



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL SUIT NO. 127 OF 2001

HIRBO GISSON GOINE ABDRAHMAN KOCORE ON HEHALF OF THE
REPRESENTATIVE COMMITTEE.....PLAINTIFF

VERSUS

JEREMIAH TEBURI ON THE BEHALF OF THE
REPRESENTATIVE COMMITTEE.....1ST DEFENDANT
GUYO OLULIA CORDINATOR GTZ.....2ND DEFENDANT
THE CLERK MARSABIT COUNTY COUNCIL.....3RD DEFENDANT

R U L I N G

This application is dated 13th March, 2012 and seeks orders;-

1. ***THAT the Honourable court be pleased to dismiss this suit for want of prosecution.***
2. ***THAT the costs of this application and of the suit be awarded to the Defendants.***

The application has the following grounds;

1. ***This suit was last in court on 3rd February, 2010 when it was stood over generally. Since then the plaintiff has not taken any steps towards the prosecution of his claim against the Defendants.***
2. ***The onus is on the plaintiff to prosecute his suit but to do so expeditiously.***

The supporting Affidavit of this application is dated 13th day of March, 2013 and was sworn by David Mbaya John, the applicant's advocate. It states as follows:

1. ***THAT I am an advocate of the High Court of Kenya and practicing as such in the firm of M/S DAVID JOHN MBAYA & CO. ADVOCATES who have the conduct of this matter on behalf of the Defendants and therefore duly competent and authorised to swear this affidavit.***
2. ***THAT this suit was filed on 16th July, 2001 vide the plaintiff's plaint dated 16th July, 2001 and upon service of summons the Defendants instructed our firm to enter appearance and file a statement of defence on their behalf, which we did on 6th August, 2001 and 3rd September 2001 respectively.***
3. ***THAT the case was last in court on 3rd February 2010 when it was stood over generally.***

4. ***THAT*** since then the plaintiff has not taken any steps to prosecute his claim against the Defendants.
5. ***THAT*** a cursory look at the court records reveals that the Defendants have set down this matter for hearing on a number of occasions and issued hearing notices to the plaintiff's advocate (Annexed herewith find copies of hearing notices and letters inviting the plaintiff to take hearing dates marked DJM1-M)
6. ***THAT*** from all the foregoing it is therefore obvious the plaintiffs are not interested in pursuing the claim against the Defendants.
7. ***THAT*** the plaintiffs are culpable of inordinate delay in the prosecution of this matter.
8. ***THAT*** the onus is on the plaintiff not only to prosecute the matter but also to do so expeditiously.
9. ***THAT I*** therefore swear this Affidavit in support of the Defendants'

application for dismissal of suit for want of prosecution.

10. ***THAT*** what is deponed herein above is true and within my personal knowledge.

The application has been opposed through a Replying Affidavit sworn by Leonard Kibagendi Ondari, the plaintiff's advocate. It states as follows:

1. ***THAT, I am a male adult of sound mind capable of swearing this affidavit.***
2. ***THAT, I have the conduct of this case right from its inception and I am competent therefore to depone on some facts herein.***
3. ***THAT, this case is indeed of much public interest.***
4. ***THAT, this case is partly heard before Justice Ruth Sitati as she was then.***
5. ***THAT, two witnesses on behalf of the plaintiffs had testified precisely on 12.06.2000 and 20.09.2006.***
6. ***THAT, upon transfer of Justice Ruth Sitati, this case was listed several times by the plaintiff but could not take off for one reason or another i.e., 3rd February 2010, 6th July, 2011 etc.***
7. ***THAT, its not true that the plaintiff have lost interest in this suit, neither is it true that the defendants have been listing this case solely. We rely on the court record.***
8. ***THAT, the circumstances under which this case has been adjourned have been clearly stated in previous proceedings.***
9. ***THAT, its trite law that a matter that is partly heard cannot be dismissed for want of prosecution but only on the evidence on record. The plaintiffs' evidence is on record.***
10. ***THAT, its trite law that a matter that's partly heard before another judge cannot proceed for hearing before another judge unless directions are given.***
11. ***THAT, the defendants equally had a duty to list the matter for directions before fixing the matter for hearing.***
12. ***THAT, as its today, this matter is not ripe for dismissal unless directions are given.***
13. ***THAT, the above notwithstanding the 1st plaintiff is deceased as I informed the court on 15th October, 2014, and he is yet to be substituted or removed from proceedings herein.***
14. ***THAT, from my knowledge of practice of law, no suit should proceed either on substantive hearing or hearing of any application unless substitution has been done or a party removed as appropriate.***
15. ***THAT, on 25th of July 2014 when I was served with a hearing notice, I signed in protest stating clearly that one of my clients is deceased. Annexed is a copy of the hearing notice marked LKO-01.***
16. ***THAT, I immediately wrote to my clients through last known address- Annexed is a copy of the letter marked LKO-02.***
17. ***THAT, to date as the plaintiffs' counsel I have not received any communication from my clients. To be precise I have lost touch with my clients.***
18. ***THAT, as a counsel I have performed my duties to my clients with utmost diligence and it's morally and legally wrong for the plaintiffs to suffer a drastic measure of a case they have presented evidence in court and there is no counter evidence against them.***
19. ***THAT, as counsel for the plaintiff, I deny that there has been laxity on my part or wrong***

