



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL CASE NUMBER 112 OF 2003

JOSEPH KAHONGE MUTHONDU.....PLAINTIFF/APPELLANT

VERSUS

JOHN THUO MACHARIADEFENDANT/RESPONDENT

RULING

1. This case subject of this ruling was filed on the 15th July 2003. Pleadings were closed in August 2003 when the defendant filed its defence. The case is pending hearing.

By his application dated 12th November 2007, the defendant sought an order that the suit be dismissed for want of prosecution on the grounds that since filing of the suit, a period of over four years, the plaintiff has not fixed the case for hearing. It was his submission that the plaintiff has lost interest in the case that has remained hanging on the defendant's neck causing him prejudice.

It was his submission that it is the duty of the plaintiff to take positive steps to prosecute the case and the inertia by the plaintiff goes against the spirit and purport of **Section 1A and 1B of the Civil Procedure Act**.

2. The application is opposed by a replying affidavit sworn on the 4th July 2014 where issues of other pending cases in relation to the subject matter, land **Parcel No. Title No. Nyandarua/Silanga/28** were brought up. In particular, **Nakuru High Court Criminal Appeal No. 218 of 2001 and JR No. 85 of 2010**.

Mr. Chege Gakuhi Advocate for the plaintiff submitted that the historical background of the suit and the subsequent court cases between the parties have delayed the hearing of this suit, and at all times the defendant was in occupation of the suit land. It is his submission that since all the cases are finalised in favour of the plaintiff, in particular the Judicial Review Application, it would be prejudicial to dismiss the suit as it would bring the gains so far to nought, and they will have to start all over again.

3. In response to the submission, Mr. Karanja-Mbugua, Advocate for the defendant referred to court orders given by Koome, Judge (as she then was) on the 20th May 2008 and J. Maraga(as he then was) in December 2009, when the plaintiff was directed to fix the case the for hearing within six months and upon payment of costs to the defendant. It was his further submission that the plaintiff did not obtain stay orders of the proceedings in this case pending hearing and determination of the suits he referred to, that as no reasons have been advanced for the unexplained delay, he sought dismissal of the case.

4. The orders referred to by Mr. Karanja-Mbugua for the plaintiff were not provided to the court. I have taken liberty to peruse the court proceedings on the 20th May 2008, Justice Koome, on the application at

hand, gave the plaintiff six months to prosecute the suit and pay costs of Kshs.3,000/= to the defendant failure to which the defendant was at liberty to apply for the dismissal of the case.

I have also seen the order given by Justice Maraga on the 16th January 2009. The court adjourned the case generally as the plaintiff had failed to comply with the earlier orders issued on the 20th May 2008.

5. The court has considered the application. There is no doubt that the respondent has not complied with the learned Judge's orders above. It is trite that court orders ought to be obeyed. Failure to do so, without any explanation calls for punitive measures. The orders were issued in 2008. The Respondent took no action to prosecute this case. The applicant was awakened by this application. It is true there were cases on going touching on the suit land and both parties were parties in those cases. At all times the applicant, being a party, knew what was going on in the cases. The said cases were finalised by the Ruling in **Judicial Review No. 85 of 2010 delivered on the 17th December 2013** giving title to suit land subject of this case to Kahonge Muthondu, the plaintiff. That is two years ago.

6. I have looked at the plaint filed on the 15th July 2003. The plaintiff sought judgment against the defendant for vacant possession of the suit property among other prayers.

In effect, the Judicial Review application determined the suit as filed, save for enforcement of the decree.

What prejudice then would the respondent/plaintiff suffer if this case is dismissed?

In **Ivita -vs- Kyumbu (1984) e KLR**, the test of whether or not to dismiss a suit for want of prosecution were well stated, that prolonged delay is inexcusable unless it is sufficiently explained and if it is, whether justice could be done to both parties, including the court. It was further held that justice is justice to both parties and the defendant must satisfy the court reasons for the delay or even the plaintiff will be prejudiced by the delay. There is no doubt that there has been inordinate delay in the prosecution of the case. However, the court is satisfied by the explanation of the delay. Both parties to the case were parties in the suits that apparently brought the delay, and a seemingly resolution to this case too.

However, the respondent did not seek redress for the prolonged delay even after the ruling in the Judicial Review application in December 2013. It is now over two years since the said ruling.

7. In view of the above, the court finds that the respondent would no doubt suffer more prejudice by the dismissal of this case than the applicant would. It is a balancing act. To that end and for the interest of justice to all the parties, the court will make the following orders:

1. *That the application dated 12th November 2007 is denied but subject to order 3 and 4 below.*
2. *That this case being a land case and pursuant to the practice Directions issued by the **Hon. The Chief Justice and gazetted** vide **Gazette Notice No. 5178 dated 25th July 2014**, the suit is hereby transferred to the Environment and Land Court for hearing and determination.*
3. *That the Respondent/Plaintiff shall take steps to have the case fixed for hearing in the Environment and Land Court within a period of 60 days from the date of this order.*
4. *That the Respondent/Plaintiff shall pay to the Applicant costs assessed at Shillings 15,000/=including costs ordered by the court on 28th May 2008 - within 30 days of this order.*
5. *That failure by the Respondent to strictly comply with the orders above, the case shall stand dismissed with costs, and without further reference to court.*

It is so ordered.

Dated, signed and delivered in open court this 26th day of May 2016.

JANET MULWA

JUDGE