



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KERICHO

CIVIL SUIT NO. 101 OF 2006

JOHN KIPTELE BII.....PLAINTIFF

VERSUS

MOGOGOSIEK TEA FACTORY CO. LTD.DEFENDANT

RULING

(Application to dismiss suit for want of prosecution; suit filed in year 2006; last in court in year 2009; application to dismiss filed in year 2012; no response filed by plaintiff ; counsel arguing that the suit ought not to be dismissed; clear demonstration that plaintiff has lost interest in the case; suit dismissed with costs for want of prosecution)

The application before me is that dated 22nd February, 2011 and filed on 8th March 2012. It is an application filed by the defendant and brought under the provisions of **Order 17 Rule 2(1) (2) and (3)** , and **Order 5 Rule 1** of the **Civil Procedure Rules, 2010** and Section **3A** of the **Civil Procedure Act, Cap 21**, Laws of Kenya. The defendant wants the plaintiff to show cause why this suit should not be dismissed for want of prosecution, and if no cause is shown, for the suit to be dismissed with costs.

The main ground upon which the application is based is that the plaintiff has not taken any step to have the suit heard since filing it. It is the view of the defendant that the plaintiff has lost interest in the case and the delay in prosecuting it is prejudicial to the defendant. The application is supported by the affidavit of Florence Mitey Rono, who has described herself as the Legal Officer of KTDA, the managing agent of the defendant. She has averred that she is charged with management of the legal affairs of the defendant company and that she is duly authorized to make the depositions in the affidavit. She has averred that the case was filed on 24th November 2006; that defence was filed on 16th January 2007 and Reply to Defence on 23rd January 2007 when pleadings closed. She has stated that the suit was last fixed for hearing on 29th May 2008 but that it did not take off. It is her view that the plaintiff has lost interest in the suit and the same should be dismissed.

No replying affidavit was filed by the plaintiff but Mr. Siele for the plaintiff argued that the suit ought not to be dismissed. He stated that he has been out of touch with the plaintiff and asked for me to give him 30 days to either reach the plaintiff or apply to cease acting. He stated that this matter is a land matter and that it will not be in the interests of justice to dismiss it. He also submitted that the replying affidavit is defective as there is no evidence that the deponent is a legal officer or has authority to swear the affidavit. Mr. Caleb Koech for the defendant, on the other hand urged me to dismiss the suit.

I have considered the application and perused the record. The suit was filed on 24 November 2006. The

claim in the suit is that the defendant fraudulently caused the transfer of the plaintiff's land **parcel No. Kericho/Sotik East S-S/593**. In the suit, the plaintiff wants the title of the defendant cancelled. The defendant filed defence in which it explained that the defendant sold to it the suit land. The defence was filed on 16th January 2007. There were several preliminaries which were sorted out and the case fixed for hearing on 28th January 2008. The judge did not sit on that day, probably owing to the volatile prevailing circumstances of that time, as the country was going through a difficult post-election period that led to violence. On that day, the matter was fixed for hearing on 29th May 2008. The file does not seem to have been taken to court on that day. The next entry on record is dated 31st October 2008, when counsel for the plaintiff took a hearing date for 31st March 2009. On 31st March 2009, Mr. Siele for the plaintiffs appeared in court but the matter was taken out as counsel stated that the matter was not ready. Nothing transpired until this application was filed on 8th March 2012, 3 years after the matter was last in court.

It will be noted that it is another 3 years after the application has been filed and there has been no replying affidavit filed by the plaintiff to show cause why the suit should not be dismissed. Neither has any step been taken by the plaintiff to list the matter down for hearing.

This application is premised on the provisions of **Order 5** and **Order 17** of the **Civil Procedure Rules**. On my part, I do not see the applicability of Order 5 which deals with service of summons. The applicable law is **Order 17** and **Order 17 Rule 2** provides as follows :-

Order 17 Rule 2 : Notice to show cause why suit should not be dismissed.

- 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.*

It will be seen from the above that the court may apply to have a party show cause why a suit should not be dismissed if no action is taken for one year. A party, under **Order 17 Rule 3** has leeway to apply for dismissal of a suit if one year lapses. Faced with such an application, the plaintiff needs to show cause why the suit ought not to be dismissed. As I stated earlier, no replying affidavit has been filed to show cause why the suit ought not to be dismissed.

Mr. Siele in his oral submissions stated that the plaintiff is old, and that he himself has lost contact with the plaintiff. I already mentioned that he asked for 30 days to try and trace him. I am not swayed by these submissions. First it has not been demonstrated to me, through evidence, that the plaintiff is old, and even if he was, age by itself is not an excuse not to proceed with a matter already in court. The fact that Mr. Siele has confessed that he does not know the whereabouts of his client is proof enough that the plaintiff has not deemed it fit to visit the offices of his advocate, to see how far his own suit has gone. This is a clear revelation that he has no interest in this matter. The request for 30 days to trace the plaintiff is superfluous as Mr. Siele had 3 years from the time the application was filed to trace his client. I have also not seen anything wrong with the supporting affidavit despite the arguments of Mr. Siele. To me, the argument that the affidavit is defective is a red herring. Even if it was defective, of which I am not in agreement, the record itself shows that the plaintiff has gone to sleep.

The case itself was filed over 8 years ago. No step has been taken to list it down for hearing since 22nd March 2009, a period of over 6 years. This is a significant period of time, which if not satisfactorily explained (and no good explanation has been forthcoming), would be evidence that the plaintiff is indolent and not keen to prosecute his case. That is the only conclusion that a reasonable person may

reach and which I do reach. The continued presence of this suit in the court is certainly causing unnecessary prejudice to the defendant.

Taking all factors into consideration, I am of the opinion that the application must succeed. This suit is hereby dismissed with costs for want of prosecution.

It is so ordered.

Dated, Signed and delivered on this 29th day of May, 2015

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

PRESENT

Mr. Caleb Koech present for Defendant/Applicant

Mr. Joshua Mutai holding brief for Mr. Siele Sigira for Plaintiff/Respondent

C/A; Emmanuel