



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC CASE NO 176 OF 2017

GLADWELL MUTHONI WARUI.....PLAINTIFF/ RESPONDENT

VERSUS

GACHAN NJUGUNA.....1st DEFENDANT/ APPLICANT

CARRIE JANE WANJIRA GACJAU.....2nd DEFENDANT/ APPLICANT

RULING

1. What is coming before me is the Notice to show cause dated the 27th February 2017, issued by the court suo moto pursuant to order 17 rule 2 of the Civil Procedure Rules for parties to appear before court on the 6th April 2017 to show cause why the suit should not be dismissed for want of prosecution.
2. The court while perusing the present matter had noted that the same was filed on the 30th September 2014 vide an originating summons for adverse possession, as well as a Notice of motion wherein parties had been lastly in court on the 15th October 2014 for the prosecution of an ex-parte application dated the 29th September 2014. The court, pursuant to this finding had caused the present notice to be served upon the parties.
3. That when parties appeared in court on the 6th April 2017 in compliance to the said notice, Counsel for the Plaintiff submitted that they could not prosecute the matter on time because on the 11th October 2014, when they had gone to effect service upon the Defendants, they were informed by the 1st Defendant that the 2nd Defendant was deceased and that he was the administrator of the 2nd defendant's estate.
4. That subsequently the 1st Defendant had filed a notice of Preliminary Objection dated the 25th September 2015 and filed on the 8th October 2015 wherein he sought for the suit to be struck out and/ or dismissed giving reasons that the 2nd Defendant was deceased. However, he did not attach any documents to prove the alleged death.
5. That pursuant to this information, the plaintiff had been trying to acquire evidence on the date of the death so as to amend their pleadings, to no avail. That this turn of events had caused the delay in prosecuting the matter.
6. They had then asked that the 1st Defendant who had alleged the death to provide the Plaintiff with the necessary document to enable the matter proceed to its logical conclusion.
7. Counsel holding brief for the 2nd Defendant sought for an adjournment stating that the instructed counsel had received the said notice on short notice and could not therefore be present in court to prosecute the same. The matter was adjourned to the 15th June 2017 to enable counsel for the 2nd Defendant respond to the submissions by the Plaintiff's Counsel.
8. On that date, the 2nd Defendant's Counsel submitted that Counsel for the Plaintiff had not showed cause why the matter should not be dismissed having been filed way back in the year 2014 and no steps having been taken since their last appearance in court on the 15th October 2014 until they were woken up from slumber by the court.
9. That even after they had put in their notice to the effect that the 2nd Defendant was deceased and had been informed upon service of this position, the plaintiff still did nothing to regularize the pleadings.
10. That upon service of the Notice to show cause by the court, it was incumbent of the Plaintiff to file an affidavit in response which again

was not done but instead they had come to court to respond from the bar and to throw the ball back to the 1st Defendant to prove the 2nd Defendant's death.

11. They submitted that the 1st Defendant was not interested in the deceased's Estate and neither was he an administrator thereon. That no cause had been shown by the Plaintiff pursuant to the Notice served upon him to show cause.

12. In rejoinder, Counsel for the Plaintiff reiterated that they had shown cause that it was due to the allegation by the 1st defendant to the effect that the 2nd Defendant was deceased, without any evidence of the same that had derailed them. He relied on section 11 of the Evidence Act to submit that he who alleges must prove and since the 1st defendant had alleged that the 2nd defendant was dead, then it was up to them to prove the death otherwise the pleadings were proper before court. That the plaintiff was desirous to proceed with the matter and as such it should not be dismissed.

13. This being a matter where the court served a Notice to show cause upon the parties to show cause why the matter should not be dismissed, I was persuaded to peruse the court record to satisfy myself whether the Plaintiff has been diligent to prosecute this matter.

14. I note that on the 30th September 2014, the Plaintiff/Applicant was before court to prosecute their application dated the 29th September 2014 ex-parte wherein the court certified it urgent and directed that same be served upon the Defendants for inter partes hearing on the 15th October 2014 on which day counsel for the 1st Defendant was not ready to proceed as he had just come on record and needed 21 days to file his relying affidavit.

15. That the application for adjournment was granted and parties were directed to file their Responses within 7 days and to take a date for hearing in the registry. Parties however did not file any documents.

16. From that day, there were no proceedings in the court file until the 8th October 2015, when the 1st Defendant filed his Notice of Preliminary Objection which was also not prosecuted until the matter was transferred to the Nyahururu Environment and Land Court on the 26th January 2017 from the Nakuru Environment and Land Court and this court subsequently woke the parties from their slumber vide a Notice to show cause dated the 27th February 2017, pursuant to order 17 rule 2 of the Civil Procedure Rules seeking that parties appear before Court on the 6th April 2017 to show cause why the suit should not be dismissed for want of prosecution.

17. Order 17 Rule 2 (1) which contains the legal framework for dismissal of suit for want of prosecution provides as follows:-

“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.”

18. I have considered the reason given by the counsel for the Plaintiff as to why the matter was not prosecuted and looking at the proceeding before the notice was issued, I find that both the parties are to blame for the delay in prosecuting this matter. I also take judicial notice on the situation at the Nakuru Environment and Land Registry before the opening of the Nyahururu Environment and Land Registry and Court where it was not possible to get dates as the diary was always full.

19. Coupled with the provisions of Section 1A Civil Procedure Act on the overriding objective of achieving justice to all the parties **and section 3A of the** Civil Procedure Act which gives courts inherent power to make such orders as may be necessary for the ends of justice to be met, I do find that sufficient cause has been shown to my satisfaction and find that the notice to show cause dated the 27th February 2017 is herein expended.

20. Having noted that there is another file being, ELC No. 18 of 2017 and further, **having had perused both files and having found that the subject matter and the parties are the same in both files, I direct that:**

i. ELC No. 176 of 2017 be and is hereby consolidated with ELC No.18 of 2017. The Plaintiff in ELC No. 176 of 2017 be treated as the 1st Plaintiff while the Plaintiff in ELC No.18 of 2017 be treated as the 2nd Plaintiff herewith thereafter file No. 176 of 2017 shall be the lead file.

ii. The Plaintiffs herein to file their responses to the Preliminary Objection dated the 25th September 2015 within the next 21 days of delivery of this ruling for interparte hearing which shall take place on the date to be given in court.

Dated and delivered at Nyahururu this 19th day of February 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE