



REPUBLIC OF KENYA

High Court at Eldoret

Environmental & Land Case 82'B' of 2012

JONATHAN K. MUTAI

KAPTICH KESSIO.....PLAINTIFF

VS

CHERUIYOT RANDICH.....DEFENDANT

RULING

(Application for dismissal of suit for want of prosecution; principles to be applied in an application of this nature; plaintiff having never set down the suit for hearing; defendant having on several occasions set down suit for hearing but matter never having proceeded; application filed before lapse of one year when matter was last in court; application dismissed; date provided for hearing of main suit).

The application before me is an application dated 21 April 2011. It is an application seeking orders for this suit to be dismissed for want of prosecution. The ground upon which the application is made is that the plaintiffs have taken no steps to prosecute the suit for an inordinate time without any reasonable cause. The application is supported by the affidavit of Cheruiyot Randich the defendant/applicant. He has averred in his affidavit that the last time the plaintiffs were in court was in February 2002 and since then he (the defendant) has attempted to move the court to have the matter finalized in vain. He has stated that it is apparent that the plaintiffs are not keen to have their case heard and that no valid reason exists for this long delay by the plaintiffs. It is for these reasons that he has prayed that this suit be dismissed for want of prosecution.

The plaintiffs have not responded to the application despite being served. Both plaintiffs and defendants are unrepresented by counsel and appear in person.

The application had initially been listed for hearing on 26 February 2013 and both the defendant and the plaintiffs were present in court. The defendant was ready to prosecute his application but the plaintiffs applied for adjournment and requested for time to consult an advocate. I allowed the plaintiff's request and adjourned the matter to 15 April 2013 for hearing of the application. On 15 April 2013, only the defendant/applicant appeared. The plaintiffs were not present in court. I then allowed the defendant to proceed with the application and he urged me to allow the same.

The power to dismiss suits for want of prosecution is contained in Order 17 Rule 2.

The same 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) 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.

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

It will be discerned that a party to the suit, (and it will inevitably be the defendant), may apply for dismissal of the suit if no application has been made or step taken by either party for one year. I need therefore to be satisfied that no application nor any step has been taken in this matter for a period of one year.

The record shows that this suit was filed on 16 July 2001 through the firm of M/s C.S. Lilan & Company Advocates. In their suit, the plaintiffs were seeking to invalidate an award of the Kapsabet Division Land Disputes Tribunal in respect of the land parcel Nandi/Kamoiywo/863 . The Tribunal had made an award on the suit land which was in favour of the defendant. The applicant contemporaneously with the suit filed an application for injunction seeking to bar the defendant from occupying any portion of the suit land in execution of the award of the Tribunal. The application was canvassed on 19 February 2002 but I am not sure whether it was allowed as I cannot see any ruling on record.

I can however see from the record that the matter had been listed for hearing on 19/7/2004. The defendant was present but counsel for the plaintiff applied for adjournment on the ground that issues for determination in the suit had not been agreed. The matter was then stood over generally. No step was taken by the plaintiffs and the defendant appeared at the registry on 7/12/2004 and took a hearing date for 13/4/2005. On 13/4/2005 the defendant appeared in court but there was no appearance for the plaintiffs. The matter for reasons not recorded did not proceed and was stood over generally.

No step was taken by the plaintiffs and the defendant on 6/2/2006 attended the registry and took a hearing date for 19/7/2006. Before that date, counsel for the plaintiff filed an application to cease acting for the plaintiffs which application was allowed on 12/7/2006. The matter appears not to have been brought to court on 19/7/2006 as scheduled and on 23/5/2008 the defendant took 8/10/2008 for hearing. There is no record for the said date and I assume that the matter for some reason was not taken to court. The defendant on 14/11/2008 again attended at the registry and was given the 21/1/2009 for hearing. On the said date the defendant appeared in court but there was no appearance on the part of the plaintiffs. The matter was for reasons not recorded adjourned to 22/04/2009.

On this day, both plaintiffs and defendant were present. The plaintiffs applied for adjournment to enable them engage counsel as their previous advocates on record had withdrawn. For this reason the matter was adjourned to 9/6/2009 but it appears that it was not attended to on the said date.

Undeterred the defendant again attended the registry on 11/6/2010 and was given 3/11/2010 for hearing. He attended court on the said date but the plaintiffs did not. The matter was stood over generally as the court was not satisfied that the plaintiffs had been served with a hearing notice.

Probably tired of seeking hearing dates in vain, the defendant then opted to file the present application for dismissal for want of prosecution.

The record herein speaks for itself. The plaintiff has never moved the court for a hearing date. All dates for hearing have been taken by the defendant but for one reason or another the matter has never taken off. It would be the classical case for dismissal for want of prosecution if it were not that the matter was last in court on 3/11/2010 and the present application was filed on 21 April 2011. One year as provided for under Order 17 Rule 1 had not lapsed. An application for dismissal for want of prosecution can only be applied for if no party takes steps within one year and for our purposes this period had not yet lapsed.

For this reason I am unable to allow the application for dismissal for want of prosecution. I have little

option but to dismiss the same but with no orders as to costs.

I note however that this matter has been in court for a long time and in the interests of justice I do list this matter for hearing of the main suit on 24th June 2013. The defendant shall ensure service for this hearing date upon the plaintiffs.

DATED and DELIVERED THIS 23RD DAY OF APRIL 2013

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT & LAND COURT AT ELDORET

Delivered in the presence of the Defendant – Acting in Person.

Plaintiffs – Absent (Acting in person).