



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 587 OF 2009

MARGARET WAMBUI KUNGU.....PLAINTIFF

VERSUS

TITUS KIONDO MUYA.....1ST DEFENDANT

DAYKIO PLANTATIONS LIMITED....2ND DEFENDANT

RULING

1. On 26th February 2019, this court on its own motion issued a notice to show cause why this suit should not be dismissed for want of prosecution. The Notice to show cause was initially scheduled for hearing on 8th March 2019 but after several adjournments, it was heard on 8th April 2019 in the presence of learned counsel representing all the parties. The plaintiff was represented by learned counsel *Ms. Nafula* who held brief for *Mr. Enonda* while learned counsel *Ms. Kimingisha* held brief for *Mr. Munyi* for the defendants.

2. In response to the notice to show cause, the plaintiff's learned counsel *Mr. Enonda* swore an affidavit which in my view was erroneously titled "supporting affidavit" which was filed in court on 7th March 2019. In the affidavit, *Mr. Enonda* admitted that the case was last in court on 19th June 2017 when it was adjourned at the instance of the plaintiff. He deposed that attempts to thereafter fix the suit for hearing had been unsuccessful as the court file had been misplaced or was missing from the court registry. He averred that the plaintiff is very much interested in pursuing the suit and urged the court not to dismiss it as proposed.

3. The above averments were reinforced by learned counsel *Ms Nafula* in her oral submissions during the hearing of the notice to show cause on 8th April 2019. Learned counsel *Ms Kimingisha* for the defendants did not support or oppose the dismissal of the suit but left it to the court's discretion.

4. I have considered the depositions made in the affidavit sworn by the plaintiff's counsel as well as the oral submissions made by both counsel on record for the parties. I have also read the court record. I note that though the suit was filed on 21st October 2009, it was certified ready for hearing about six years later on 28th January 2015. It is not clear from the court record why it took so long to have the case certified ready for hearing or which party was responsible for the prolonged delay. But it should always be remembered that the plaintiff having dragged the defendants to court bore the primary responsibility of moving the court in any way that would have ensured the expeditious disposal of her suit.

5. The plaintiff has claimed that since 19th June 2017, her efforts to have the suit fixed for hearing have been unsuccessful allegedly because the court file was missing or had been misplaced at the court registry. No evidence was however availed to the court to substantiate this claim. The letter dated 18th January 2018 which is the only document that was annexed to the supporting affidavit is an invitation letter addressed to the defendant's advocates inviting them to attend the court registry on 25th January 2018 to take a mutually convenient hearing date. There is no indication in the court record to show that any of the parties attended the court registry on the aforesaid date.

6. The dismissal of suits for want of prosecution is governed by *Order 17 Rule 2* of the *Civil Procedure Rules* which provides that:

"(1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

"(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit."

7. In this case, it is admitted that the plaintiff has not taken any step to progress hearing of the suit since 19th June 2017 when it was last in

court. In fact, no action had been taken by the plaintiff by the time the court issued the notice to show cause on 26th February 2019 about 18 months later. The explanation advanced by the plaintiff for failure to set down the suit for hearing or to take any step to facilitate its hearing for a period of over one and a half years is not satisfactory given that no evidence has been availed to the court to prove or to demonstrate that the court file was indeed missing or had been misplaced in the court registry at any given time. The onus was on the plaintiff to demonstrate to the satisfaction of the court that she was interested in pursuing her claim but that the delay in prosecuting the suit was occasioned either by circumstances beyond her control or by other plausible and valid reasons. A mere assertion that she was keen on prosecuting the suit without any credible explanation for the failure to do so for a period of over nine years cannot suffice.

8. I must say that the records in the court file do not paint the plaintiff as a diligent litigant who is keen on pursuing her claim. Infact, the court record shows that on the two dates that the suit was fixed for hearing, that is, on 21st November 2016 and 19th June 2017, the hearing was adjourned at the instance of the plaintiff.

9. In view of the foregoing and considering the age of the suit, it is my finding that the plaintiff has failed to show sufficient cause why the suit should not be dismissed for want of prosecution. Consequently, the suit is hereby dismissed for want of prosecution with costs to the defendants.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 11th day of April, 2019.

C. W. GITHUA

JUDGE

In the presence of:

No appearance for the plaintiff

No appearance for the defendants

Mr. Salach: Court Assistant