



REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT
MOMBASA LAW COURTS
ELC PETITION NO. 6 OF 2017

IN THE MATTER OF REVOCATION/ANNULMENT OF GRANT

1. IBRAHIM SHEIKH ABDULLA t/a GULSHAN RESTAURANT.....PETITIONERS

- VERSUS -

1. ZAFFER EBRAHIM TAYABALI KARIMZEE

2. MUSTAFA EBRAHIM TAYABBILOY KARIMZEE

3. MUSTAFA FAZALABBAS MUHAMMEDALI

4. HASSAN SHEIKH ABDALLA

5. NATIONAL LAND COMMISSIONS

6. LAND REGISTRAR MOMBASA

7. HASHIM GOT SAT.....RESPONDENTS

RULING

I. Introduction

1. What is before this Honorable Court for determination is the Notice of Motion application dated 25th March, 2021 by the 1st, 2nd, 4th and 7th Respondents/Applicants. It is brought under the Provisions of Sections 3A of the Civil Procedure Act, order 17 Rules 2 (3) Order 51 Rule 1 of the Civil Procedure Rules 2010.

II. The 1st, 2nd, 4th & 7th Respondents/Applicants.

2. The 1st, 2nd, 4th and 7th Respondents/Applicants seeks for the following orders:-

(a) That the Petitioner's Petition dated 18th April, 2017 be dismissed with Costs for want of prosecution.

(b) That the costs of this application be borne by the Petitioner.

3. The 1st, 2nd, 4th and 7th Respondents/Applicants application is premised on the facts, grounds testimony and averments of the 8 paragraphed Supporting Affidavit of PETER OMWENGA sworn and dated on 25th March, 2021. He deponed that he was an Advocate of the High Court of Kenya practicing as such at the Law Firm of Messrs. Mogaka Omwenga & Mabeya Advocates who had the conduct of the matter and hence well versed to the matter.

4. He held that the Petition had never been scheduled for hearing since it was filed on 19th April, 2017 to date. He stressed that since then the Petitioner had never set the matter for hearing at all. He argued that it showed the Petitioner had lost interest in the Petition and as a result had not set it down for hearing which was over four (4) years down the line. He therefore urged for the suit to be dismissed for want of prosecution with costs.

III. The Replying Affidavit by the Petitioner.

5. On 7th July, 2021, the Petitioner filed a 14 paragraphed Replying Affidavit sworn by IBRAHIM SHEIKH ABDULLA – the Petitioner hereof and dated 6th July, 2021. He deposed that he had always taken steps from the issue he filed the Petition. He held that the steps he took were in the form of filing for Notice of Motion application on 18th April, 2017 seeking for injunction and which he succeeded. Upon serving the Respondents they were in breach of the said orders which compelled him to file for contempt application dated 22.2.2019. He stated that the Notice of Motion application dated 22.2.2019 for contempt was dismissed by this court on 7th July, 2020, being aggrieved by this decision he preferred an appeal at the Court of Appeal.

6. In the meanwhile he filed another Notice of Motion Application dated 19th December, 2019 for an injunction and on 23rd December, 2019 he obtained the orders which are still in force. He admits not taking any steps on this Notice of Motion application dated 19th December, 2019 as he gave the one for contempt precedence. Thus the Notice of Motion application by the Respondent does not meet the requirements for the dismissal of suit for want of prosecution. Hence he urged court to dismiss it with costs.

III. Submissions

7. On 27th July, 2021 while in the presence of all the parties, Court directed that the Notice of Motion dated 25th March, 2021 be disposed off by way of written submissions pursuant to that by 6th December, 2021 all parties had fully complied and a ruling date was reserved accordingly.

A. The 1st, 2nd, 4th and 7th Respondents/Applicants Written Submissions

8. On 22nd July, 2021, the Law firm of Messrs. Mogaka Omwenga and Mabeya Advocates for the 1st, 2nd, 4th and 7th Respondents filed their written submissions dated 22nd July, 2021. Mr. Omwenga Advocate submitted that the instant Petition on 19th April, 2017 and to date it had never been prosecuted – which was over four (4) years. He submitted that the Petitioner being a tenant to a suit property was just out to frustrate the Landlord for no apparent good reason or justifiable cause. He had not taken any step to prosecute his Petition since he filed it apart from merely hearing of myriad of applications filed before this court and the Court of Appeal.

9. He submitted that the Petitioner had failed to provide any credible explanation for the failure in prosecuting the Petition, and the excuse on Covid-19 Pandemic was out of scope as even before the said health issue the Petitioner had still not taken any step and besides matters would still be heard by virtual means.