- doing, and even if there was any, it cannot be visited upon the plaintiffs who are my clients.*
20. *THAT, this court may also take Judicial notice that there is and still there is today a back log and getting a date in the registry between 2007 and 2011 was an uphill task not only in Meru but also elsewhere.*
 21. *THAT, this is nevertheless a land matter. Land matters are sensitive issues all over. Dismissing a matter for want of prosecution without giving a chance to parties would be unfair because the court would not have assisted the parties in any way.*
 22. *THAT, courts are Avenues of justice and not places where rights of parties are trumped upon on simple technicalities.*
 23. *THAT, I therefore swear this affidavit in opposition to the application dated 13th March, 2013 which application as at 15th October was not served on us.*
 24. *THAT, there is no service of that application and I have had to rely on the court copy to write this replying affidavit, an act that was purely calculated to cause injustice.*
 25. *THAT, whatever is deponed herein is true to the best of my knowledge and belief.*

The Respondents have proffered the following authorities:

1. *Civil Appeal No. 151/2010 – Moses Muriira & 2 OTHERS Versus Maingi Makuru & Geoffrey Mwirigi Maingi (Court of Appeal, Nyeri)*
2. *Civil Appeal No. 59 and 89 of 1983 [1984 KLR 572], Court of Appeal Mombasa.*

Order 17 Rule 2(1) of the Civil Procedure Rules governs dismissal of suits for non-prosecution. It states:

“2(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(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.”

“2(3) Any party to the suit may apply for its dismissal as provided in sub- rule 1.”

This application has been brought by the defendants/applicant under Order 17 Rule 2(3) of the Civil Procedure Rules and Section 3 A of the Civil Procedure Act. This suit was filed on 16th July, 2001. There is no dispute that the suit is part heard. There is also no dispute that it was last in Court on 3rd February, 2010 when Lady Justice M. G. Mugo, J, issued the following orders:

1. *For reasons of absence of counsel the suit can not proceed.*
2. *The same is hereby marked S.O.G.*
3. *The plaintiff shall pay C.A.F before the matter is allocated a fresh date.*

On 15.10.2014 the advocate for the defendants urged the court to allocate this application a priority hearing date as the suit affected the implementation of a major project that affected the entire Marsabit County. He told the court that he had taken dates more than 13 times. He lamented that it was more than 16 years since the suit had been instituted.

Mr. Ondari for the defendants told the Court that the 1st plaintiff was deceased and that the 3rd defendant, the Clerk, Marsabit County Council, did not exist. He told the court that he had not substituted the 1st plaintiff as he had not received his death certificate. He, however, did not tell the court when he died and if the suit as concerned him, had abated.

This court directed that this application be heard on 23.10.2014.

During the hearing of the application M/S Nelima for the applicant told the Court that she would wholly rely on the grounds on the face of the application and the supporting affidavit of advocate D.J

Mbaya.

