



**REPUBLIC OF KENYA**

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

**E&L NO. 210 OF 2012**

**Formally HCC NO. 40 OF 2005**

**CATHERINE C. KITTONY .....PLAINTIFF**

**VS**

**JONATHAN MUINDI.....1ST DEFENDANT**

**THE CHAIRMAN KAPSARET DIVISION**

**LAND DISPUTES TRIBUNAL.....2ND DEFENDANT**

**THE ATTORNEY GENERAL .....3RD DEFENDANT**

***(Application to reinstate suit dismissed for want of prosecution; application allowed subject to payment of costs).***

**RULING**

The application before me is that dated 10 March 2014 filed by the plaintiff. It is an application seeking orders to reinstate the plaintiff's suit which was on 29 January 2014 dismissed for want of prosecution. A little background will shed light as to how this came about.

This suit was commenced by way of plaint filed on 5 May 2005. In the plaint, the plaintiff pleaded that on 6 May 1998 she attended a public auction where the land parcel Karuna/Sosiani Block 2 (Progressive)/157 was on sale. The said land was being offered for sale by the National Bank of Kenya Ltd in exercise of their chargee's statutory power of sale. The chargor was one James Thogo Mwai. She was declared the successful bidder and the land was subsequently transferred to her. When the plaintiff went to the suit land, she found the original 1st defendant Jonathan Muindi Dome (now deceased) having fenced off 5 acres of the suit land. She asked him to vacate but the said Jonathan proceeded to file a case before the Land Disputes Tribunal. The Tribunal awarded Jonathan the 5 acres. Through this suit, the plaintiff contends that the award of the Tribunal was made out of jurisdiction and she wants a declaration to that effect. She also sought a permanent injunction to restrain Jonathan from the suit land. The plaint was amended on 23 June 2005 to add a prayer for an order of eviction.

Jonathan, as 1st defendant, filed a Defence on 12 July 2005. He pleaded that he has been in occupation of 5 acres of the suit land from the year 1984 having bought the same from James Thogo Mwai, the previous registered owner. It was his view that the decision of the Land Disputes Tribunal was legal and justified. That Defence was later amended on 9 November 2006 to include a counterclaim whereby Jonathan sought orders that he be declared to be the rightful owner of 5 acres of the suit land.

The State Law Office filed Defence for the 2nd and 3rd defendants. The defence is basically a denial of the plaintiff's claims.

In the year 2007, Jonathan, the original 1st defendant died. His two sons, Benard Muhindi and Francis Muhindi, took out letters of administration and applied to continue the suit on behalf of their late father. The application was allowed on 3 March 2010. At the moment therefore, it is Benard Muhindi and Francis Muhindi who are the joint 1st defendants.

From the time the application was allowed on 3 March 2010, no party took any step to move the suit. On 16 December 2013, the Court on its own motion issued a notice to the parties to show cause why the suit ought not to be dismissed for want of prosecution. The Notice to Show Cause was listed for 29 January 2014. On that day, only Benard Muhindi and Francis Muhindi appeared in court. The plaintiff did not appear in court and neither was there any representative from her firm of advocates, M/s Kalya & Company Advocates. The plaintiffs asked that the plaintiff's suit be dismissed and stated that they were ready to prosecute their counterclaim. I observed that the plaintiff had failed to prosecute her case since inception and also noted that since 3 March 2010, when the matter was last in court, a period close to 4 years, the plaintiff had taken no step to prosecute her case. The only reasonable conclusion I could reach was that the plaintiff had lost interest in her case and I proceeded to dismiss her case with costs for want of prosecution. I directed the defendants to file their list of documents and witness statements in preparation for the prosecution of their counterclaim.

