



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO.475 OF 1995

MIKULULO RANCHING (DIRECTED AGRICULTURAL)

CO. LIMITED.....PLAINTIFF

VERSUS

THE DISTRICT COMMISSIONER,

MAKUENI DISTRICT.....1ST DEFENDANT

THE HON. ATTORNEY GENERAL.....2ND DEFENDANT

THE DIRECTOR KENYA WILDLIFE SERVICE.....3RD DEFENDANT

GOVERNMENT OF MAKUENI COUNTY.....4TH DEFENDANT

RULING

1. In the Application dated 27th April, 2018, the Plaintiff is seeking for an order of re-opening this matter for the purpose of prosecuting its Application dated 1st September, 2015. The Application is premised on the grounds that the Plaintiff has premised its entire case on the draft Further Amended Plaintiff filed in court on 3rd December, 2015 and that the failure by the Plaintiff's advocate to prosecute the Application dated 1st September, 2015 was occasioned by an inadvertent mistake.
2. In her Supporting Affidavit, the Plaintiff's advocate deponed that she filed an Application dated 1st September, 2015 for leave to Further Amend the Plaintiff; that this file was then transferred to Nairobi for hearing; that it was after the transfer of the file to Nairobi that the Application of 1st September, 2015 was inadvertently not prosecuted by the Plaintiff and that the Plaintiff's evidence was premised on the draft Further Amended Plaintiff.
3. Counsel deponed that the issues introduced in the Further Amended Plaintiff are necessary to enable the court make a fair and just determination of the case.
4. The Plaintiff's advocate deponed that this is a very old matter; that its just conclusion can only be reached upon determination of all the vital questions that have been raised in the draft Further Amended Plaintiff and that if the case is not re-opened for purposes of prosecuting the Application, the Plaintiff stands to suffer irreparable loss, harm and great injustice.
5. The 3rd Defendant filed Grounds of Opposition in which it deponed that the Application is an attempt by the Plaintiff to engage in piecemeal litigation and to steal a match upon the 3rd Defendant; that if the Application is allowed, it will be necessary to re-open the entire case for hearing and that the Application goes against the overriding objectives of the Civil Procedure Act which is meant to facilitate the just, expeditious, proportionate and affordable resolution of the dispute.
6. The 3rd Defendant finally averred that litigation must come to an end; that further delay in the determination of this case will prejudice and visit an injustice upon the 3rd Defendant and that it is in the interest of justice that the Application be dismissed and the case determined expeditiously.
7. In her oral submissions, the Plaintiff's advocate stated that the Defendants never responded to the Application dated 1st September, 2015 which sought for leave to Further Amend the Plaintiff; that the Plaintiffs have always had the zeal to finalize this matter and that no prejudice will be suffered by the Defendants because they can amend their Defences.

8. Counsel submitted that it will be in the interest of justice if the suit is re-opened for the hearing of the Application seeking for leave to Further Re-Amend the Plaint and that the Plaintiff moved swiftly in the filing of the current Application.
9. The 3rd Defendant's advocate submitted that it was the duty of the Plaintiff to have prosecuted the Application that was filed in the year 2015 for amendment of the Plaint; that having not prosecuted the Application, the Defendants assumed that the Plaintiff had abandoned the Application and that they only filed the current Application after reading the 3rd Defendant's submissions.
10. The 3rd Defendant's counsel submitted that allowing the Application will mean beginning the matter *de novo* and that that will further delay the hearing and disposal of the matter. Both the Plaintiff's and the 3rd Defendant's counsel filed their respective authorities which I have considered.
11. This suit was filed on 24th November, 1995, which is twenty three (23) years ago. The Plaint was then amended on 10th January, 1996. In a Ruling dated 15th June, 2000, the court directed that any party who wished to amend its pleadings should do so within fourteen (14) days. Taking a cue from the said Ruling, the Plaintiff filed a Further Amended Plaint dated 29th June, 2000, with the 3rd Defendant filing an Amended Defence on 19th July, 2000.
12. On 3rd December, 2015, the Plaintiff filed an Application dated 1st September, 2015 in which they sought for the transfer of this file to the Environment and Land Court, Nairobi and for leave to Further Amend the Plaint. The draft Further Amended Plaint was annexed on the Application. The record shows that the Plaintiff did not prosecute the Application dated 1st September, 2015. Indeed, the issue of the unprosecuted Application dated 1st September, 2015 was never raised when the matter came up for directions on 9th February, 2017 and on 14th June, 2017.
13. The hearing of this matter commenced on 24th October, 2017. Again, neither the Plaintiff nor its advocate made reference to any unprosecuted Application. On 19th February, 2018, and after hearing all the witnesses, the court directed all the parties to file their respective submissions.
14. It would appear that it was while preparing her written submissions that the Plaintiff's advocate realised that the Application dated 1st September, 2015 had never been prosecuted. Counsel has deponed that the said Application was not prosecuted because the file was transferred from Machakos to Nairobi and that the non-prosecution of the Application was due to an inadvertent mistake.
15. It is trite that if the Plaintiff's Application to Further Amend the Plaint is heard and determine in favour of the Plaintiff, the Defendants will not only have the right to amend their respective Defences, but the hearing of the matter will commence *de novo*.
16. The only reason that has been given by the Plaintiff's advocate for failure to prosecute the Application dated 1st September, 2015 is that it was an inadvertent mistake which was occasioned by the movement of the court file. In my view, and considering that it is the Plaintiff's advocate who filed the Application of 1st September, 2015, the movement of the court file did not or could not have changed the status of the notes on her file viz-a-viz the status of Application dated 1st September, 2015.
17. Having filed the current Application three (3) year down the line, and after the court has heard all the witnesses, I find that the delay is not only inexcusable but also inordinate. Indeed, this matter is so old that re-opening it for hearing will not only be prejudicial to the 3rd Defendant but will also be a direct affront to the provisions of Article 159(2) (b) of the Constitution which provides that justice shall not be delayed.
18. Considering that the Constitution and the Civil Procedure Act dictates that civil matters should be heard justly, expeditiously and proportionately, I decline to re-open the hearing of this old matter on the grounds shown on the face of the Application. The Application dated 27th April, 2018 is therefore dismissed with costs to the 3rd Defendant.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 21ST DAY OF SEPTEMBER, 2018.

O.A. ANGOTE

JUDGE