



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CIVIL CASE NO.128 OF 2010**

**JASON MUDAKI KIVATI.....PLAINTIFF**

**VERSUS**

**DAVID KENYANI ONGUSU.....DEFENDANT**

**RULING**

This suit was filed on 8<sup>th</sup> December 2010 and the plaint amended on 2<sup>nd</sup> September 2011. The plaintiff seeks the main order that the defendant be evicted from the land parcels **No. E. BUKUSU/W. SANGALO/2736, 2737 and 2738** (the suit land) which are sub-divisions of the land parcel **No. E. BUKUSU/W. SANGALO/950** which was registered in the names of the plaintiff before the defendant sub-divided it.

The defendant filed a defence and counter-claim in which he pleaded, inter alia, that he has been living on 1½ acres of land excised from the parcel **No. E. BUKUSU/W. SANGALO/950** since 1989 which his father bought from one **WEKESA MILIMO MATERE**. That the plaintiff signed documents before the Land Registrar Bungoma on 16<sup>th</sup> December 1996 to sub-divide the land parcel **No. E. BUKUSU/W. SANGALO/950** and was ordered to surrender the original title which he refused. That the defendant is utilizing his portion with distinct boundaries. The defendant therefore counter-claims for an order that the plaintiff surrenders the title to land parcel **No. E. BUKUSU/W. SANGALO** for cancellation and his suit be dismissed.

The defendant further pleaded that this suit is sub-judice as there is pending between the same parties **BUNGOMA SENIOR PRINCIPAL MAGISTRATE CASE NO.120 OF 1997**.

The plaintiff filed a reply to defence and defence to counter-claim in which he joined issues with the defendant and prayed for the dismissal of the counter-claim.

The record shows that the suit was last in Court on 27<sup>th</sup> May 2015 when the late **MUKUNYA J** adjourned it as it could not be reached due to time constraints. On 21<sup>st</sup> February 2018, the Deputy Registrar directed that it be placed before the Judge for dismissal although no date was fixed.

The defendant has now moved to Court vide his Notice of Motion dated 15<sup>th</sup> August 2018 and filed on 20<sup>th</sup> August 2018 seeking the main order that the plaintiff's suit be dismissed for want of prosecution and the defendant's counter claim be listed for hearing.

The application is founded on the grounds set out herein and supported by the defendant's affidavit. The gravamen of the application is that although this suit was filed on 8<sup>th</sup> December 2010 and amended on 2<sup>nd</sup> September 2011 and a defence and counter claim filed, it was last in Court two years ago when the plaintiff was not ready to proceed and since then, the plaintiff has not taken any action to prosecute it.

In opposing the application, the plaintiff filed a replying affidavit claiming that he has not lost interest in the suit but he has been sickly and was even admitted at Moi Teaching and Referral Hospital and also Mbale County Referral Hospital and is recovering gradually.

Further, that **MR. AREBA** who has conduct of this suit has also been in and out of the Country for specialized treatment and so he was not able to hand over the file to another Counsel. That he is desirous to be heard in order to protect his interest and the defendant will not suffer any prejudice.

When the parties appeared before me on 13<sup>th</sup> November 2018, it was agreed that the application be canvassed on the basis of the parties respective affidavits.

Before considering the merits or otherwise of the application, there is an important issue pleaded by the defendant in defence and counter-claim at paragraph 9 to the effect that there is a pending matter between the parties being **BUNGOMA SENIOR PRINCIPAL MAGISTRATE'S COURT CASE NO.120 OF 1997** involving the same parties and the same land and therefore his suit is sub-judice. As

neither of the parties availed proceedings or pleadings in that case I took the liberty to request the Head of ELC Registry **MS. VERONICA MURUTU** to look for it and luckily it was found. I thank her for keeping our old records safe and available.

Upon perusal of the case file in **BUNGOMA SENIOR PRINCIPAL MAGISTRATE'S COURT CASE NO.120 OF 1997**, I have confirmed that indeed it involves the same parties but it is a case filed by the plaintiff against the defendant seeking damages for malicious prosecution. The defendant is alleged to have sued the plaintiff for defamation on the grounds that the defendant had on 16<sup>th</sup> December 1996 uttered the following words:

***“This is the one who stole land.”***

That suit was however dismissed on 15<sup>th</sup> May 2008 for want of prosecution. The rule of sub-judice is found in **Section 6 of the Civil Procedure Act** and provides as follows:

***“No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed”*** Emphasis added.

Clearly, this matter is not sub-judice for the simple reason that although the parties herein are also parties in **BUNGOMA SENIOR PRINCIPAL MAGISTRATE COURT CASE NO.120 OF 1997**, that suit is not pending but was dismissed on 15<sup>th</sup> May 2008. More importantly, however, that suit was a claim for damages for defamation and was not a dispute over the ownership of the suit land. The plea of sub-judice is therefore not well taken and is dismissed.