It is with the above background that the plaintiffs filed the application dated 10 March 2014, seeking to re-instate the plaintiff's suit. The principal ground upon which the application is founded is that the notice of dismissal for want of prosecution was never served upon the firm of M/s Kalya & Company Advocates and that the plaintiff was therefore condemned unheard. In the supporting affidavit, sworn by the plaintiff, she has deponed that from the year 2009, she lost touch with her advocates on record as she relocated to Nairobi and did not inform the said firm of her change of address. She has stated that she is keen to prosecute her said suit. There is a further supporting affidavit sworn by Mr. Wilson Kalya, the proprietor of M/s Kalya & Company Advocates. He has deponed that his office was not served with the notice for dismissal and he only came to know of the dismissal after he was served with the order. He further stated that failure to move the suit was due to a communication breakdown with the plaintiff. He annexed several letters showing that he had been writing to the plaintiff asking her to attend to his office.

The 1st defendants filed a replying affidavit to oppose the application. They have stated that the plaintiff lost interest in the suit after filing suit. They have asserted that the plaintiff never changed address nor did she relocate to Nairobi as she is a teacher at Sosiyo Primary School in Karuna Location, Uasin Gishu County and that she is their neighbor. They further stated that the allegation that the notice of dismissal was not served is baseless as the advocates are based in Eldoret and had an onus of checking on the status of the case. They have averred that there is no justification as to why the plaintiff took so long to prosecute the suit and that the order of dismissal was justified.

The State Law Office filed Grounds of Opposition. In their view the delay of close to 4 years was clearly inordinate and unreasonable yet no good explanation has been tendered for the delay.

Mr. E.K. Maritim for the plaintiff, urged me to allow the application and relied on the supporting affidavits to the application. The 1st defendants on the other hand argued that the plaintiff had enough time to prosecute her suit. Mr. Ngumbi for the 2nd and 3rd defendants submitted that the fact that the plaintiff never took initiative to visit her advocate's chambers since the year 2010 to follow up on her case shows that she was clearly indolent.

I have considered the opposing views of the parties. Order 17 Rule 2, allows a court to dismiss a suit if no step is taken for one year. This is done after a notice is issued to the parties to show cause why the suit should not be dismissed.

I do not have an affidavit of service to affirm that the firm of M/s Kalya & Company Advocates were served with the notice to dismiss. On that point I will give them the benefit of doubt. But even if I were to

revisit the notice to dismiss, I would have all reason to still dismiss the suit for want of prosecution, as the reasons given by the plaintiff are not convincing. First, it is not disputed that the plaintiff has never taken any step to prosecute her case since inception. It is also not disputed that since 3 March 2010, when the application for substitution of the deceased 1st defendant was allowed, the plaintiff has never taken any step to prosecute her case. The reason that there was a communication breakdown to me does not wash. The suit was of the plaintiff and it was incumbent upon her to follow up with her counsel and push them to move the suit. It does not matter that the plaintiff relocated to Nairobi, assuming that that is true. She could still make a call or find time to visit her counsel in Eldoret and follow up on her case if she had any interest in it. But even that alleged relocation is doubtful, as the 1st defendants have deponed that she is a teacher at Sosiyo Primary School, an allegation that the plaintiff has not deemed it fit to controvert. On the merits, there is really no good reason tabled as to why the plaintiff's suit ought not to be dismissed for want of prosecution.

I however take note that every party deserves to be given a hearing. It should be a last resort to shut out a party from being heard. In my own discretion, I will allow the application to reinstate the suit but this will be subject to the plaintiff paying costs of Kshs. 30,000/= to the 1st defendants. Such payment to be made within a period of 30 days. If the costs are not paid within this time frame, then the order of 29 January 2014, dismissing the plaintiff's suit for want of prosecution will stand.

It is so ordered.

**DATED AND DELIVERED AT ELDORET THIS 30TH DAY OF OCTOBER 2014**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET**

*Delivered in the presence of:*

*Mr. Akello for plaintiff/appellant.*

*1st defendant in person – present.*

*Mr. P. Kuria of state Law office present for 2nd & 3rd defendants.*