



REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (NAIROBI LAW COURTS)

ENVIRONMENTAL & LAND CASE 2234 OF 2001

HASHAM LALJI PROPERTIES LIMITED.....PLAINTIFF

VERSUS

SIGILAIN LIMITED1ST DEFENDANT

THOMAS KIPLAGAT BETT2ND DEFENDANT

MILCAH CHEPTUM BETT3RD DEFENDANT

ESMAIL HASHAM LALJI4TH DEFENDANT

LAPKEIYET TRUST (KENYA) LIMITED5TH DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion application dated 11th June 2012 brought under Section 1A, 1B and 3A of the Civil Procedure Act, Order 17 Rules 2(3) and (1), Order 2 Rule 15 (1) and (2) of the Civil Procedure Rules and all other enabling provisions of the law. It seeks for the following orders:-

- 1) That this suit be dismissed for want of prosecution
- 2) That in the alternative and without prejudice this suit be struck out for being scandalous, frivolous and vexatious.
- 3) That in the alternative and without prejudice this suit be struck out as it does not disclose a reasonable cause of action.
- 4) That the suit may prejudice, embarrass or delay the fair trial of the action and is otherwise an abuse of the court process.
- 5) That the costs of this application and of the entire suit be awarded to the Defendants.

The application is premised upon the grounds appearing on the face of the application and the supporting Affidavit of Thomas Kiplagat Bett sworn on 11th June 2012 in which he stated that the Plaintiff has shown no interest in prosecuting this matter as no steps have been taken since 12th October 2004 for purposes of the full hearing of the matter. He further stated that the Plaintiff's delay and

inactivity to prosecute its case is gross, inordinate and inexcusable, warranting dismissal of the suit for want of prosecution. He further stated that the Plaintiff's suit is frivolous, vexatious, vain and void on the face of it. He further swore that the issue of ownership of the property has been the subject of trial in Nairobi Criminal Case No. 2061 of 2000 wherein the court's verdict did not impeach the 1st, 2nd, 3rd and 4th Defendants right to Title. He further averred that the Plaintiff's interest in the property in issue was conferred by a Grant No. I.R. 11791 of 1st January 1951 for a term of 50 years which lapsed by effluxion of time in the year 2001 and that the Plaintiff not having applied for extension of the said lesse retained no residual interest on the property and has no *locus standi*. He further averred that the lawful holder of a grant vide Grant No. I. R. 83451 in respect of the Land Reference No. 209/4360/56 sold the same to the 1st Defendant so the Plaintiff has no conceivable claim thereto. He further swore that he together with the 1st, 3rd and 4th Defendants cannot be exposed to suffer prejudice for being recipients of a discretionary Presidential grant.

The Plaintiff/Respondent did not file a Replying Affidavit to that application.

Both the 2nd Defendant/Applicant and the Plaintiff/Respondent have filed their written submissions which this court has read and taken into consideration.

Dismissal for want of prosecution

It is the Applicant's submission that there have not been any proceedings in the matter since 12th October 2004 as the Plaintiff has neglected and/or failed to set down the suit for hearing. They further submit that that period of delay is gravely inordinate and inexcusable. They further submit that all invitations with a view to taking a hearing date for the suit have been done by the Defendant yet the Plaintiff is the owner of the Suit.

In their submissions, the Plaintiff quoted the case of *Ivita v Kyombu [1984] KLR 441* where it was stated:-

"...Thus, even if delay is prolonged, if the court is satisfied with the Plaintiff's excuse for the delay and that justice can still be done to the parties notwithstanding the delay, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest possible time."

Another case quoted by the Plaintiff was *Agip (Kenya) Limited v Highlands Tyres Limited [2001] KRL 630* where the Judge stated:-

"Where a reason for the delay is offered, the court should be lenient and allow the Plaintiff an opportunity to have his case determined on merit. The court must also consider whether the Defendant has been prejudiced by the delay"

Apart from citing the above cases, the Plaintiff submitted that there was no inordinate and inexcusable delay in prosecuting this suit for the following reasons:

1. The Defendants filed their application on 21st June 2006 seeking to dismiss this suit. This application was not prosecuted by them and it became a hindrance to setting down the suit for full hearing. On 28th May 2008, the Plaintiff appeared in Court for the hearing of that application. Conspicuously the Defendant/Applicant was not in court. The Applicants refused to prosecute the application and voluntarily withdrew the same after causing a two year stand off and waste of time.
2. Since then, on numerous occasions as shown in their hearing notices to the Defendant's advocate, the Plaintiff tried to set down the application for hearing on 3rd, 18th and 23rd June 2008 and on 28th July when the Defendants withdrew the said application before Justice Kubo.
3. Further, the Plaintiff informed the Court that the 4th Defendant died sometimes in December 2006 and

that there was need to enjoin the estate of the deceased. The advocate on record for the 4th Defendant refused/neglected to act for the 4th defendant and/or declined to furnish the identity of the administration of the deceased estate, thereby occasioning delay.

4. On its part, it filed its documents intended for discovery by 12th June 2007 and was awaiting the reply on its agreed issues from the Defendant Advocates.

5. On 21st June 2010, the Plaintiff unable to proceed with the suit as the Defendant has not filed their documents save for a list of documents Justice Dulu ordered that the Defendants file their documents and the administrator of the 4th Defendant be personally served with all the pleadings in readiness for the main suit. To date, the Defendants have not complied with that order. The Plaintiff submitted that the Defendant have not filed and/or served their bundle of documents, witness statements and list of Agreed issues, despite having been served with the Plaintiff's documents. The Plaintiff further submitted that it has always been ready and willing to go for trial.