I shall now consider the defendant's application on its merits. He seeks the dismissal of this suit for want of prosecution. As I have indicated above, this suit was last in Court on 27<sup>th</sup> May 2015 when the late **MUKUNYA J** adjourned it due to time and directed the parties to take a date in the registry for further hearing. It would appear that they did not do so and so on 21<sup>st</sup> February 2018, the Deputy Registrar mentioned it in the absence of the parties and directed that it be placed before the Judge for dismissal. He did not however indicate which date that should be done with the result that the suit remained pending until this application was filed.

It is clear that the parties were last in Court on 27<sup>th</sup> May 2015 and since then, none of the parties has moved the Court until the defendant filed this application on 15<sup>th</sup> August 2018 over three (3) years since the case was in Court. No doubt this suit is ripe for dismissal in terms of the provisions of **Order 17 of the Civil Procedure Rules**.

Having said so, however, it is clear from a reading of **Order 17(2)(1) of the Civil Procedure Rules** that the dismissal of a suit for want of prosecution is not automatic. The Court still retains the discretion to save a suit that has run foul of the said provision which reads:

***“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.”*** Emphasis added.

The use of the term **“may”** means that the Court may or may not dismiss a suit even in cases where no action has been taken by either party for a year but the decision will be made based on the circumstances of each case. In **IVITA V KYUMBU 1984 KLR 441 CHESONI J** (as he then was) held as follows:

***“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant so both parties to the suit must be considered and the position of the Judge too because it is no easy task for the documents and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the Court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the Court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus even if delay is prolonged, if the Court is satisfied will the plaintiff's excuse for the delay, 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 clear therefore that while exercising its discretion whether or not to dismiss a suit for want of prosecution, the Court will consider whether the delay is inordinate, if so, is it excusable and any prejudice that will be caused to the other party. The Court will also consider if justice can still be done to the parties notwithstanding the delay. It must also be remembered that under **Article 50 of the Constitution**, a party has a right to a fair trial and unless such a trial is no longer possible, a Court should aim at saving rather than dismissing a suit. In this case, the plaintiff claims that he has been in and out of hospital but has no single document to show for that. He also avers that his Counsel **MR. AREBA** has been un-well. I have no doubt that **MR. AREBA** is un-well. Indeed since I reported to this Court mid this year, I am yet to meet him but I have been told by Counsel holding his brief that he is indisposed. But again, litigation belongs to the party and not to the client and nothing stopped the plaintiff from instructing another Counsel to act for him in this matter. The plaintiff's explanation for the delay which is clearly inordinate is not satisfactory.

On the other hand, apart from the delay, the defendant has not stated what prejudiced he will suffer if this suit is saved. There is no suggestion that he no longer has his witnesses or evidence to enable him mount a defence to the plaintiff's claim. Most significantly however, the defendant has a Counter-claim of his own to which a defence has been filed. Even if the plaintiff's suit is dismissed, he will still have to serve him for the trial of the counter-claim. Taking all that into account, I am of the view that the cause of interest will best be served if this case is allowed to proceed to hearing on its merits rather than dismissing the plaintiff's suit.

The up-shot of the above is that the Defendant's Notice of Motion dated 15<sup>th</sup> August 2018 is dismissed costs shall be in this cause.

It appears to me that this suit is within the jurisdiction of the subordinate Court at Bungoma and I intend to transfer it to that Court unless the parties can demonstrate to this Court why I should not do so.

**BOAZ N. OLAO**

**JUDGE**

**22<sup>ND</sup> NOVEMBER 2018**

Ruling dated, delivered and signed in open Court this 22<sup>nd</sup> day of November 2018 at Bungoma.

Mr. Wekesa for plaintiff - present

Defendant – present

**BOAZ N. OLAO**

**JUDGE**

**22<sup>ND</sup> NOVEMBER 2018**

**MR. WEKESA:** This suit can be transferred to the Chief Magistrate's Court at Bungoma. Value of land is Ksh.5 million.

**COURT:** This suit is hereby transferred to the Chief Magistrate's Court Bungoma for mention on 4<sup>th</sup> December 2019 to fix hearing date.

**BOAZ N. OLAO**

**JUDGE**

**22<sup>ND</sup> NOVEMBER 2018**