defendants **Notice of Motion** dated 27th May, 2013 seeking;

(i) That the suit be dismissed for want of prosecution

(ii) That this honourable court be pleased to order the 2nd and 3rd defendants to remove forthwith the cautions placed over land parcels Nos. Nakuru/ Moi Ndabi/ 1322 and Nakuru/ Moi Ndabi/1267(hereinafter referred to as the suit properties)

(iii) That costs of this suit and of this application be provided for.

2. The Application is expressed to be brought under **Order 17 Rule 2, Order 51 Rule 1** of the Civil Procedure Rules, **Section 3A** of the Civil Procedure Act and **Sections 72 and 73 of the Land Registration Act.**

3. The application is anchored on a Supporting Affidavit deponed by **John Kariuki**, a partner in the firm of **Kinyanjui Njuguna & Company Advocates**, the 4th defendant herein and Counsel for the 4th and 5th defendants sworn on 27th May, 2013 and on the grounds on the face of the application.

4. The 4th and 5th Defendants set out their case as follows; that the suit was filed on 2nd June, 2010

simultaneously with a certificate of urgency seeking orders of injunction. The application was set down for interparties hearing on 6th July 2010 but did not proceed as the plaintiff was not ready. The application was again fixed for hearing on 5th November, 2010 and 27th March, 2012 respectively. Still the plaintiff was not ready to proceed. That it is now over three years since the suit was filed and the plaintiff has never set the matter down for hearing. Therefore the plaintiff is not interested in prosecuting the suit.

5. On 29th June 2010, the 2nd and 3rd defendants Registered a caution on the suit properties without the sanction of the court and the applicants now urge the court to vacate and or remove the caution as the plaintiff continues to enjoy irregular/ illegal orders akin to an injunction while taking no action on this suit.

6. An affidavit of service was sworn by **Henry Mugo** a process server of this honourable court, on 20th January, 2014 in which he depones that he served the plaintiff's Counsel **Gicheru & Co Advocates** who acknowledged service on 25th November, 2013 at 3.15 P.m. The plaintiff did not respond to the application nor appear despite service.

7. The 1st, 2nd and 3rd Respondents filed no reply to the application nor did they attend court. The applicant filed no affidavit of service as evidence that the 1st, 2nd and 3rd Respondents had been be served with the current application.

8. I have perused the court record and heard oral submissions by counsel for the 4th and 5th defendants. I take the following views on the matter.

9. It is true to say that the court should be slow to dismiss a suit for want of prosecution if the suit can be heard without any further delay, if the defendant will not suffer any hardship and if there has been no flagrant and culpable in activity. See **Victory Construction Company vs. A. N. Duggan (1962) E.A. 697**. But in this case where the Plaintiff has taken no action to move the court since 2012, I am persuaded that the plaintiff has lost interest in the suit.

10. Since no affidavit of service has been filed to persuade me that the 1st, 2nd and 3rd respondents were served with this application, I am reluctant to order the removal of the caution issued on the suit properties and registered by the District Land Registrar as he/she was not given an opportunity to respond to the application.

11. I therefore find prayer 1 in the Notice of Motion dated 27th May, 2013 merited and dismiss the plaintiff's suit for want of prosecution with costs to the 4th and 5th defendants.

Dated, signed and delivered in open Court at Nakuru this 16th day of May 2014.

L N WAITHAKA

JUDGE

PRESENT

Mr Wahome for 4th & 5th defendant/Applicants

N/A for plaintiff

N/A for 1st 2nd & 3rd Defendant

Emmanuel Maelo : Court Assistant

L N WIATHAKA

JUDGE