6. Further, the Plaintiff submitted that the 5th Defendant could not be traced and the Advocate on record for the other Defendants refused to act for it resulting in their being unable to serve it with the relevant documents and hearing notices. Overall, it is the Plaintiff's submissions that though there was delay, the same is partly attributed to the Defendants as demonstrated above and the Defendants cannot turn around and lay all the blame for the delay on the Plaintiff.

No Reasonable Cause of Action

The 2nd Defendant submitted that the Plaintiff's interest in the Suit Property conferred by grant No. I. R. 11791 of 1st January 1951 for a term of 50 years lapsed by effluxion of time in the year 2001 and the Plaintiff not having applied for an extension retained no residual interest on the Suit Property and has no apparent or real *locus standi* in the Suit by being incapable of suffering any right or injury deserving of being restored or protected by law.

In response thereto, the Plaintiff cited the decision of *Anyara, J. in Spin Knit Limited v Subsahara Supplies Limited HCCC. 114 of 2008* as follows:-

“In law, the phrase ‘ a cause of action’ means either a fact or a combination of facts which give rise to a cause of action, of a claim for remedy, in contract – a debt in simple contract, or deed, tort or trespass and a host of other claim, trust, etc. It is “the act on the part of the Defendant which gives the Plaintiff his cause or reason for complaint”

The Plaintiff submitted that its Plaint dated 27/12/01 disclose a cause of action. He further submitted that there are facts which give rise to the Plaintiff's claim and his claim cannot be regarded as either non-existent or unreasonable.

Scandalous, Frivolous and Vexatious

The 2nd Defendant submitted that this suit is scandalous, frivolous and vexatious and ought to be struck out. He cited the case of *Mpaka Road Development Limited v Kana [2004] 1 EA 161* where Ringera J. held:-

“A matter can only be scandalous, frivolous and vexatious if it would not be admissible in evidence to show the truth of any allegation in the pleading which is sought to be impugned, for example, imputation of character where character is not in issue. A pleading is frivolous if it lacks seriousness. It would be vexatious if it annoys and tends to annoy. It would annoy or tend to annoy if it is not serious or contains scandalous matter, irrelevant to the action or defence. A scandalous and/or frivolous pleading is Ipso facto vexatious.”

The 2nd Defendant submitted that this suit is frivolous, scandalous and vexatious as it lacks any form of seriousness, carries no weight or importance and on the face of it does not answer the claim of the Plaintiff therefore it is unsustainable in court. He further submitted that this suit is baseless and its intention was to only harass the Defendants citing the same case as the 2nd Defendant, the Plaintiff submitted that this suit is not unarguable on the face of it, it is not annoying and indeed raises issues for consideration.

Abuse of the Process of Court

The 2nd Defendant submitted that the suit herein is an abuse of the court process because the matter of ownership of the Suit Property has been the subject of the trial in court before a court of competent jurisdiction in Criminal Case No. 2061 of 2000. Wherein the Plaintiff was the complainant in the matter while the accused persons were the 2nd and 4th Defendants in this Suit. He submitted further that the accused were acquitted of all charges against them. The 2nd Defendant further submitted that the Plaintiff having sensed defeat in the Criminal case went on a hunting spree for a forum that would be sympathetic to its quest, resulting in the filing of this suit.

In response thereto, the Plaintiff submitted that the criminal case against the Defendants was on charges of fraudulent procurement of transfer of land title and concealing deed certificates of title, issues which differ from the ones enumerated in the plaint for determination in this suit.

Upon review of the foregoing the following are my findings:-

- a) On dismissal for want of prosecution, I find that though this Suit was filed way back in 2001 and has not been concluded to date, it is untrue to state that no steps have been taken by the Plaintiff to facilitate its expeditious disposal from October 2004 as alleged by the 2nd Defendant. I find on the submissions made by the Plaintiff that the Plaintiff has taken steps to prosecute this suit over the years since 2004. I also find that part of the delay in prosecuting this Suit to conclusion is partly attributed to the Defendants. Accordingly, I rule that this suit is not fit for dismissal on the grounds of want of prosecution.
- b) On the issue of no reasonable cause of action, I find that the Plaintiff does in fact disclose the act on the part of the Defendants which gives the Plaintiff his reason for complaint. This is disclosed in the plaint wherein the Plaintiff states, that though it bought the Suit Property in 1969, it lost title to the same through the acts of the Defendants. This is a reasonable cause of action.
- c) On the question of this suit being scandalous frivolous and vexatious, this court finds that the matter in contention in this suit being title to a prime property in Nairobi is neither scandalous, frivolous or vexatious. The Plaintiff demonstrates seriousness in his claim to his lost title over the Suit Property.
- d) On the question of abuse of the process of court, this court finds that the issues canvassed in the criminal case differ from the issues raised in the Plaint filed in this case. Accordingly, this Court finds that his case should be allowed to progress to full hearing.

In the light of the foregoing, this court declines to allow the application herein and dismisses the same with costs to the Respondent/Plaintiff.

This court directs that this suit be set down for hearing expeditiously.

It is so ordered.

SIGNED AND DELIVERED AT NAIROBI ON THE 24TH DAY OF MAY 2013

MARY M. GITUMBI

JUDGE