



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO 1084 OF 2007

FRANK RIMIRU MATUTO

NJOGU NJOROGE

RAPHAEL THUKU GAKERE

ELIJAH NGAHI NGUNJIRI

JOHN PAUL KIBOI

JOHN NGUNGI KIMANI

MUTIRITHIA WA WANDU CO.LTDPLAINTIFFS/RESPONDENTS

=VERSUS=

JOHN NJOROGE CHEGE.....DEFENDANT/APPLICANT

RULING

The application coming up for determination is the Defendant's Notice of Motion dated **23rd June 2014**, which is brought under **Order 17 Rule 2 (1) and (3) of the Civil Procedure Rules and section 3A of the Civil Procedure Act** seeking for orders that the Plaintiffs' suit be dismissed for want of prosecution and the costs be provided for.

The application is premised on the grounds stated on the face of the application and supported by the affidavit of the defendant. He deposes that the plaintiff brought this suit in **2003** being **HCCC No 676 of 2003** before it was assigned a new number **ELC No 1084 of 2007**. That since the suit was filed in court, it has not taken off for various reasons each time it came up for hearing. That the last time this suit was dealt with in court was on **23rd January 2012** at the behest of the plaintiff that they wanted to consolidate this case with another but since then no action has been taken to have the suit consolidated or fixed for hearing for a period of more than two years. That it is clear that the plaintiffs have lost interest in this matter therefore it is in the interest of justice that this suit be dismissed for want of prosecution.

This application is opposed. Simeo Mugalavai Keyonzo an advocate of the High Court of Kenya filed a Replying Affidavit on 10th July 2014. He acknowledged that the case has not proceeded since 2012 and that the plaintiffs wanted to consolidate this case with **HCCC No 409 of 2006** which involves the same parties and the same pieces of lands only that in that case those parties were the plaintiffs. He stated that he had not been able to consolidate the case for the reasons that **HCCC No 409 of 2006** was being handled by Messrs JK Mwangi & Co Advocates who were to avail copies of the pleadings to him. He

further stated that the parties have not complied with the provisions of Order 11 Rule 3 of the Civil Procedure Rules and that it is necessary for the same to be complied with before the case is relisted for hearing.

The application was canvassed by way of written submissions. The defendant in his submissions reiterated the contents of his affidavit and relied on the case of **Cecilia Wanjiku Njoroge –vs- National Environmental management Authority ELC No 529 of 2010** where the court held that Order 17 Rule 2(3) entitles a party in a suit to file an application for want of prosecution and that a delay of two years was inordinate. The plaintiffs filed their written submissions on 18th November 2014 where counsel outlined the actions of this suit since its inception. Counsel stated the principles of dismissal for want of prosecution that was set out in the case of **Ivita –Vs-Kyumbu (1984) KLR 442** which state that for a case to be dismissed for want of prosecution the court has to consider whether the delay was prolonged and inexcusable and if it is whether justice can be done despite the delay .Even if the delay is prolonged if the court is satisfied with the plaintiff’s excuse for delay and that justice can still be done to the parties the action will not be dismissed but will be ordered to set down for hearing at the earliest possible time. Counsel concluded that the delay of 1 ½ years is not prolonged and that the suit can still be heard as the evidence and the witnesses are available and justice can still be done to the parties.

The issue for consideration in this application is whether the suit is ripe for dismissal for want of prosecution. Whether there was a delay? Is it inordinate and inexcusable delay and are the defendants likely to be prejudiced by the delay? The test which the court should apply is the one enunciated in the case of **IVITA v KYUMBU [1984] KLR 441**, where the court held that,

“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 with 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.”

Was there inordinate delay?

Inordinate delay for purposes of dismissal for want of prosecution is one which is beyond acceptable limits in the prosecution of cases. The wording of Order 11 rule 2 of the Civil Procedure Rules does not confine the responsibility under that rule to the plaintiffs alone. However the plaintiffs should take such steps as are required by the pre-trial procedures in order to advance the case towards full trial. The last time this suit was dealt with in court was on 25th May 2009 wherein the court marked the matter as Stood over generally after the plaintiff sought an adjournment .The plaintiff also attempted to take hearing dates after inviting the defendant. The plaintiff secured hearing dates three times being 25th February 2010, 11th November 2010 and 23rd January 2012.On 23rd January 2012 when the matter was listed for hearing the plaintiff sought to file an application to consolidate this suit together with ELC No 409 of 2006.

The court gave directions that the plaintiff should file a formal application. Since then, there has been a delay of almost three years. I note that all this time the suit was in abeyance, the defendant did not take any measures to hasten the matter considering that he is a party to the suit. He ought to have also shown this court that he also attempted to have this matter heard and determined by the court but was impeded in one way or another.

Was the delay intentional?

This is borne out of the practice of courts in trying as much as possible to sustain a suit rather than dismiss it without hearing it on merit. The court will normally try to preserve the suit by asking the

plaintiff to take the necessary action including filing pre-trial processes and setting the suit down for hearing within a particular period of time. I have perused the court record and noted that the plaintiffs have filed their witness statements and filed the pre trial questionnaire. The defendant has not complied with pretrial processes. It is therefore my finding that the defendant has also contributed to the delay in the prosecution of this suit.

Is there any substantial risk to fair trial or serious prejudice to the Defendant?

The Defendant has also not elucidated to this court that the delay in prosecuting the suit has given rise to any risk to fair trial or that the delay in prosecuting this case has resulted into severe injustice to him. The defendant must indicate the prejudice he has suffered to justify the dismissal of the suit without trial. His affidavit has not stated any prejudice he has suffered in the delay of prosecuting this matter.

What prejudice will the plaintiff suffer by the dismissal?

It is a rule of law that in assessing the prejudice caused to the defendant by the delay in prosecuting a case, the court should also determine the likely prejudice the dismissal of the suit will occur upon the plaintiff. The plaintiffs' cause of action in this suit is for trespass to the plaintiffs parcels of land and the allegation that the defendant being a councilor organized residents of Kasarani to invade the plaintiffs property with the claim that it was government land. Land being emotive subject in Kenya, is not an issue to be wished away by the court. The issues in this matter arises from the fact that the plaintiffs right to own property and the defendants right to rebut the plaintiffs claim is an issue to be determined in court on merit. It is therefore my finding that the plaintiffs be given a final chance by the court to set down this matter for hearing. The defendant's application dated 23rd June 2014 is hereby dismissed but the plaintiffs will pay costs.

Therefore, the parties herein must comply with Order 11 of the Civil Procedure Rules within 45 days from today. They should also file a statement of agreed issues within 14 days from today which failing, each part to file own issues within 7 days immediately after the expiration of the 14 days that they ought to have filed the agreed issues. Parties shall thereafter get a date from the registry for pre trial after the 45 days. Failure to which this suit shall stand dismissed.

It is so ordered.

Dated, Signed and delivered this 27th day of April 2015

L. GACHERU

JUDGE

In the Presence of:-

None Appearance for Plaintiff/Applicants (though notified)

None Appearance for Defendant/Respondent (though notified)

Hilda – Court Clerk

L. GACHERU

JUDGE