She told the Court that she had looked at the replying affidavit of Advocate Ondari for the respondent. She pointed out that at paragraph 13, it had been deponed that the reason why the case had not moved was because the 1st plaintiff was dead. She opined that no document had been annexed to confirm this claim. She also submitted that this was not a good reason for the court not to dismiss the suit.

She also pointed out that at paragraph 17 of the Replying Affidavit, Counsel for the respondent had admitted that he had had no communication with his clients. She argued that this was confirmation that the plaintiffs had lost interest in the case since they were last in Court in 2006. She proffered that if indeed Counsel had lost communication with his clients, he should have filed an application to cease acting for the plaintiffs.

She concluded her submissions by saying that Counsel for the respondents had not adduced genuine reasons to persuade the court not to allow the application.

Advocate Ondari told the Court that he opposed the application. He said that he was relying on his own affidavit sworn on 21.10.2014 and stated that the affidavit was elaborate enough. He also said that he supported his position by proffering the following 2 authorities

1. ***Civil Appeal No. 157 of 2010 – Moses Maingi & Others Versus Maingi Makuru & Another (Court of Appeal).***
2. ***Mugacha Versus Mwakubundu [1984] KLR 572 – Court of Appeal***

He told the Court that the 2 cases had set the parameters for dismissal of suits for want of prosecution. He invited the Court to read and consider the 2 authorities.

DETERMINATION

There is no dispute that this suit was filed on 16th July, 2001. There is also no dispute that the suit was last in Court on 3rd February, 2010 when it was stood over generally and the plaintiff was ordered to pay Court Adjournment Fees (CAF) before the matter could be allocated a fresh date. I am unable to find out if the plaintiff ever paid the CAF.

An examination of the Court file shows that in her ruling on 12.7.2006, the Hon. Lady Justice Sitati issued the following orders. Among others;

(3)Plaintiffs to pay today's CAF of Kshs.1000/= before next hearing date; and also pay defendants' costs for today in any event.

(4) Because of the age of this case, this is the first and last adjournment to the plaintiffs.

Again on 20.9.2006, the Hon. Lady Justice Sitati, J, Ordered the plaintiffs to pay Kshs.1000/= CAF and to pay Kshs. 5000/= as witness expenses, before the next hearing date. As already seen, the suit was last in court on 3.2.2010 when Lady Justice M. G. Mugo, J, stood it over generally and ordered the plaintiffs to pay CAF before the case could be allocated a fresh date.

A perusal of the court file shows that the defendants have all along been more active than the plaintiffs in trying to have the suit heard.

In his replying affidavit at paragraph 9, Advocate Ondari states: "THAT, it is trite law that a matter that is partly heard cannot be dismissed for want of prosecution but only on the evidence on record. The plaintiffs' evidence is on record." I do not agree with this submission. Order 17 of the Civil Procedure Rules in simple language says that in any suit in which no application has been made or step taken by

either party for one year, the parties may be required to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, the court may dismiss the suit. Nowhere are part heard cases exempted from the sting of these provisions.

At paragraph 10 of his affidavit Mr. Ondari says that a matter that is partly heard before another judge cannot proceed to hearing before another judge unless directions are given. With due respect, the learned advocate is conflating issues. Here we are dealing with parameters for dismissal of suits for want of prosecution and not with the prerequisites before a suit can be heard.

In the affidavit, Mr. Ondari, laconically states that the 1st Plaintiff is deceased and has not been substituted. He does not indicate if the 1st plaintiff's case has abated. More tellingly at paragraph 17 of his affidavit the advocate states: "THAT, to date as the plaintiffs' counsel, I have not received any communication from my clients. To be precise, I have lost touch with my clients."

