REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL SUIT 6 OF 2009

KANAMPIU M'RIMBERIA…..……PLAINTIFF
VERSUS

JULIUS KATHANJE ……..……1ST DEFENDANT

ROBERT MUTHEE……2ND DEFENDANT

DISTRICT LAND ADJUDICATION &

SETTLEMENT OFFICER-TIGANIA..…….....3RD DEFENDANT

R U L I N G

The 1st defendant/applicant through his application dated 17th January, 2012 brought under Order 17 Rule 2(3) of Civil Procedure Rules seeks the following orders:-

1. That the Honourable Court be pleased to dismiss the plaintiff's suit for want of prosecution.

2.That the costs of this application and suit be paid by the plaintiff.

The application is based on the following grounds:-

1. That the suit was last in court on 30/9/2009.

2. That the plaintiff has never taken any step since 30/9/2009 to set out down the suit for hearing.

3.That the plaintiff seemingly, has lost interest in this suit.

The application is further supported by applicant's supporting affidavit dated 17th January, 2012. The applicant in his affidavit has stated as follows: That this suit was filed against the defendants herein on 20/1/2009. That the 1st defendant/applicant appeared and filed a defence after he was duly served with summons to enter appearance. That on 30/9/2009 the suit was adjourned generally. That since then, the plaintiff has never taken any action to set suit down for hearing.

The applicant averred that the plaintiff has lost interest in the suit and that the same should be dismissed for want of prosecution. The respondent filed a replying affidavit dated 19th March, 2012. The respondent in opposing the applicant's application stated as follows: That since the filing of the suit it came up for hearing on 30/9/2009 when the applicant adjourned the suit. The respondent stated that they tried to fix the suit down for hearing but they have always been told that there were no available dates. He stated the mistake not to fix suit down for hearing is not his but of the courts. He stated that he is more than anxious to be heard in this matter. The respondent has further stated that he was surprised when he was served with the application with a date because in the same week when this application was fixed for hearing he had gone to court and was told there were no dates available but only matters from 2007 were the only matters being fixed for hearing.

When the same came up for hearing the learned Counsel for 1st applicant Mr. Mwirigirelied on the grounds set out in the notice of motion and affidavit in support thereof. He added that it is now almost 3years since the suit came up for hearing. He pointed out that failure of the plaintiff to seek leave to have judgment entered against 3rd defendant is proof of the plaintiff's inactiveness and unwillingness to prosecute this suit. He submitted that plaintiff tried to apply for interlocutory judgment against 2nd and 3rd defendant at the same time which is against the law. He further argued the plaintiff has not moved the court for formal proof. He argued that the respondent's contention that they were told by registry that there were no dates available to be without merits.

He averred that there was no invitation letter exhibited to court to show at least an attempt to take a hearing date had been made nor is there any letter to Deputy Registrar complaining that the plaintiff was unable to get a hearing date. He has further pointed out that the plaintiff has not disclosed the source of the information that only matters being fixed for hearing were those of upto 2007. He submitted therefore that the respondent has not explained the delay and prayed that the suit be dismissed.

Mr. Kimathi, learned Counsel for the respondent on his part, stated that the application is opposed. He relied on the respondent's replying affidavit. He added that it was common knowledge that there are difficulties in getting a hearing date at the High Court. He argued that there are directions that the matters which can be fixed for hearing are those matters for upto 2007. He argued this matter is of 2009 and in view of the directions no date could be fixed for hearing of this matter. He added that this is a matter of over a claim of land which is sensitive. He submitted that the applicant had applied for interlocutory judgment against 1st and 2nd defendant and that this matter was last before court on 30/09/2009. He further submitted the respondent has complied with the new civil procedure rules. He submitted that the respondent would have been given a hearing date were it not for the applicant's application.

Mr. Mwirigi, learned Counsel for the applicant in reply stated that the court record is clear that interlocutory judgment is against 2nd and 3rd respondents. He further submitted the documents referred to by the respondents were filed after filing of this application.

