



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 241 OF 2011

REV. BENARD NGUYO.....1ST APPLICANT
SHADRACK MUTHAMA.....2ND APPLICANT
JOHN MUSYOKI.....3RD APPLICANT

**(All suing on behalf of African Inland Church
Kenya – Machakos Area)**

VERSUS

BENARD WAMBUA.....1ST RESPONDENT
DAVID NGANGA.....2ND RESPONDENT
JAPHETH IKOMBO.....3RD RESPONDENT
SHADRACK SILA.....4TH RESPONDENT
PETER SILA.....5TH RESPONDENT
AARON MUTUNDU.....6TH RESPONDENT
HARRISSON MULI.....7TH RESPONDENT
DANIEL MUTUKU.....8TH RESPONDENT
PAUL MUNYAO.....9TH RESPONDENT
DANIEL MUSYOKA.....10TH RESPONDENT
JAPHETH MULE.....11TH RESPONDENT
HARRISSON MBUVI.....12TH RESPONDENT
DAVID NGYEMA.....13TH RESPONDENT

RULING

The Application

The application before the court for determination is a Notice of Motion dated 27th May 2015. The Applicants are seeking orders that the court be pleased to set aside the orders made on 25th May 2015 dismissing the suit herein for want of prosecution, to accord the Applicants' Advocates an opportunity to show cause why the suit should not be dismissed and to reinstate the suit for hearing on its merits. The application is premised on the grounds that there is a ruling on an Application dated 10th May 2012 pending in the matter herein which is yet to be delivered, and on which the Court directed that the matter be mentioned on the 30th of January 2013 for the purpose of taking a ruling date.

Further, that there exist other matters directly related to the matter herein in which the issues are similar, namely the leadership of the Africa Inland Church in Kenya.

It was also contended that there are orders issued by this Court sitting in Nairobi in **Petition No. 395 of 2012: Bishop Silas Misoi Yego & others versus Ministry of Provincial Administration and Internal Security & others** on 7th of April 2015, calling for the file herein to be mentioned before the said court on the 29th of May 2015 following an application seeking to consolidate the said files. Further, that this Court's Registry was duly notified of the same via a letter from the High Court Registry at Nairobi dated 17th April 2015 and the Defendants were duly served with the Application and order, together with a mention notice.

The Applicants averred that due to an inadvertent mistake on their Advocates' part they did not attend court on 25th of May 2015 when the Notice to Show Cause why this suit should not be dismissed was scheduled for hearing. The failure was not the Applicants' mistake nor was it a deliberate omission on the part of their advocates on record which should not be visited on them.

Lastly, the Applicants contended that they have all along been willing and ready to prosecute the suit, and had indeed sought to have the same consolidated with other suits raising similar issues as seen above.

Conrad Maloba, the Applicants' Advocate, gave a detailed account of the various suits that are pending in various courts concerning the Applicants and Respondents in a supporting affidavit he swore on 27th May 2015, and he attached the pleadings filed in the said suits and various orders given therein.

The said learned counsel also filed submissions dated 23rd February 2016 wherein the above arguments were reiterated, and various judicial decisions were cited for the position that the Applicants had been actively pursuing the matter in the various suits filed in court, the delay was not in abuse of the process of Court, and that there is no substantial risk to fair trial or serious prejudice that has been caused to the Respondents by the delay in prosecuting the suit.

The Response

The Respondents opposed the Applicant's application in a replying affidavit sworn on 15th July 2015 by the 4th Respondent wherein he averred that the Applicants were represented in court on 25th February 2015 when the date of 25th May 2015 was fixed, and it has not been shown why they were not in court on 25th May 2015.

The Respondents also denied that there is a ruling pending delivery herein, and averred that the Applicants failed to fix the application for purposes of highlighting submissions, even after being served with the application for dismissal of the suit for want of prosecution. It was also alleged that the Applicants have never replied to the application for dismissal of the suit for want of prosecution, which is a clear indication that they were not interested in pursuing the matter.