To buttress their case they relied on several authorities being *Pacton –Versus- All Supp 1971 al ER 370 at page 371, Raindrops Limited –Versus- County Government of Kilifi (2020) eKLR, Nairobi Civil Case No. 148 of 2018 Tirth Constructions Limited –Versus- Arion Hotels Limited.*

The Learned Counsel held that the Petitioner was not candid in explaining the delay and this should have deprived him of equitable relief and urged Court to allow their Notice of Motion application dated 25th March, 2021.

B. The Petitioner's Written Submissions

10. On 22nd November, 2021, the Law firm of Messrs. Aboubakar Mwana Kitina & Company Advocates for the Petitioner filed their written submissions dated 18th November, 2021. Mr. Aboubakar Advocates submitted that considering that the suit was not ready for hearing it would not be dismissed for want of prosecution, there were still several applications and a pending appeal against dismissal of the application for contempt meaning according to them the suit was still alive and not abandoned.

The Learned Counsel cited Provisions of Order 17 Rule 2(3) of the Civil Procedure Rules 2010 and several authorities of *Mariam Bakari Kisuse -Versus- Momo Mohamed Matan ELC. No. 173 of 2018, Utalii Transport Company Limited –Versus- NIC Bank & Another.*

11. To hold that the Petitioner had taken steps on this matter by filing several applications in court and holding that the application be allowed if the delay was prolonged and un-excusable. He held that the court should be guided by a high sense of Promoting the Principles of substantive Justice enshrined in the Constitution and therefore convinced that the circumstance of this case deserved a lenient exercise of discretions by the court in favour of sustaining rather than dismissing the suit.

He prayed that the Notice of Motion Application by the Respondent be disallowed with costs.

IV. Analysis and Determination

12. I have considered all the pleadings in this matter arisen from the bounds of the Notice of Motion application dated 25th March, 2021 by the 1st, 2nd, 4th and 7th Respondents herein wanting to have the Petition dated 18th April, 2017 dismissed for want of prosecution, the grounds adduced the Replying Affidavit by the Petitioner the articulate written submissions by the parties herein the cited authorities to boot and the relevant provisions of the law.

In order to arrive at an informed, just and fair decision I have framed the following three (3) issues for determination these are:-

(a) *Whether the Notice of Motion application dated 25th March, 2021 by the 1st, 2nd, 4th and 7th Respondents against the suit by the Petitioner meets the required fundamental standards enshrined under the Provision of order 17 Rules 3(1) and (2) of the Civil Procedure Rules 2010.*

(b) *Whether the parties are entitled to the relief sought.*

(c) *Who should meet the costs of the Notice of Motion application dated 25th March, 2021.*

ISSUE NO. A. Whether the Notice of Motion application dated 25th March, 2021 by the 1st, 2nd, 4th and 7th Respondents against the suit by the Petitioner meets the required fundamental standards enshrined under the Provision of order 17 Rules 3(1) and (2) of the Civil Procedure Rules 2010.

Brief Facts.

13. The Petition was instituted on 18th April 2017 together with a Notice of Motion application seeking injunction orders by the Petitioner against the Respondents. This close to five (5) years ago. The Honorable Court granted interim orders. According to the Petitioner the said orders were not obeyed prompting the Petitioner to file an application for contempt dated 22nd February, 2019. This application was argued but dismissed for lack of merit on 7th July, 2020.

Being aggrieved by the said ruling the Petitioner preferred an appeal at the Court of Appeal. The said appeal is still pending hearing and final determination by the said Superior Court.

14. In the meantime, on 19th December, 2019 the Petitioner filed yet another Notice of Motion application seeking for injunction orders and whereby on 23rd December 2019 this court granted the interim orders. This application still pending hearing “*inter-partes*” and determination. Actually it was scheduled for hearing on 12th February, 2020 but on that material day the Honorable Court was not sitting. In other words, there is still pending to be heard the Notice of Motion application for injunction and the appeal at the Court of Appeal against the ruling on the dismissal of the Notice of Motion application for contempt.

15. Now turning to the issue under this sub-heading. The Mo Legal substractions for dismissal of suits for want of prosecution is founded on the Principles that litigation must be expedited, and concluded by parties who come to court for seeking justice. To assists in clearing backlogs in court and the ever increasing over-loads restoring bad public confidence and trust on the judiciary. Upon filing of cases parties should efficiently and effectively be seen to fast track their hearing and determination. There should be no delay at all based on legal maxim – ***Justice delayed is justice denied***” Nonetheless, should there be any delay arising from one substantive and justifiable logistical cause or reason, the same should be inordinate, unreasonable and inexcusable as that would be doing grave injustice to one side or the other or both. In such circumstances, the Honorable May in its discretion may dismiss the action straight away. But be that as it may, the discretionary powers granted to court hereby by law have to be exercised judicially, fairly and capriciously.

16. The Provisions of Order 17 Rule 2 (3) of the Civil Procedure Rules provides 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.

