



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT 2120 OF 2007

ALLOYS KEVIN CHEPKWONY1ST
PLAINTIFF

VERSUS

THE CHIEF LAND REGISTRAR, NAIROBI.....1ST
DEFENDANT

STEPHEN MUCHAI GITHINJI.....2ND
DEFENDANT

CHARLES ONKWANI NYANGITO.....3RD
DEFENDANT

JOSEPHINE MOCHACHE.....4TH
DEFENDANT

RULING

The application before the Court is brought by the 3rd and 4th Defendant Applicants, by way of a Notice of Motion dated 5th July 2011. The Applicants are seeking orders that the Plaintiff's/Respondent's suit against the Applicants be dismissed for want of prosecution, and that the 3rd and 4th Defendants be awarded the costs of this application as well as those of the entire suit. The grounds for the application are that there has been an inordinate and inexcusable delay by the Respondent to prosecute this suit, and that it is therefore apparent that the Respondent has lost interest in this suit. Further that the continued pendency of this suit has greatly prejudiced the 3rd and 4th Defendants and it is only fair that the Respondent's suit be dismissed as its continued pendency is otherwise an abuse of the Court process.

The Applicants in an affidavit sworn on their behalf by Charles Onkwani Nyangito on 5th July 2011, state that the Respondent in a application dated 30th March 2010 sought leave to join them as Defendants and was accordingly granted prayers by this Court on 14th June 2010. The Applicants further state that the court also directed that the Respondent serves them with a Further Amended Plaint which has not been done, and that no attempts have been made since to set the suit down for hearing. The Applicants aver that the continued pendency of the case is highly prejudicial to them as the Respondent continues to enjoy injunctive orders barring them from developing the suit property.

The Respondent in a Replying Affidavit sworn on 18th July 2011 admits that indeed the Applicants were joined as Defendants upon his application, and that he was directed to file and serve a further amended

Plaint on them. The Respondent submits that he was out of the country working in Sudan and was not able to sign the verifying affidavit to the further Amended Plaintiff until his return. The Respondent relies on a copy of a cheque dated 30th October 2010 paid to his lawyer as evidence of payment for filing of the Further Amended Plaintiff upon his return. The Respondent also avers that his lawyer has tried in vain to trace the court file and has been unable to get it since applying for the court order on the 14th October 2010. Further that it was not until 11th July, 2011 when this application was served upon his lawyers, that the court file became available at the Court registry.

Finally, the Respondent states that it is not true that no steps have been taken towards the hearing of the case, that he has always been ready, able and willing to have this case heard and determined conclusively, and that there has been no inordinate delay in prosecuting this case. Further that the delay if any, was due to the unavailability of the Court File at the Registry, a fact which was outside the Respondent's and his lawyer's control. The Respondent has annexed a copy of the Further Amended Plaintiff, and two letters dated March 2011 and 20th April 2011 to the Deputy Registrar and Registrar of the High Court respectively, asking for the court file in the suit herein to be availed.

Both the Applicants and Respondent filed written submissions dated 14th November 2011 and 30th November 2011 respectively. Both parties have relied on the decisions in **Ivita vs Kyumbu (1984) KLR 441** and **Allen v Sir Alfred McAlpine & Sons Ltd (1968) 1 All. E.R. 543** in support of their arguments for or against dismissal of the suit filed herein for want of prosecution. Counsel for the Applicants also relied on the Court of Appeal decision in **Salkas Contractors Limited v Kenya Petroleum Refineries Ltd, Civil Appeal No 250 of 2003 (Mombasa)** where the decision to dismiss a suit for want of prosecution was upheld, even though reasons were given for the delay .

Counsel for the Respondent in addition made oral submissions to the court at the hearing of the application on 5th December 2011, and reiterated that the delay in prosecuting the case herein was not inordinate, and that the Plaintiff would be irreparably prejudiced if the case is dismissed summarily. He further cited the decisions of this Court in **Concorde Container Services v Joseph Muthika Kago (2004) eKLR** and **Francis Githinji Karobia v Stephen Kageni Gitau (2006) eKLR** in support of his arguments.

I have carefully considered the pleadings, evidence and submissions made with regard to the application before this Court. The application is brought under Order 17 Rule 2(3) of the Civil Procedure Rules and other enabling provisions of the law. There are two tests to be satisfied under Order 17 rule 2(3) as read together with Order 17 Rule 2(1) of the said Rules, for the a suit to be dismissed for want of prosecution. The first one is whether there has been delay in prosecuting the suit of over one year. Time for purposes of delay starts to run from the last time an application was made or any step taken by the parties in the suit. In the present application the last application and step taken in the suit was the application to join the 3rd and 4th Defendants which was granted on 14th June 2010. The delay in prosecuting the suit at the time of filing of the application for dismissal on 5th July 2011, was for a period of one year and one month. My finding is that the threshold of one year delay has been met, rendering the suit filed herein subject to dismissal.

The second test to be satisfied under Order 17 rule 2 is that the delay must be inexcusable. In **Ivita vs Kyumbu**, following the decision in **Allen v Sir Alfred McAlpine & Sons Ltd**, it was further held that even if there are good reasons for the delay, the court must also be satisfied that justice will still be done to the parties despite the delay. The Respondent submitted and has provided the evidence to show that he wrote letters to the Deputy Registrar of this Court dated 17th March 2011 and 21st April 2011 asking for the court file to be traced and/or reconstructed, after attempts to trace it at the registry had failed. The said letters bear this Court's stamp evidencing receipt, but upon perusal of the court file, I found that the same had not been filed. I am however willing to give the Respondent the benefit of doubt that indeed this was because the file could not be found.

I do find that a reasonable explanation has been offered by the Respondent for the delay in prosecuting the suit filed herein, and I wish to distinguish the Court of Appeal's decision in **Salkas Contractors**

Limited v Kenya Petroleum Refineries Ltd, Civil Appeal No 250 of 2003 (Mombasa) in this regard. In the said Court of Appeal decision it was stated that no letter was availed to the court in support of any attempt to have the case fixed for hearing, and the Appellant never claimed that it had made an attempt to have the case set down for hearing. Such evidence and attempt have on the contrary been shown by the Respondent in the present application.

As to whether the delay will cause injustice to the parties, the Applicants submit that they are innocent purchasers for value, and hold a legally valid title to suit property. Further that they intend to develop the property and are being prejudiced by injunctive orders in force, and the Respondent's delay in prosecuting the suit. I think it ought to be clarified in this respect that the injustice and prejudice envisaged is that which a party affected by the delay will suffer if the trial is allowed to proceed, and not any type of prejudice. This was explained by Salmon L.J in **Allen v Sir Alfred McAlpine & Sons Ltd (1968) 1 All. E.R. 543.**

The Respondent also claims an interest in the suit property, and that interest was protected by an injunction ordered by this Court at the time of the transfer of the suit property to the Applicants. The injunction was also extended by this Court to the Applicants. In my opinion it is not only in the interests of justice but also for the expeditious disposal of the dispute between the parties that the trial be allowed to proceed, and to determine with finality the issue of ownership of the suit property. I am also in this respect persuaded by the decision of Visram J. (as he then was) in **Concorde Container Services v Joseph Muthika Kago (2004) eKLR** that to determine the rights of a Plaintiff who has established a *prima facie* case by a summary procedure, would prejudice a Plaintiff who has shown a reasonable excuse for delay in prosecuting a case.

For the reasons given in the foregoing, the application dated 5th July 2011 is hereby dismissed.

The costs of the application shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____8th____ day of ____February____, 2012.

P. NYAMWEYA

JUDGE