



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CASE NO. 10 OF 2020

SARAH HILDA NYIVA HILLMAN.....PLAINTIFF/RESPONDENT

VERSUS

JOSEPH RASHIDI MASENGO.....1ST DEFENDANT/APPLICANT

PAULINE NDITO MASENGO2ND DEFENDANT/APPLICANT

LUC RASHIDI NKULWA3RD DEFENDANT/APPLICANT

RULING

1. By a Notice of Motion dated 16th April 2021 and brought under Sections 3 and 19 of the Environment and Land Court Act as well as Sections 1A, 1B and 3A of the Civil Procedure Act and Order 17 Rule 2 (3) of the Civil Procedure Rules, the Defendants/Applicants sought for the following orders;

- (a) **That this suit be dismissed for want of prosecution.**
- (b) **That the cost of this application and the suit herein be borne by the Plaintiff.**

2. The application is premised on the grounds listed on its face as well as the affidavit sworn on 16th April 2021 by Joseph Rashidi Masengo the 1st Defendant. He deposes that this suit was filed on 8th February 2020 by plaintiff dated 5th February 2020; that simultaneous with filing the plaint, the Plaintiff filed a Notice of Motion Application dated 5th February 2020 seeking injunctive orders, which application was not prosecuted; that pleadings were closed on 2nd March 2020 after the Defendants had entered appearance and filed their defence; that one year passed without the Plaintiff taking any step; that the suit property was sold and transferred on 16th March 2020 hence the suit is overtaken by events and that the Plaintiff has lost interest in the suit.

3. Though the application was served on the Plaintiff/Respondent's counsel on 21st June 2021, and the Plaintiff granted leave of 7 days to respond on 14th October 2021, the Plaintiff/Respondent did not file any response to the application and when the matter came up on 25th November 2021, the same was referred for ruling on 26th January 2022.

4. The Application was canvassed by written submissions. The Applicants filed their submissions on 23rd November 2021, while the Plaintiff/Respondent did not file any submissions.

APPLICANT'S SUBMISSIONS

5. The Applicant submitted that pleadings were closed on 2nd March 2020 and that 1 year 2 months had passed without the Plaintiff taking any steps to prosecute his claim. The Applicants relied on the case of *Mukavi Ways Co. Limited vs. Family Bank Limited [2020] eKLR* for the proposition that if a matter remains inactive for over 1 year before the Defendant files an application for dismissal for want of prosecution, then the court may dismiss such matter.

6. The Applicant further contended that the delay to prosecute this matter was prejudicial to the Defendants. They argued that the Applicants were Congolese Citizens and their only business and attachment to Kenya was the suit property which they had inherited from their maternal grandfather; and that therefore the pendency of this matter is a punishment to them as they keep travelling to Kenya and pay for their stay in Kenya. They placed reliance on the case of *Acqualine Distributors Limited vs. Coastal Bottlers Limited [2016] eKLR* where the court held as follows;

“This court notes that as long as the application is subsisting, it remains a thorn in the flesh of the applicant and will

continue so unless this court takes action as required.”

The applicants further relied on the case of *Safina Limited vs. Jamnadas (K) Ltd [2000] eKLR*, which this court has considered.

7. The Applicants also argued that the present suit is nugatory as the suit property was sold to Kerai Square Limited on 16th March 2020. They contend that even after being aware that the suit property was sold to a third party, the Plaintiff has never amended the plaint accordingly. They concluded by submitting that the Plaintiffs conduct shows that she is not keen to prosecute this matter.

ANALYSIS AND DETERMINATION

8. I have carefully considered the application, the supporting affidavit and the submissions filed. In my considered view, the only issue for determination is whether an order for dismissal of this suit for want of prosecution ought to issue against the Plaintiff.

9. The law governing dismissal of suits for want of prosecution is provided for in Order 17 Rule 2 of the Civil Procedure Rules as follows;

(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.”

10. The principles for dismissal of a suit for want of prosecution are now well settled. In the case of *Ivita vs. Kyumbu [1984] KLR 441* the court stated as follows;

“The test is whether the delay is prolonged and inexcusable and, if it is, can justice be done despite such delay.”

11. Similarly in *Mwangi S. Kimenyi vs. Attorney General & Another, Civil Suit Misc. No. 720 of 2009*, the court reiterated the test as follows;

“1. When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties – the Plaintiff, the Defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.

2. Invariably, what should matter to the court is to serve substantive justice through exercise of discretion which is to be guided by the following issues; (1) Whether the delay has been intentional and contumelious; (2) Whether the delay or the conduct of the Plaintiff amounts to an abuse of the court; (3) Whether the delay is inordinate and inexcusable; (4) Whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the defendant and (5) What prejudice will the dismissal cause to the Plaintiff.

By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.”

12. My view therefore is that in determining whether or not to dismiss a suit for want of prosecution, a court ought not only to consider whether there is a one year delay but go further to evaluate whether the delay would prejudice a fair trial of the action and whether in dismissing the claim, substantive justice would have been served to all the parties in the suit.

13. Before a suit is considered ripe for dismissal for want of prosecution, one year should have lapsed without any party taking any action in the suit. In the instant suit, I have perused the court record and I note that this matter first came up on 6th February 2020. On 21st July 2020, the defendants attended the court registry and fixed the matter for hearing of the application dated 19th February 2020, on 23rd September 2020. On 23rd September 2020, both parties appeared in court, where the court granted the Plaintiff leave of 14 days to amend the plaint. Thereafter on 18th June 2021, the Defendant attended the court registry and fixed the instant application dated 16th April 2021 for hearing on 14th October 2021. Therefore the issue that this court ought to address is whether a period of one year had lapsed between the last action taken by the parties and the date of filing the application for dismissal for want of prosecution. As has already been pointed out, the last time the matter came up in court was on 23rd September 2020, yet the application for dismissal was filed on 16th April 2021; which is a period of six months only. It is therefore my finding that the application for dismissal was prematurely filed.

14. The argument that the suit property was sold on 16th March 2020 and therefore the suit is overtaken, does not hold water. First, the disposal of the suit property was done during the pendency of the suit and secondly that is not a reason envisaged under Order 17 Rule 2 of the Civil Procedure Rules.

15. In the premises therefore I find that the Notice of Motion application dated 16th April 2021 lacks merit and the same is dismissed with no order as to costs.

16. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 26TH DAY OF JANUARY 2022
THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

A. NYUKURI

JUDGE

IN THE PRESENCE OF:

MR. MAKAMBO FOR THE DEFENDANTS/APPLICANTS

NO APPEARANCE FOR THE RESPONDENTS

MS JOSEPHINE MISIGO – COURT ASSISTANT