According to the Respondents, the other matters the Applicants claim to be related to this one involve different issues, the parties in the alleged matters are different and so are the prayers. Reference was made to the various other matters, and it was averred that if the Applicants failed to prosecute this matter because of pendency of others, the most appropriate order is to leave this matter as dismissed and proceed with the others where parties are ready to prosecute. Further, that there is no order for transfer of this suit or stay of its proceedings in any of the said suits.

The Respondents' learned counsel, B.M.Musyoki & Co Advocates filed submissions dated 4th March 2016 wherein the above arguments were reiterated and it was submitted that the delay in taking steps in this matter is inordinate.

The Issues and Determination

I have read and carefully considered the pleadings and submissions filed. I find that the main issue for determination is whether reasonable grounds have been shown for this Court to set aside the orders dismissing the suit herein for want of prosecution. This Court is minded of the applicable law on the dismissal of a suit for want of prosecution as set out in Order 17 Rule 2 of the Civil Procedure Rules, which provides as follows:

“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.”

I note from the court record that the last step taken before the filing for the application for dismissal of suit on 8th April 2014 was a mention before the Deputy Registrar on 24th January 2013, when directions were given that this matter be mentioned before the Judge on 30th January 2013 for fixing a ruling date, which mention did not appear to have taken place. The threshold of one year's delay in prosecuting the suit herein was therefore met, and that it was amenable to dismissal.

For the order of dismissal to be set aside, the Applicants have to demonstrate that the grounds set out Order 45 Rule 1 (b) of the Civil Procedure Rules apply to their application. These grounds which are as follows:

- i. There must be discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicants knowledge or could not be produced by him at the time when the decree was passed or the order made,
- ii. mistake or error apparent on the face of the record,
- iii. any other sufficient reason,
- iv. the application must be made without unreasonable delay.

The Applicants have relied on various other suits that involve the parties herein to show that they are still interested in pursuing the suit herein. I also note that contrary to the Respondents' assertions, the Applicants did file a replying affidavit to the application for dismissal of the suit, which was sworn by the 1st Applicant on 21st July 2014 and filed in Court on 22nd July 2014. The Applicants alleged in their response that the Respondents had filed a case in the Machakos Chief Magistrate's Court (CMCC No. 766 of 2011) over the same subject matter in this suit, and in which case the trial magistrate ruled that the parties were to agree on which cases were to be stayed.

It is therefore evident that there is a multiplicity of cases involving the Applicants and Respondents herein, and it is in the interests of justice that all the said suits be determined together for a final and comprehensive determination of all issues they raise. I also note that in one of those cases, namely Nairobi High Court Petition No. 395 of 2012, there was an order by J. Lenaola dated 8th April 2015 which is annexure “A” to the Applicants’ supporting affidavit, calling for the file for this suit for a mention before the High Court in Nairobi. This order was made before the order dismissing the suit herein, and it is therefore prudent that the same be observed.

Lastly, there is now a constitutional obligation placed on this Court to dispense substantive justice under Article 159(2)(d) of the Constitution and not to pay undue regard to procedural technicalities, and in light of the above reasons I find that there is sufficient ground to set aside the orders of dismissal of this suit given on made on 25th May 2015. In determining the issue whether the suit herein should be reinstated, I am also guided by the ruling of this Court in **Ivita vs Kyumbu (1984) KLR 441** that even if there are good reasons for the delay in prosecuting a suit, the court must also be satisfied that justice will still be done to the parties despite the delay.

The Respondents have not demonstrated any prejudice they will suffer in having the suit herein reinstated, and on the contrary it is in the interests of justice that the issues in the many suits involving the dispute between the parties herein be determined on merit and with finality.

The Applicants’ Notice of Motion dated 27th May 2015 is therefore accordingly allowed, and the orders dismissing the suit herein for want of prosecution made on 25th May 2015 are hereby set aside. The suit herein is accordingly reinstated and shall proceed to full hearing. Lastly, since it is conceded that there was a delay in prosecuting the suit herein, the Applicants shall bear the costs of the Notice of Motion dated 27th May 2015.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 30th day of May 2016.

P. NYAMWEYA

JUDGE