



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 164 OF 2013

JACOB NYAGA NJERU PLAINTIFF/RESPONDENT

VERSUS

NJERU KINANDA DEFENDANT/APPLICANT

RULING

The plaintiff/respondent filed this suit against the defendant/applicant on 25th October 2011 seeking some orders with respect to a parcel of land known as KAGAARI/WERU/559 situated in Embu. The plaintiff/respondent also sought some injunctive relief but that application was dismissed for want of prosecution on 14th December 2011 by the High Court Embu before this file was transferred to this Court. Meanwhile, a defence was filed by the defendant/applicant on 24th November 2011.

Nothing seems to have happened in this file since 14th December 2011 and therefore on 19th June 2013, the defendant/applicant filed this Notice of Motion under Order **17 Rule 2 (1) and (3) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act** seeking the dismissal of this suit for want of prosecution. The defendant/applicant further seeks orders compelling the plaintiff/respondent to remove the caution placed on the parcel of land No. KAGAARI/WERU/559 or an order of the Court directing the Land Registrar Embu to do so.

The application is supported by the defendant/applicant's affidavit in which he depones, inter alia, that he is the registered owner of the said parcel of land and although this suit was filed on 25th October 2011, the matter has never been set down for hearing and ought to be dismissed for want of prosecution as it was last in Court on 14th December 2011.

However, in a replying affidavit sworn by the plaintiff/respondent's advocate Mr. E.M. Njiru, it is deponed that this suit having been transferred from Embu to this Court, the plaintiff/respondent was awaiting to be notified of the new number and therefore it is not true that the plaintiff/respondent failed to take steps to prosecute it.

Submissions were filed by both sides and I have considered them. In his submissions, Mr. Njiru has laid much emphasis on the fact that the application is also founded upon **Section 3 A of the Civil Procedure Act** and urges me to strike out the application on that basis. I think nothing turns on that argument. The application is also founded upon **Order 17 of the Civil Procedure Rules** and it is therefore not fatal.

Order 17 Rule 2 (1) of the Civil Procedure Rules provides that where no application or step has been taken by either party, the Court may give notice 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. **Order 17 Rule 2 (3)**

of the Civil Procedure Rules on the other hand gives the party the right to move the Court under sub-rule 1. The defendant/applicant has moved the Court and so this application is properly before me.

It is not in doubt that prior to filing the application for dismissal now before me, this suit was last in Court on 14th December 2011 in Embu when Justice Ong'udi dismissed an application filed by the plaintiff/respondent. Mr. Njiru's explanation for not taking any steps to prosecute this case is that the suit was transferred to this Court and he was waiting to be notified of the new number. That is really not a good explanation because the delay occurred long before this application was filed. The file was transferred here on 28th December 2012 and the delay being referred to goes back to December 2011. It cannot therefore be a good explanation that the plaintiff/respondent was waiting for the new number from this Court. It is the duty of the plaintiff and his advocate to bring the suit to trial and failure to discharge this burden could be detrimental to the plaintiff's case.

Having said so, however, **Order 17 Rule (2) of the Civil Procedure Rules** uses the words the Court "***may dismiss the suit***". That means that the Court has a discretion whether or not to dismiss the suit. But like all discretions, it must be exercised on sound reasons. In **IVITA VS KYUMBU 1984 K.L.R. 441**, Justice Chesoni (as he then was) after examining various authorities including **ALLEN VS SIR ALFRED MCALPINE & SONS 1968 1 ALL E.R. 543** stated that the test to be applied by Courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable and if it is, whether justice can be done despite the delay. Thus even if the delay is prolonged, if the Court is satisfied with the plaintiff's excuse for the delay and justice can still be done to the parties, the suit will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time. It is all a matter for the Court's discretion.

In this case, the delay is since December 2011. That is a long delay. It is also inexcusable because Mr. Njiru has offered no good reason why between December 2011 and when this application was filed in June 2013, no activity had taken place in this file. The fact that the file was transferred here is really no good reason because as I have said, that transfer was in December 2012.

That notwithstanding, there is nothing to suggest that justice cannot be done despite that delay. There is no suggestion from the defendant/respondent that due to the delay, he may have lost his evidence or that his witnesses may not be available at time of the trial. I also take into account that this dispute relates to land which is an emotive subject. It would serve the interest of justice that this suit be determined on its merits. The defendant/respondent can be compensated in costs.

I therefore make the following orders with respect to the application dated 18th June 2013 and filed herein on 19th June 2013.

1. ***The application is dismissed***
2. ***The plaintiff/respondent to meet the defendant/applicant's costs of this application which I assess at Ksh. 5,000/= payable within 30 days of this ruling***
3. ***The plaintiff/respondent to complete all pre-trial procedures, if he has not done so, within 30 days from the date of this ruling and have this suit listed for hearing and in default, this suit shall stand dismissed with costs to the defendant.***

B.N. OLAO

JUDGE

22ND OCTOBER, 2013

22/10/2013

Coram

B.N. Olao – Judge

CC – Muriithi

Mr. Kinyua for Beth Ndorongo for Defendant/applicant present

Mr. Njiru for Plaintiff/respondent absent

COURT: Ruling delivered this 22nd day of October 2013 in open Court.

Mr. Njiru for Plaintiff/respondent – absent

Mr. Kinyua for Ndorongo for Defendant/applicant – present

B.N. OLAO

JUDGE

22ND OCTOBER, 2013