



REPUBLIC OF KENYA.
IN THE HIGH COURT OF KENYA AT BUSIA.

ELC. NO. 11 OF 2013.

THOMAS COSMAS ODUNGA OKOTI..... PLAINTIFF

VERSUS

ROSELINE SITAWA MUTIBO.....1ST DEFENDANT

BENEDICTO OUYO.....2ND DEFENDANT

THADEUS MATEBA EKESA.....3RD DEFENDANT

TIMOTHY OKIYA OUYO.....4TH DEFENDANT

PANPHIL COSMAS OKOTI.....5TH DEFENDANT

MARY ANYANGO OKOITI.....6TH DEFENDANT

THE COUNTY LAND REGISTRAR, BUSIA.....7TH DEFENDANT

THE CHIEF LAND REGISTRAR.....8TH DEFENDANT

THE ATTORNEY GENERAL.....9TH DEFENDANT

RULING.

Through the Notice of Motion dated 25th February, 2015, counsel for the 6th Defendant prays for the Plaintiff’s suit to be dismissed for want of prosecution with costs. The applicant sets out five grounds marked (a) to (e) on the face of the application and also relies on the supporting affidavit of Francis Omondi sworn on 25th February, 2015.

The application is opposed by the Plaintiff/Respondent through the grounds of opposition dated 12th March, 2015.

During the hearing, Mr. Omondi and Ashioya advocates for the Applicant and Respondent respectively presented their oral submissions.

I have carefully considered the grounds on the application, the supporting affidavit, grounds of opposition and submissions and find as follows;

1. That the issue to be decided is first whether the suit has remained for over one year without any of the

parties taking any step towards prosecuting it. Secondly, whether the delay has been inexcusable. The application is brought under Order 17 Rule 2 (3) of the Civil Procedure Rules which allows any party to a suit to move the court for dismissal orders.

2. That this suit was commenced through the plaint dated 4th February, 2013 filed through M/S. Manwari & company advocates, naming the Applicant herein as the 6th Defendant. There are other eight Defendants. The 1st to 5th Defendant's entered appearance vide memorandum of appearance dated 19th March, 2013 filed through M/S. Bogonko, Otanga and company advocates while the 6th Defendant/Applicant entered appearance through the memorandum dated 20th March, 2013 filed through M/S. Omondi & co. advocates. The 6th Defendant/Applicant then filed a statement of defence dated 10th April, 2013 through her advocate. The defence for the 1st to 5th Defendants dated 17th April, 2013, was filed by their counsel on 18th April, 2013. The Senior Principal Litigation counsel filed the statement of defence for 7th to 9th Defendants dated 1st July, 2013, on the 2nd July, 2013. By notice of change of advocate dated 29th November, 2013, M/S. Ashioya & company advocates came on record for the Plaintiff/Respondent in place of M/S. Manwari & company advocate. The pleadings in this suit have therefore been closed.

3. That before the filing of the Notice of Motion dated 25th February, 2015 seeking to have the suit dismissed for want of prosecution, the case had been in court last on the 6th November, 2013 when the Plaintiff/Applicant applied for adjournment to instruct another counsel before his application under certificate of urgency dated 5th February, 2013 could be heard. The court allowed the application and directed as follows;

“ So as to ensure the Plaintiff does not delay the hearing of the application dated 5th February, 2013 while enjoying the interim orders, the court issues the following orders;

- 1. Plaintiff application for adjournment granted to enable him get counsel for [within] two weeks.***
- 2. That the interim orders of 13th March, 2013 are hereby vacated.***
- 3. That the Plaintiff to pay court adjournment fee and costs for 1st to 6th Defendants.***
- 4. A suit hearing date be taken at the registry.”***

Though the court notes that the Plaintiff/Respondent instructed a new counsel who filed a notice of change of advocate dated 29th November, 2013, it is clear that he did not take any other or further step to prosecute this case by the time the notice of motion dated 25th February, 2015 was filed..

4. That between 6th November, 2013 when the matter was in court last, to 27th February, 2015 when the notice of motion dated 25th February, 2015 was filed, a period of over 15 months had passed without any steps being taken by either of the parties. If the court was to take the filing of notice of change of advocate dated 29th November, 2013 and filed on 2nd December, 2013 to be a step towards prosecuting the case, then by the time the notice of motion was filed, a period of about 14 months had elapsed. The Plaintiff/Respondent has not explained what challenges, if any, prevented him from taking steps to prosecute his case for that period of over one year. While any of the Defendants could have taken steps to move the case forward, they chose not to. In any case, they have no obligation to take any steps unless if they chose to. They may choose to wait and after the one year passes without any step being taken by the Plaintiff, move the court for dismissal of the suit as is the situation in this case.

5. That the court has discretionary powers to allow the dismissal of a suit that has remained for over a year without action towards its prosecution being taken. The 6th Defendant/Applicant has established that no step or action has been taken in this case for a period of over one year before the filing of the notice of motion dated 25th February, 2015. The Plaintiff/Respondent did not offer or tender any explanation for his failure to take any steps during that period. The failure to take action or step within that period cannot be said to be a technicality that can be excused under Article 159 (2) (d) of the Constitution as the same

article abhors justice being delayed at sub article (2) (b). That further, the overriding objective set out in Section 1A of the Civil Procedure Act is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes which cannot be attained where parties file suits and fail to take appropriate steps to prosecute them.

6. That having found as above, the court finds that the Plaintiff/Respondent has not shown any determination to prosecute his case without undue delay. The 6th Defendant/Applicant has shown that the Plaintiff/Respondent stayed for over one year without taking any steps to prosecute this case by the time the notice of motion dated 25th February, 2015 was filed. The application dated 25th February, 2015 is therefore allowed and the Plaintiff's suit is hereby dismissed with costs to the 6th Defendant.

It is so ordered.

S.M. KIBUNJA.

JUDGE.

DATED AND DELIVERED ON 27TH DAY OF MAY, 2015.

IN THE PRESENCE OF;

PLAINTIFF.....PRESENT.....

DEFENDANTS.;ABSENT.....

COUNSEL...MR. IPAPU FOR OMONDI FOR THE 6TH DEFENDANT.....

JUDGE