



REPUBLIC OF KENYA

High Court of Kisii

Civil Case 117 of 2007

WALTER ODHIAMBO ODONGO PLAINTIFF/APPLICANT

VERSUS

ABNER NYAGUCHA NYAKUNDI 1ST DEFENDANT/RESPONDENT

JOSEPH ONDIEK ODHONG' 2ND DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion dated 14th January 2010, and brought under **order XVI rule 5** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**, the 2nd defendant/applicant seeks orders that:-

- a) *The suit against the 2nd defendant/applicant's be dismissed with costs for want of prosecution.*
- b) *The 2nd defendant/applicant's costs be borne by the plaintiff/respondent in any event.*

2. The application was grounded on grounds that:

i. *since filing the suit the respondent has not taken any (single) step to prosecute the same for over twenty six (26) months, a period well in excess of the statutory three (3) months.*

ii. *there is none and there can be no tenable reason excusing the respondent's indolence and wanton neglect to undertake prosecution of this suit for over twenty six (26) months.*

iii. *The plaintiff/respondent's refusal or neglect to prosecute this suit is synonymous with a design on the part of the plaintiff/respondent to obstruct and/or delay the course of justice.*

iv. *The plaintiff/respondent has lost interest in this suit.*

v. *The plaintiff/respondent does not stand to suffer any prejudice should the prayers sought be made.*

vi. *The pendency of this suit unprosecuted constitutes an unbridled abuse of due process.*

vii. *It is in the interest of justice that litigation comes to a timely end.*

3. The plaintiff/respondent though served not file any reply to the above application. The matter was fixed for *interpartes* hearing on 30th January 2013. Mr. Nyamurongi learned counsel for the 2nd defendant/applicant submitted that since the plaintiff/respondent filed the suit he had taken no action to have the same move forward. Counsel urged the court to grant the orders sought as this would be in the interests of justice so as to avoid a situation where the 2nd defendant/applicant would be unduly kept in court.

4. In response to Mr. Nyamurongi's submissions, Mr. G.S. Okoth for the plaintiff/respondent confirmed that though they did not file a replying affidavit there was an issue in law as to whether the court can allow the application when it is clear that the substantive issue in this case concerns land parcel number KABONDO/KAKANGUTU EAST/559 Counsel submitted that in the circumstances, the issue herein ought to be determined by the **Environment and Land Court in accordance with Section 13 of the Environment and Land Act No.19 of 2011.**

5. He further submitted that in light of the provisions of **section 38 of the Limitations of Actions Act, Chapter 22 Laws of Kenya** provide once the land court is established under **section 162 of the Constitution** then in the event of any conflict the Constitution prevails. That **section 13 of the Environment and Land Act, 2011** as read together with the directions of the Chief Justice clearly showed that this court had no jurisdiction and where a court has jurisdiction to hear a matter it should not dismiss the suit. Counsel urged the court to dismiss the application.

6. Mr. Nyamurongi in reply to the above submission contended that this court is a constitutional court as provided under **Article 159 (2) (e)** which requires a court to decide matters based on substantive justice and not on technicalities. He further submitted that in dealing with this application this court would not be usurping jurisdiction of the land court. He therefore urged the court to find that the application is well founded and to allow the same.

7. What I have to determine in this case is whether this court has jurisdiction to hear this land matter and make substantive orders such as orders of dismissal.

8. In **Republic –vs- Chairman Matungu Land Disputes Tribunal Ex parte Eleckina Wang'ona [2012] e KLR**, Gikonyo J. held:-

“.....the authority which the Chief justice exercised in making the

Practice Directions is derived from section 22 of the Sixth Schedule of

the Constitution, and section 30 read together with section (3) of the Environment and Land Court Act, 2011. The particularly relevant Practice Direction to this case is NO.3 that [all part heard cases relating to the Land and Environment and use and occupation of and title of land pending before the High Court shall continue to be heard and determined by the same court].”

9. The above is the law and the practice when dealing with land related cases that were filed in court before the passing of the Environment and Land Act 2011 and before the establishment of the Environment and Land Court. The question that begs an answer is whether the suit herein was a part-heard case as at the time of the hearing of the instant application? And what is a part-heard case in terms of land matters? What I understand a part-heard case to be is that some evidence in the case had been taken before the establishment of the Environment and Land Court and in such circumstances, the case would have to proceed before this court the establishment of the Environment and Land Court notwithstanding pursuant to the **Environment and Land Court Act, 2011** and **Practice Direction Number 13** of the Chief Justice Practice Directions 2012.

10. In light of the above, the instant case is not a part-heard case. Apart from the filing of the Originating Summons on 13th November 2007, no other substantive step had been taken on the file until

the instant application was filed. In the circumstances, and for the reasons advanced by the plaintiff in opposition to the 2nd defendant/applicant's Notice of Motion, this matter ought to be heard by the Environment and Land Court. Accordingly, the Notice of Motion dated 14th January 2010 and filed in court on 15th January 2010 be and is hereby struck out. The case shall now be placed before the Environment and Land Court for hearing and final disposal. Because the plaintiff/respondent has been indolent, he is condemned with the costs of this application.

11. It is so ordered.

Dated and delivered at Kisii this 21st day of February, 2013

**RUTH NEKOYE SITATI
JUDGE.**

In the presence of

Mr. S.M. Sagwe for M/s Omonde Kisera (present) for Plaintiff/Respondent

Miss Sagwa h/b for Nyamurongi for 2nd defendant/applicant

N/A for 1st defendant

Mr. Bibu - Court Clerk

**RUTH NEKOYE SITATI
JUDGE.**