



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 559 of 2010

**GRACE WANGARI NDIKIMI T/A JONGRAED GENERAL
MERCHANTS.....PLAINTIFF/APPLICANT**

VERSUS

**MULRAJ KANJI PATEL
PURSHOTTAM KANJI PATEL**

**ALEX NDEGWA MWENDWA.....DEFENDANTS/
RESPONDENTS**

RULING

The Applicants here in who are 1st and 2nd Respondents have brought this Notice of Motion dated 17th October 2012 under Order 17 Rule 2 (1) and (3) of the Civil Procedure Rules for orders that ***“this suit be dismissed for want of prosecution and cost of the suit and application be awarded to the Applicant”***.

The application was supported by the grounds set out on the face of application and on the supporting affidavit of ***Geofrey Thiong'o Ngotho*** Advocate for the Applicants.

The Applicants stated that it has been more than one year since the Respondent took away any step towards prosecuting this matter.

That it is clear that the Respondent has no interest in the same and its continuing to hang in abeyance is an embarrassment to the Applicants.

In the Affidavit in support of the application, the Applicants counsel stated that the Plaintiff filed this suit on 18/11/2010 together with an application for injunctive orders dated 15/11/2010.

That after several abortive attempts to prosecute the application, the Plaintiff finally set the matter down for hearing on 22/9/2011.

That on the same date, the Law firm of ***Muturi S.K. & Co. Advocates*** filed a Notice of change of Advocate and proceeded to withdraw the application dated 15th October 2010 but to proceed with the claim raised in the plaint.

That since then the Plaintiff has made no move to prosecute the suit and it is clear that the Plaintiff is no longer interested in pursuing the suit and it's continuing to pend in Court is an embarrassment to the Defendants.

The Plaintiff/Respondent did not file his replying affidavit but filed the Plaintiff's written submissions.

Parties erected to dispose of the application by way of written submissions.

The Applicants' in their submissions stated that the Plaintiff filed the suit on 18/11/2010 through the firm of Mbugua V.W. & Co. Advocates.

That pursuant to a few attempts to prosecute the application, the same was finally listed for hearing on 22/9/2011. That on the stated date, the firm of **Muturi S.K. & Co. Advocate** filed a Notice of change of Advocate and proceeded to withdraw the application and indicated to Court that they would proceed with the main claim for damages.

That the Plaintiff took no step to prosecute the case. The applicant's further stated that it is trite law under Order 17 Rule 2 (c) and (3) that once a party fails to prosecute its suit within one year and take any step, the Court may dismiss such suit for want of prosecution.

That the same is meant to discourage indolent parties who file suits in Court and then go to sleep.

That it was great dishonesty and an abuse of the Court process that once the Plaintiff was served with the current application, she rushed to Court and purported to take a hearing date allegedly for 18/1/2013. As per the practice, no date could be given before an application earlier filed could be prosecuted. That the act by the Plaintiff was a desperate act to circumvent an application properly before Court and the Court should not consider that dishonest attempt. That the Plaintiff is guilty of laches and indolence and the suit should be dismissed with costs.

The Plaintiff submitted that she has not been guilty of laches and she is ready and willing to have the matter heard and finalized at the earliest opportunity. That the Plaintiff has fixed a hearing date for the matter on 18/1/2013 and the application has been overtaken by events. That the Plaintiff should be given a chance to prosecute the case. Plaintiff prayed for application dated 17/10/2012 to be dismissed with costs.

The Court has now considered the instant application and the entire file and the provisions of Order 17 Rule (2) (1) and 3 of the Civil Procedure Rules which provides that

“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 the cause is not shown to its satisfaction, (Court) may dismiss the suit.”

17 (2) (3) *“any party to the suit may apply for its dismissal as provided by sub-rule 1”*. I have perused the file and noted that its true that the Plaintiff filed this suit on 18/11/2010. There was a Notice of Motion dated 15/11/2010 attached to the plaint for injunctive orders.

It is also evident that on 14/10/2011, Plaintiff withdrew the interlocutory application but indicated that she would pursue the claim for damages. Since then the Plaintiff did not set down the matter for hearing.

The applicants herein filed the instant application on 17/10.2012. It was evident that Plaintiff had not taken any step to have the matter set down for hearing for more than one year. The Plaintiff is therefore guilty of laches.

After the Applicants filed their application, the Plaintiff woke from her slumber and attempted to fix the matter for hearing. In her submissions, the Plaintiff alleged that the matter was set for hearing on 18/1/2013. However there was no proceedings for 18/1/2013 in the file.

I will agree with the Applicant's counsel that the Plaintiff has no interest with instant suit and same continue to hang on the shoulders of the Applicants and it is therefore an embarrassment to them.

The Plaintiff attempted to set the matter down for hearing after the Applicants filed this application. This was a desperate attempt to scuttle the Applicant's application and thus abuse of the Courts process.

I will disallow the Plaintiff's objection to the application and allow the applicants' appreciation as prayed in the application dated 17/10/2012.

Application dated 17/10/2012 allowed entirely.

GACHERU

JUDGE

25/2/2013

25/2/2013

Before Gacheru, J

Court clerk Florence

Nzuki holding brief for Nyamu for 3rd Defendant.

Applicant – absent – though notified of the ruling.

Plaintiff – Respondent – absent though notified of the ruling.

GACHERU

JUDGE

25/2/2013

Court

Ruling read and Signed in open Court in the presence of Mr. Nzuki holding brief for Nyamu for 3rd Respondent.

Mr. Nzuki undertakes to serve Ruling outcome Notice to the absent parties.

GACHERU

JUDGE

25/2/2013