



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT 14 OF 1999

FRED EMMANUEL MIRIGA.....PLAINTIFF

VERSUS

1. ATTORNEY GENERAL

2. DISTRICT COMMISSIONER, MOMBASA

3. COMMISSIONER OF LANDS

4. ALCOP LIMITED

5. SUPER NOVA PROPERTIES.....DEFENDANTS

RULING

The 4th and 5th defendants have filed a notice of motion dated 28th July, 2010. By that application they seek the dismissal of this suit for want of prosecution. It is brought under order 17 Rule 2 (3) of the Civil Procedure Rules 2010. This case has now been in this court for some 12 years. The plaintiff obtained an interlocutory injunction on 6th December 2000 which lasted for 8 months. An application for dismissal of the suit for want of prosecution, dated 24th March 2003 filed by the same defendants was dismissed and the plaintiff was given an opportunity to prosecute his case. It was dismissed on 23rd September 2003. On the day of dismissal the plaintiff was ordered to fix the case for hearing within 14 days otherwise the suit was to stand as dismissed. The case was fixed for hearing on 11th November 2008. On that day the plaintiff testified. The case was to be heard further on 14th June 2010 but there is no indication of what happened on that day in the court file. From 14th June 2010 the plaintiff took no action to set the case for hearing. No action was taken until the 4th and 5th defendant filed their notice of motion under consideration dated 28th July 2011. The plaintiff objected to that application by relying on grounds of opposition and written submissions. The plaintiff's grounds of opposition described the 4th and 5th application as defective and incompetent without stating why it was so described. The plaintiff in his written submissions gave evidence which ought to only have been in an affidavit. The plaintiff tried to explain his failure to fix the case for hearing in those submissions by stating that there were delays of release of his file from his former advocate to his present advocate. The court cannot accept that evidence in those submissions which evidence is not under oath. The plaintiff relied on the case **IVITA VS KYUMBU [1984] KLR** where it was held:

“The test applied by the courts in an application for the 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 that justice can still be done to the parties, the action will not be dismissed but it will be

ordered that it be set down for hearing at the earliest available time. It is a matter in the discretion of the court.”

The plaintiff did not respond to the 4th and 5th defendants where the defendants stated that there had been inordinate delay in fixing this case for hearing. There is however an affidavit in this matter sworn by Gikandi Ngibuini advocate dated 17th October 2011 which probably explains the lack of enthusiasms on the plaintiff’s part to fix this case for hearing. Mr. Gikandi deponed in that affidavit as follows:

“That the plaintiff relocated to the United States of America and ever since the said relocation the plaintiff has failed to furnish us (Gikandi Advocate) with instructions pertaining to the this (sic) suit.”

Mr. Gikandi Advocate relied on that affidavit for his prayers to cease to act for the plaintiff. That application was before the court on 24th October 2011. On that day, an advocate holding brief for the firm of Kadima & Company Advocates informed the court that the said firm Kadima & Co. Advocates had been instructed to take over the case on behalf of the plaintiff from Mr. Gikandi Advocate.

All in all, there seems to have been inordinate and unexplained delay in prosecuting this case. This court when it previously entertained, the previous application for dismissal for want of prosecution did also acknowledge that the plaintiff had failed to prosecute his case with diligence. The plaintiff in defence of that previous application stated that he had engaged the land registry with a view to having the matter resolved through that office. As I have stated before, when one considers the entirety of this case, it is clear that the plaintiff has failed to prosecute his case with speed as required. I am guided in this regard by the case: **NILANI VS PATEL & OTHERS [1969] EA P 340** where the court had these to say:

“No rule making authority would wish to create such an unreasonable situation of permitting actions to hang over the head of any Defendant for an indefinite period, without giving him a right to move the court to have the action dismissed for want of prosecution.”

Section 1A (1) of the Civil Procedure Act Cap 21 the overriding objective which should guide the court in resolution of civil dispute is set out the overriding objective is as follows:

“The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.”

The plaintiff’s action in delaying the prosecution of this case is not aiding expeditious disposal of this case. It is because the court has found that the plaintiff has failed to diligently prosecute his case that the application will succeed. The suit will be dismissed against all the defendant s because the main cause of action is against the 4th and 5th defendants and once the suit against them is dismissed then there would be no basis to have the suit subsist against the 1st to the 3rd defendants. I grant the following orders:

1. The plaintiff’s suit as against all the defendants is hereby dismissed with costs of the suit being awarded to all the defendants.

2. The costs of the notice of motion dated 28th July, 2011 are awarded to the 4th and 5th defendants as against the plaintiff.

DATED and DELIVERED at MOMBASA this 29th day of March, 2012.

MARY KASANGO
JUDGE