I will produce here below paragraphs 5, 6, 7,8 and 9 of the plaintiffs' plaint so that a conspectus of the suit can be captured:

5. ***THAT on or about the year 1996, the plaintiffs who are all members of WABERA ESTATE UPGRADING SELF HELP SCHEME, agreed with the 3rd defendant to start up a project to improve the way of life by up-grading roads; provision of water, electricity and other amenities to the plaintiffs without structural damages and or demolition of their buildings and other structures.***
6. ***THAT to oversee and implement this project, the 3rd defendant entered into a bilateral agreement with G.T.Z. (2nd defendant) to upgrade the estate.***
7. ***THAT further to make sure that the plaintiffs'/stakeholders' interests are taken care of and promises kept, the 2nd and 3rd defendant set up a representative committee and hand picked few village elders where the 1st defendant is the chairman.***
8. ***THAT pursuant to the aforesaid arrangement on or about the year 1999, the 1st and 2nd defendants started the work of upgrading roads water and installing essential amenities within Wabera Estate.***
9. ***THAT contrary to the agreement between the stakeholders and the plaintiffs and the promise of not demolishing erected structures including walls, residential houses and other erected structures the 1st, 2nd and 3rd defendants are carrying out the aforesaid project completely unmoved by the pleas of the stakeholders the plaintiffs and intend to do so without any compensation of the structures and buildings to be demolished.***

The plaintiff prays for judgment against the defendants jointly and severally for:

- (a) A declaration that the intended demolition of residential, Commercial buildings and other erected structures without compensation is illegal.
- (b) an order of permanent injunction against the aforesaid defendants against intended demotion (sic).
- (c) Costs and interests of the case.

I note that through a Chamber Summons application dated 16th July, 2001, the plaintiffs sought the following orders:

- (a) That service of this application be dispensed with in the first instance due to its urgency.
- (b) that the 1st, 2nd and 3rd defendants/respondents by themselves or their agents be restrained from carrying on with the upgrading scheme/project until further orders of this court.

The Hon. Justice W. K. Tuiyot, J, granted exparte orders on 17.7.2001. On 6.8.2001 he confirmed the exparte orders. The is over 13 years ago . The effect is that the project that the defendants had

intended to implement has for the last over 13 years remained unimplemented.

Although this has nothing to do with how I arrive at my decision as to whether the plaintiffs have shown to the satisfaction of this Court cause why this suit should not be dismissed, I note that this suit had elicited the attention of the public during the Judicial Marches week in 2012. The Principal Magistrate at Marsabit wrote to the Deputy Registrar a letter whose contents are reproduced here below.

“Date: 27th August, 2012

RE: Meru HCCC/127/2000 (sic)

Matters arising out of the above case came up during our station's engagement with the public at the just ended Judicial Marches week, out of which some interested parties to the case have now compiled a memorandum for the attention of the Hon. Chief Justice.

Do kindly receive the copy for your perusal and necessary action. It may also be necessary for our station to get an acknowledgement of receipt to the same from you for confirmation of our action.

Signed: S.O. Mogute

PRINCIPAL MAGISTRATE

MARSABIT”

I do note that though the 3rd defendant ceased to exist in 2010, the plaintiffs have not shown any evidence of efforts to substitute it with the County Government of Marsabit.

I have perused the 2 authorities proffered by the plaintiffs. They are very good law and precedents in the right circumstances. In Civil Appeal no. 151 of 2010, among other things, the 1st defendant had been substituted and his case, therefore, had not abated. In the present case the 1st Plaintiff has not been substituted. The date of his death has not been given and no evidence to prove his death has been adduced. In the case proffered as an authority parties were in communication among themselves. In this case, the advocate for the plaintiffs has in paragraph 17 of his affidavit stated that he, to be precise, had lost touch with his clients.

In *Mugacha Versus Mwakibundu (op.cit)* the Judge was found to be at fault by employing his discretion incorrectly by not allowing an adjournment with the effect that the advocate's fault prejudiced his client. In this case, the court is being careful not to use its discretion incorrectly. Also in this case, no blame can be ascribed to Mr. Ondari, the plaintiff's advocate. It is the plaintiffs who have over the years refused to communicate with him and to give apposite instructions.

Having carefully examined the pleadings and the submissions of the parties, plus the two authorities proffered by Mr. Ondari for the plaintiffs, the plaintiffs have not, in terms of the provisions of order 17 rule 2 of the Civil Procedure Rules, 2010, shown cause to the satisfaction of this court that this suit should not be dismissed. I, therefore, dismiss the suit.

Costs are awarded to the defendants.

It is so ordered.

Delivered in Open Court at Meru this 25th day of November 2014 in the presence of:

Cc. Daniel

Ondari present for plaintiffs.

P. M. NJORGE

JUDGE