



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC NO.632 OF 2011 (O.S)

ZIPPORAH WACEKE MUKUL.....PLAINTIFF

=VERSUS=

DANIEL KIMATA GITHUTHWA.....DEFENDANT

RULING

1. The Defendant /Applicant filed a Notice of Motion dated 26th May 2017, in which he sought dismissal of the Plaintiff/Respondent's suit for want of prosecution. The application is expressed to be brought under Order 17 Rule 2 (1) of the Civil Procedure Rules which 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”.

Sub-rule 3 of Rule 2 provides as follows:-

“Any party to the suit may apply for its dismissal as provided in sub-rule 1”.

2. The applicant contends that the respondent has not taken any step for a period of one year with a view to prosecuting her case. It is on this basis that he seeks its dismissal. The parties were directed to file witness statements after which a date for pre-trial was to be taken at the Registry. These directions were given on 23rd November 2015. The respondent did not take any steps towards prosecuting the suit.

3. The respondent opposed the applicant's application through a replying affidavit sworn on 11th July 2017. The respondent contends that she did not take steps to prosecute her case because of sickness. She states that she was diagnosed with diabetes type 2 and was later found to be hypertensive. These conditions took a toll on her health and finances and was thus unable to instruct her lawyer to proceed with the case.

4. The respondent pleads with the court to spare this case from dismissal urging the court to have it heard on priority basis as the suit property is her only home and the applicant is her in-law who wants to kick her out of the land.

5. I have carefully considered the applicant's application as well as the opposition thereto by the respondent. I have also considered the submissions filed by the parties. The only issue for determination is whether there are grounds disclosed for dismissal of this suit for want of prosecution.

6. I have perused the court record and note that this suit was filed on 11th November 2011. There were interlocutory applications filed which were dealt with. Directions were given that trial was to be by way of viva voce evidence. On 21st January 2016, the applicants advocate fixed the suit for pre-trial conference which was to be on 27th April 2016. The record however shows that the file was not listed. The record shows that the matter was listed for 26th June 2016 but parties were not in court. The file was ordered returned to the registry.

7. The application for dismissal was filed in court on 26th May 2017. It is clear that the last step taken towards prosecution of the case was on 21st January 2016 when a pre-trial conference date was taken. After that, there was no step taken by either party. It is not known which party took the date of 27th June 2016. If it is the court which fixed the date on its own motion, then this was not a step taken by the parties and as there is no evidence of service by the court, I take it that the last step by the parties themselves was on 21st January 2016. There was therefore no step taken by either party for one year until the application for dismissal was filed.

8. The question which then follows is whether this suit should be dismissed for ant of prosecution. In the case of **Ivita Vs Kyumbu 1984 KLR 441 Justice Chesoni** as he then was stated as follows:-

“ The test applied by the Courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable , and if, it is whether justice can be done despite the delay. Thus even if the delay is prolonged if the court is satisfied with the Plaintiff’s excuse for the delay and that justice can still be done to the parties , the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time. It is a matter in the discretion of the Court”.

9. Applying the test in the ***Ivita case (supra)***, I find that there is no inordinate delay in the prosecution of this case. The parties were directed to file witness statements on 23rd November 2015, and thereafter fix the suit for pre-trial. Though there is no evidence that statements were filed, at least there was a step taken by the applicant’s advocate to fix the case for pre-trial. This step was taken on 21st January 2016. The matter was last in court on 27th June 2016. Had I found that the date of 27th June 2016, had been taken by either party then I would have found that the current application is pre mature. However as I am unable to decipher how this date was fixed, I will go by the date of 21st January 2016 and find that the delay is not unreasonable and in any case, the reason given by the respondent for failure to move forward is excusable . I will therefore decline to have this suit dismissed. I will however direct that this suit be transferred to Thika Chief Magistrates’ Court where the suit should be fixed down for hearing on priority basis.

It is so ordered.

Dated, Signed and delivered at **Nairobi** on this **19th** day of **April 2018**.

E.O.OBAGA

JUDGE

In the absence of parties who were aware of the date and time of delivery of Ruling.

Court Assistant: Hilda

E.O.OBAGA

JUDGE