3. any party to the suit may apply for its dismissal as provided in Sub-rule 1”

17. In order for this Principles to be applicable the following need to be demonstrated:-

(a) That no application has been made or step taken by either party for one (1) year from the time of filing the suit and

(b) That the Respondents have failed to comply with the directions of the court clearly.

In so doing, the test applied by court in the application for dismissal of suits for want of prosecution is whether the delay is prolonged and inexcusable and if it is, whether justice can be done despite the delay. In other words if the delay is satisfied with the Plaintiff’s excuse for the delay and the parties are still keen and interested in pursuing their matter going forward in the fullness of time, justice can still be done to the parties before court, and hence the action would not be to dismiss it but direct that it be heard at the earliest time possible and available.

This court on the legal ration of Order 17 (2) (3) of the Civil Procedure Rules relies on the decision of ***Investment Limited –Versus- G4s Security Services Limited (2015) eKLR where court held :- “This order is permissive and allows quite significant room for exercise of discretion to sustain the suit. And I think it is so especially when one fathoms the requirements of Article 159 of the Constitution of Kenya and the overriding objective when demands of courts to strive often, unless for very good cause, to serve substantive justice. This is well understood in the legal reality that dismissal of a suit without hearing it on merit is such draconian act comparable only to the proverbial “Sword of the Damocles”. But in reality should be checked against yet another equally important constitutional demand that case should be disposed of expeditiously, which is founded upon the old adage and now an express Constitutional Principle of Justice under Article 159 (2) of the Constitution of Kenya that justice delayed is justice denied. Here I am reminded that justice is to all the parties not only to the Plaintiff. This is the test I shall apply.***

ISSUE No. B. Whether the parties are entitled to the relief sought.

18. From the facts and the legal principles on Order 17 Rule 2 (3) of the Civil Procedure Rules 2010, it is graphically clear that the suit was filed on 18th April, 2017 by the Petitioner, who happens to be a tenant to the Respondent, the Landlord. The only steps the Petitioner has taken is to engage this court and the Court of Appeal with myriad of applicants seeking injunction orders and to cite the Respondent for being in breach in contempt of court orders.

This Honorable Court is anxious to know the substantive reason the Petitioner has prolonged the fixing of the Petition for over four (4) years certainly the delay is inexcusable, inordinate and unreasonable at the chagrin of the Respondent the Landlords. The Petitioner's action has definitely caused the Respondents agony, anguish and frustrations for no apparent good reasons. The court has not been shown any order in form of stay of proceedings from the Court of Appeal which would bar this matter from proceedings to the logical conclusion. Orders of stay of proceedings or execution are not mere formalities as they are intended to serve a specific purpose of proceedings of case.

19. This Honorable Court takes Judicial Notice is taken to the fact that this court are taking old and delayed matters so mechanically through issuance of the Notices to show cause under Order 17 2 91) and which are not a common fracture in the daily cause list and the judges service week activity all intended to clear these cases which seem to have stagnated and stalled at the behest of the parties.

For this very reason the application must succeed and the Petitioner's suit be considered for dismissal for want of prosecution.

ISSUE No. C. Who will bear the cost by the Petitioner.

20. The provisions of Section 27(1) of the Civil procedure Act, Cap. 21 holds that costs follow the events. In this case, as Court finds that the 1st, 2nd, 4th and 7th respondents have succeeded in their Notice of Motion application dated 25th march, 2021, they are entitled to costs accordingly.

V. Conclusion and Disposal.

21. Ultimately, from the above detailed analysis of facts and law prefacing of facts and law pertaining to this application I find the Notice of Motion application dated 25th March, 2021 by the 1st, 2nd, 4th and 7th Respondents/Applicants has merit is allowed with costs but on the fulfillment of the following pre conditions :-

(a) THAT the Notice of Motion application dated 25th March, 2021 be and is hereby allowed with costs but only on fulfillment of these conditions:-

(i) THAT the Petitioner is granted 90 days leave to have fixed and had the Petition dated 18th April 2017 filed on 19th April, 2017 heard and finally determined.

(ii) Should the Petitioner fail to have taken the step stated here above Under Clause 1 (a) (i) of this Order on or before 31st July, 2022 this orders will unless other stated by operation of law the Notice of Motion application dated 25th March, 2021 and the orders sought will automatically stand allowed without any further reference to this court.

(a) THAT the costs of this Notice of Motion application to be borne by the Petitioner to the 1st, 2nd, 4th and 7th Respondents/Applicants.

IT IS SO ORDERED ACORDINGLY.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 14TH DAY OF MARCH 2022.

HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIROMNENT AND LAND COURT

MOMBASA

In the presence of:

Mr. Ben, Court Assistant;

No appearance for the Petitioner.

M/s. Ondieki holding brief for Mr. Omwenga Advocate for the 1st, 2nd, 4th and 7th Applicants/Respondents

No Appearance for the 3rd Respondent.

No Appearance for the 5th Respondent.

No Appearance for the 6th Respondent.