



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT**  
**AT KERICHO**

**CIVIL SUIT NO. 199 OF 2015**

**BARNABAS MARITIM.....PLAINTIFF**

**VERSUS**

**MANYWELE KORGOREN.....1<sup>ST</sup> DEFENDANT**

**KIPKOSKEI ARAP TANGUS.....2<sup>ND</sup> DEFENDANT**

**RULING**

***(Application to reinstate a suit dismissed for want of prosecution; suit remaining unprosecuted for over 5 years; applicant blaming his advocate for the delay ; obligation is on litigant to pursue his case; no good reason demonstrated to reinstate suit; however purely out of discretion suit reinstated but subject to payment of throw away costs and deposit of taxed costs within 15 days)***

The application before me is that dated **3<sup>rd</sup> February 2016** filed by the plaintiff. The principal order sought is the setting aside of my order **dated 26<sup>th</sup> June 2015** and all consequential orders. It also seeks orders that the law firm of M/s E.M Orina & Company Advocates to come on record in place of the law firm of Koech J.K & Company Advocates. In the order of **26<sup>th</sup> June 2015**, the plaintiff's suit was dismissed for want of prosecution. It will be seen that through this application, the plaintiff wants his suit reinstated. The application is opposed but before I go to the gist of the same, I think it is prudent that I set out a little background to this suit.

This suit was commenced by way of plaint that was filed **on 19<sup>th</sup> August, 2009**. The plaintiff at the time was represented by the law firm of M/s Koech J.K & Company Advocates. In the plaint, it was pleaded that on **8<sup>th</sup> January 1993**, the plaintiff purchased a commercial plot measuring 50 X 100 feet to be excised from the **land parcel Kericho/Olokyin/315**. The **land parcel Kericho/Olokyin/315** was at the time registered in the name of Rusi Chepkirui Titany. It is pleaded that on **24<sup>th</sup> April 1998**, the 1<sup>st</sup> defendant took the title deed to the **land parcel Kericho/Olokyin/315** from Rusi Titany, under the guise that he needed to transfer a portion of the said land that he had purchased. Instead, it is pleaded that the 1<sup>st</sup> defendant obtained title to the entire land. It is further pleaded that **on 25<sup>th</sup> January 2001**, the defendant acquired title deed to a **land parcel Kericho/Olokyin/1086**, apparently a subdivision of the **land parcel No. 315**, and registered it in his name, inclusive of the 50 X 100 portion that the plaintiff had purchased. It is averred that later in May 2007, again without the knowledge of the plaintiff, the 1st defendant subdivided the **land Kericho/Olokyin/1086** "into parcels **L.R No. Kericho/Olokyin/1108** inclusive " and illegally transferred the same to the 2<sup>nd</sup> defendant on **24<sup>th</sup> May 2007**. Various particulars of fraud were pleaded against the defendants.

The defendants filed a joint defence. They refuted that they acquired their titles by way of fraud. It was pleaded that in **November 2008**, the plaintiff requested the 2<sup>nd</sup> defendant to use a portion of the land as a Jua Kali shed, after which he laid claim to the land on allegation that he had purchased it from a son of the former registered owner. The 2<sup>nd</sup> defendant averred that he then reported to the Police and the plaintiff asked for a refund of Kshs. 12,000/= in order to surrender his claim and the refund was made. It is further pleaded that any sale to the plaintiff is void for want of the Land Control Board consent and that the plaintiff lacks locus as he is not privy to the contract between the defendants.

On **16<sup>th</sup> September 2009**, the plaintiff filed an application for injunction, seeking to restrain the defendants from the **land parcel Kericho/Olokyin/1108** pending hearing of the suit. That application was withdrawn on **22<sup>nd</sup> September 2009** when it came up for inter partes hearing.

There followed another application dated **24<sup>th</sup> November 2009** seeking to amend the plaint to include Rusi Titany as 2<sup>nd</sup> plaintiff. That application was listed for hearing before the Deputy Registrar Honourable N. Wairimu on **27<sup>th</sup> January 2010**. On that day, Mr. Koech for the plaintiff asked that the case be stood over generally. The court then stood over generally the matter. No further step was taken by the plaintiff to list his case for hearing.

On **18<sup>th</sup> February 2011**, a date was taken by counsel for the defendants for a mention date on **11<sup>th</sup> May 2011** but I have no record that the case ever went to court on that day.

On **25<sup>th</sup> March 2015**, the defendants filed an application dated **23<sup>rd</sup> May 2014** seeking to have the plaintiff's suit dismissed for want of prosecution. That application was served upon M/s Koech J.K & Company Advocates. On **22<sup>nd</sup> June 2015**, the day that the application came up for inter partes hearing, only Mr. Caleb Koech, counsel for the plaintiff was present for the defendants. The plaintiff was absent and so was his counsel Mr. Koech J.K despite being served. I directed the application to proceed and on **26<sup>th</sup> June 2015**, I allowed it and dismissed this suit for want of prosecution. I observed in my ruling that the last time the plaintiff moved the court was on **27<sup>th</sup> January 2010** when the case was stood over generally. I was of the view that the time lapse, that is of about 5 and a half years, was a very long period for the plaintiff not to have moved the court. I was of the view that the plaintiff has lost interest in the suit and ordered it dismissed with costs for want of prosecution.

Upon dismissal of the suit, the defendants filed a Bill of Costs for taxation. A date, **13<sup>th</sup> October 2015**, was given for taxation. Again despite being served, there was no appearance on the part of counsel for the plaintiff. The bill of costs was thereafter taxed ex-parte in the sum of Kshs. 181,686/=.

It will be observed that through this application, the plaintiff now wants to reinstate his dismissed suit. In his affidavit in support, he has deposed that he was served with the decree on **28<sup>th</sup> January 2016**. It is then that he realized that his suit has been dismissed with costs. He has deposed that his former advocates never advised him of the application seeking to have his suit dismissed for want of prosecution. He has averred that the failure to prosecute the matter was not due to any fault of his own but was a failure of his previous advocates who did not inform him nor guide him through the process.

The defendants filed a replying affidavit sworn by the 2<sup>nd</sup> defendant to oppose the application. He has inter alia pointed out that the plaintiff took no steps since **27<sup>th</sup> January 2010**. It is his view that there was inordinate delay. He does not believe that the plaintiff was ever serious, since as an aggrieved party, he ought to have noted that his case is not progressing. He has averred that a litigant ought to be diligent in pursuit of his matter. He has deposed that the plaintiff has been guilty of laches.

A supplementary affidavit was filed by the plaintiff vide which he averred that there was some delay since the defendants had indicated a willingness to settle the matter out of court. An affidavit was also filed by Mr. Koech J.K Advocate where he averred that at some point, the plaintiff and 2<sup>nd</sup> defendant came to his chambers, and the 2<sup>nd</sup> defendant informed him that he would instruct his advocate to close his

file since the matter had been settled. It is for that reason that he never fixed the case for hearing. This was refuted by a further replying affidavit filed by the defendants.

I have considered the matter. There is no dispute that since **January 2010**, the plaintiff never bothered to move the court. In his affidavit, he has averred that he thought that the matter would be settled outside court. If that is the case, a wait of more than 5 years without a settlement, would have informed him that there was no settlement forthcoming, and since he had a case, he had a duty to prosecute it. It should always be remembered that the duty to prosecute a case rests with the person who has presented it. The court registry is not a place to pile up cases. A litigant must be vigilant and must pursue his case. He must at all times, if he has engaged counsel, liaise with his advocate to ensure that his case is given due attention. If he is not happy with the conduct of his advocate, he has avenue to seek alternative counsel. What I am emphasizing is that the duty to move the case ultimately remains with the litigant.

Although there is an affidavit by Mr. Koech, he has not explained what he did when he received the application to have the case dismissed. He has not stated that he did not contact his client. Maybe if he had said this, I would have been a little sympathetic to the plaintiff. But there is no averment by Mr. Koech in this respect. If Mr. Koech actually did not inform him, maybe the plaintiff can consider suing him for professional negligence. But I think any party who has left his case to remain unprosecuted for more than 5 1/2 years is clearly disinterested in the case. One really needs to demonstrate special circumstances, to be excused from a delay of such length. I am afraid that the applicant has not demonstrated to me any special circumstances. He was very much in the know that his case is unprosecuted. He never bothered to move the court. One should not be allowed to hang the sword of litigation over another's head for such a duration of time.

I actually have every reason to dismiss this application. It is however not my practice to shut out a party from having his case heard. I in fact bend over backwards to ensure that every litigant has his chance in court. Out of a pure exercise of discretion, I will allow this application but subject to some conditions. The applicant will need to deposit in court the taxed costs of Kshs. 181,686/= within 15 days of this ruling to demonstrate that he is serious with this case. If he deposits the money and succeeds, the same shall be refunded to him. If he fails, then the same shall go to the defendants. In addition to depositing the taxed costs, the applicant will also have to pay directly to the defendants through their advocates on record, the sum of Kshs. 25,000/= being my assessment of throw away costs which I grant to the respondents for this application. This must also be paid within 15 days of today. If the two sums of money are not paid within the specified time, the order of dismissal of suit shall stand and the defendants will be at liberty to execute for both taxed costs and the Kshs. 25,000/= that I have awarded to them on this application.

The prayer for change of Counsel is otherwise allowed.

It is so ordered.

**Dated, Signed and delivered on this 29<sup>th</sup> day of July, 2016**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT AND LAND COURT**

**PRESENT**

Ms Kitur holding brief for Ms. Chelimo for Plaintiff/Applicant

Mr. Caleb Koech for defendants/Respondents

Court Assistant; Gladys Wambany