



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC 250 OF 2013

TERESIAH WANJIRU KARIUKIPLAINTIFF

VERSUS

DOMINIC OCHENGE OGORI1ST DEFENDANT

SKOV ESTATES LIMITED2ND DEFENDANT

RULING

(Application to dismiss suit for want of prosecution; suit instituted in year 2011; matter last in court more than 1 year to date of application for dismissal; however not in all instances where 1 year has been attained will suit be dismissed for want of prosecution; will be harsh on plaintiff to dismiss the suit but defendants awarded costs of the application)

1. The application before me is that dated 1st March 2013 and filed on 19th March 2013. It is an application filed by the defendants and brought under the provisions of Order 17 Rule 2(3) of the Civil Procedure Rules, 2010. It seeks the dismissal of this suit for want of prosecution.

The plaintiff has filed Grounds of Opposition to oppose the motion in the following terms :-

- (a) *That the application is a non-starter and an abuse of the due process of the court.*
- (b) *That the suit is not ripe for hearing since parties have not complied with Order 11.*
- (c) *That the suit has not been listed for hearing since there is a pending application for injunction.*
- (d) *That the directions have not yet been taken.*
- (e) *That not even the defendants have filed their statements, list of witnesses and list of documents.*

2. Order 17 Rule 2 of the Civil Procedure Rules is drawn as follows :-

Notice to show cause why suit should not be dismissed [Order 17, rule 2.]

- (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.

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.

(4) The court may dismiss the suit for non-compliance with any direction given under this Order.

3. It will be seen that Rule 2(3) does permit a party to apply for the suit to be dismissed where no step has been taken in the suit for more than one year. So has one year lapsed since the matter was last in court ?

4. This suit was filed on 27th September 2011. The plaintiff sued the two defendants claiming that she is entitled to 120 acres of the land registered as L.R No. 9467 Skov Estate. It was claimed that Skov Estates Limited who were named as 2nd defendant, had illegally sold the plaintiff's share of the land to the 1st defendant. In the suit, the plaintiff sought an order of permanent injunction against the defendants and a declaration that the plaintiff owns the 120 acre piece of land claimed. Together with the plaint, the plaintiff filed an application for injunction under certificate of urgency seeking orders to have the defendants restrained from entering or dealing with the suit property pending inter partes hearing and ultimately pending hearing of the suit. On the same day that the suit was filed, the application was placed before Ouko J (as he then was) who declined to grant interim orders and directed that the application be served for inter partes hearing on 13th October 2011. On this day, the application did not proceed inter partes, but the court (Wendo L. J) did give interim orders as asked for, pending hearing of the application inter partes. The matter was then fixed for inter partes hearing on 17th November 2011. On 17th November 2011, Mr. Mongeri for the plaintiff did not appear and Mr. Githui for the defendants asked that the matter be stood over generally. The court then proceeded to stand over the matter generally. There was no mention of the interim orders which I presume lapsed as they were never extended.

5. That is the last time the matter was in court before this application was filed.

6. It will be observed from the foregoing that this application has been filed about 1 year and 4 months after the matter was last in court. I agree that the 1 year time frame required to lapse before one may file an application for dismissal of suit for want of prosecution has been attained. But I do not think that in every case where 1 year has lapsed, the suit must be dismissed. The court needs to take account of all surrounding circumstances for dismissing a suit before a party is heard is harsh. It must be in the clearest of cases, where there is no doubt that the plaintiff has lost interest in the suit, that the order of dismissal for want of prosecution will be made.

7. For the circumstances of this case, I take judicial notice of the fact that matters in this court are numerous and at times it may be difficult for a party to have his/her matter listed within 1 year. I also note that directions have not been taken in the matter and the defendants have not even filed defence. All I can see is a replying affidavit to the application for injunction. I am unsure whether the defendants would wish to oppose this suit. The application has also been filed just after 4 months from the lapse of the required 1 year, which though, it has attained the statutory period, is not a time lapse that can be said to be lengthy in the circumstances herein.

8. I think in the premises, it will be harsh on the plaintiff if I am to dismiss her suit. I will instead list this matter for directions on a date that I will give in court when delivering this ruling, so that the plaintiff may inform the court on the path that she wants to chart going forward. I will therefore not proceed to dismiss her case for want of prosecution.

9. The only issue left is costs, which are always at the discretion of court. On this score, I cannot fault the defendants for making this application for the statutory period of 1 year had lapsed. In as much as I am not giving them the order of dismissal, I will award them costs of this application.

10. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 21st Day of January 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of -:

Ms. Alwala holding for Mr. Githui for 2nd defendant/applicant

No appearance on part of M/S Mongeri & Co. for plaintiff

1st defendant : Absent

CA : Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

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