The issue for determination in this application is whether the delay in prosecuting this suit is prolonged and inexcusable and if it is, can justice be done despite such a delay?

Under Order 17 Rule 2(3) of Civil Procedure Rules it is provided:-

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

Under the above-mentioned Section, in any suit in which no application has been made or step taken by either party for one year, court may give notice to parties to show cause why the suit should not be dismissed. In the instance case, before the applicant filed the application under Order 17 Rule 2(3) of Civil Procedure rules, a period of over one year had expired nevertheless court had not given any notice to the parties herein. The applicant is within his rights by seeking that this suit be dismissed for want of prosecution and has properly made the application under Order 17 rule 2(3) of Civil Procedure Rules.

The lead case which sets out the principles for dismissal of suit for want of prosecution is case of:-

IVITA – VS – KYUMBU(1984) KLR 441 in which case the Hon. Chesoni J, as he then was stated:-

"So the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant; so both parties to the suit must be considered and the position of the judge to, because it is no easy task for the document, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that he will prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. 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 available time. Where the defendant satisfies the court that there has been prolonged delay and the plaintiff does not give sufficient reason for the delay the court will presume that the delay is not only prolonged but it is also inexcusable and in such case the suit may be dismissed. To put it in the words of Salmon LJ in Allen V McAlpine at P.561, as a rule, when inordinate delay is established until a credible excuse is made out, the natural inference would be that it is inexcusable. It is an all-time saying, which will never wear out however often said that, justice delayed is justice denied."

The plaintiff suit was filed on 20/11/2009. It last came to court on 30/09/2009 since then the same was never set down for hearing. The court record shows that no attempt were made since 30/09/2009 to set the suit down for hearing or for formal proof after the plaintiff obtained interlocutory judgment against 2nd and 3rd defendants on 2/7/2009. The delay upto time of applicant's application is 2years and 4months. The delay of 2years and 4 months without setting this matter down for hearing is with all due respect prolonged.

The respondent's excuse for failure to set this matter down for hearing is that he was always told that there were no dates available and that only matters that were being fixed were those of upto 2007. The applicant has not disclosed who was telling him dates were not available and matters being fixed for hearing were those matters of upto 2007. The respondent did not demonstrate that he made any efforts to take a hearing date by either attaching an invitation letter or copy of the directive issued to the effect that matters which could be set down for hearing were those of upto 2007. He did attach any complaint letter to Deputy Registrar to demonstrate that some efforts were made to have the suit set down for hearing. I find that the delay is inexcusable.

The matter before this court relates to land which is a very sensitive issue in this country. Justice as stated in **IVITA – VS – KYUMBU** case(supra) should be done to both the plaintiff and the defendant. In this case it has not been argued that witnesses may be missing nor was it argued that evidence is weak due to disappearance of human memory resulting from lapse of time. The applicant has not satisfied the court that he will be prejudiced by the delay or that the plaintiff will also be prejudiced. The applicant has to show that justice will not be done in this case due to the prolonged delay on part of the plaintiff before the court can exercise its discretion in his favour and dismiss the suit for want of prosecution.

I find that though the plaintiff has not explained to satisfaction to this court the prolonged delay and though the court is not satisfied with the excuse given by the plaintiff/respondent that justice can still be done to the parties and more so bearing in mind the nature of the claim relates to land which very sensitive issue in this country.

Accordingly in exercise of my discretion and for reasons given herein-above I refuse to grant the application but due to prolonged delay on part of the respondent I award the applicant costs of this application.

The plaintiff is given 90 days to take steps to set the suit down for hearing in default the same shall stand dismissed as against 1st defendant/applicant with costs to the 1st applicant/defendant.

DATED, SIGNED AND DELIVERED AT MERU THIS 31ST DAY OF May, 2012.

J. A. MAKAU
JUDGE

Delivered in open court in presence of:

1.Mr. Mwirigi for the 1st applicant/defendant(absent)

2.Mr. Kimathi for the respondent/plaintiff(absent)

J. A. MAKAU
JUDGE