



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 2017 OF 2007

CHARLES MUIRURI NJERI.....1ST PLAINTIFF

**SAMUEL KURIA NJERI.....2ND
PLAINTIFF**

**PETER NJOROGE NJERI.....3RD
PLAINTIFF**

VERSUS

**DR. VIOLET WANGUI KIMUI
DEFENDANT**

RULING

The Defendant’s application is dated 1st March 2011, and is brought under Order 17 rule 2 (1) and Order 51 (1) of the Civil Procedure Rules. The Defendant is seeking orders that the suit filed herein be dismissed for want of prosecution. The ground for the application is that the Plaintiffs have not made any application or taken any steps to prosecute this suit since 19th June, 2007, when this court directed that this suit and H.C.C.C 878 of 2003 be deconsolidated.

The Defendant has given a detailed account in his supporting affidavit sworn on 2nd March 2011 of the steps taken since the filing of the Plaint herein on 27th September 2006, and subsequent consolidation on 21st November 2006 with **H.C.C.C No. 878 of 2003 – Margaret Wanjiru Ogada versus Marion Njeri Kamau, Julius Nganga Njihia, Chief Lands Registrar and Commissioner of Lands**, until 19th June, 2007 when directions were given by this Court that the suit herein and H.C.C.C. No. 878 of 2003 be de-consolidated. The Defendant further states that it is now more than three years since this suit and HCCC No. 878 of 2003 were de-consolidated, and the Plaintiffs have not taken any steps to fix the suit for hearing and are no longer interested in prosecuting this suit. Further, that it is in the interests of justice that this litigation comes to an end as some of the Defendant’s witnesses are very old and others have since died, and this does prejudice the Defendant’s case.

The Plaintiffs opposed the application in the Replying Affidavit sworn on 13th July 2011 and Supplementary Affidavit sworn on 14th December 2011 by the 2nd Plaintiff. The Plaintiffs state that on 19th June, 2007 on directing that this suit be deconsolidated with HCCC No. 878 of 2003, the court was of the view that HCCC No. 878 of 2003 should be heard and determined first and the present suit awaits and abides the outcome and/or judgment in H.C.C.C No. 878 of 2003. Further, that judgment in H.C.C.C. No. 878 of 2003 was delivered by Lady Justice Ang'awa on 29th July 2008. The Plaintiff in HCCC No. 878 of 2003 thereafter lodged an appeal in the Court of Appeal and the said Appeal has not been filed and/or heard, as the Plaintiff in the HCCC No. 878 of 2003 has not taken steps to prosecute the same. The Plaintiffs have annexed as evidence a copy of the said judgment and of the said Notice of Appeal .

The Plaintiffs also aver that whatever orders the Court of Appeal may make will have an effect on the judgment in HCCC No. 878 of 2003 and consequently on the proceedings in the instant suit, and it is for this reason that the Plaintiffs herein have not taken steps to prosecute this matter as they may be somewhat acting in vain or in speculation before the intended appeal is determined.

The Plaintiffs also states that they are willing to withdraw the suit herein with no orders as to costs were the Plaintiff in HCCC No. 878 of 2003 to confirm that they are no longer interested in pursuing the said intended appeal, and the said appeal be withdrawn with no orders as to costs .They also seek that no order as to costs be made in this matter as their claim herein was initially premised on valid titles, which titles this Court has since ordered the relevant government authorities to cancel thereby making this suit to be one overtaken by events, and further on the ground that the parties herein are related by family ties.

At the hearing of the application on 23rd February 2012, Mr. Murungara the Defendant's Advocate relied on the authorities of **Nilani v Patel and Others (1969) EA 340** for the position that a three-year delay was culpable delay in prosecuting a suit, and on the decision in **Fitzpatrick v Batger & Co Ltd (1967) 2 All E.R 657** for the position that the duty to prosecute lies with the Plaintiff and never shifts to the Defendant in a suit. He also submitted that the tests as set out in **Ivita v Kyumbu (1984) KLR 441** had been met and that it was not necessary for the Defendant to show that they had suffered any prejudice as held in **Kenya National Corporation Ltd v Vidhya Sagar Vohora and T.N Vohora H.C.C.C. 2967 of 1997**. The Advocate also submitted that the Plaintiffs have admitted to their inactivity in the instant suit, and have given no justifiable reason since the parties in the suit herein are not parties in HCCC No. 878 of 2003, and the Notice of Appeal in the said case has no impact on the present case and does not operate as a stay. The Advocate argued that the Plaintiffs were approbating and probating by agreeing to withdraw the suit, and that section 27 of the Civil Procedure Act is clear that costs follow the event.

The Plaintiffs' Advocate, Mr. Njage, reiterated the arguments made by the Plaintiffs at the hearing of the application, and submitted that excusable delay had been shown as the suit properties in the present suit are part of the suit properties in HCCC No. 878 of 2003 and also in Succession Cause No. 1240 of 1999, both of which are still pending. He reiterated that if the delay be found to be inexcusable, then costs do not issue in as against the Plaintiffs because of the fact that the appeal in HCCC No. 878 of 2003 had not proceeded, and they had not been notified of this fact by the Defendant, and for reasons that this is a family matter.

I have read and carefully considered the pleadings and submissions made by the parties to this application. The main issues are whether the suit filed herein should be dismissed for want of prosecution, and if so, which party should bear the burden of costs in the present suit. There are two tests to be satisfied under Order 17 rule 2 of the Civil Procedure Rules for the dismissal of a suit for want of prosecution. The first one is whether there has been delay. The delay in prosecuting the suit at the time of filing of the application for dismissal and which is not disputed by the Plaintiffs is over three years. My opinion on this requirement is that as long as the threshold of one year's delay in prosecuting a suit has been met, the suit is subject to dismissal. My finding is therefore that there has been culpable delay in the prosecution of the suit filed herein by the Plaintiffs.

The second test to be satisfied under Order 17 rule 2 is that the delay must be inexcusable. I am also persuaded in this respect by the ruling of this Court in **Ivita vs Kyumbu (1984) KLR 441** 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. I find that the reasons given by the Plaintiff for not prosecuting this suit would have been valid as until 29th July 2008, the date of judgment in HCCC No. 878 of 2003, given that the averments that there were directions that this suit be stayed until determination of the suit filed in HCCC No. 878 of 2003 have not been disputed by the Defendant. However, after the said date of judgment, this Court was no longer seized of the said suit and the said directions lapsed, and there is therefore still a culpable delay of over two years on the part of the Plaintiffs since the date of the said judgment.

Furthermore, by the Plaintiffs' own admission this suit has been overtaken by the event of the judgment in HCCC No. 878 of 2003, as since the Plaintiffs' claim is now premised on invalid titles, even if the delay was to be excused there would be no useful purpose to be served in keeping the suit herein alive. I therefore find that the Plaintiffs have delayed in prosecuting the suit filed as ELC No 459 (OS) OF 2009 for no good excuse, and there will be no justice served to the parties by continuing with the suit.

On the issue of costs the general rule as submitted by the Defendant's Advocate, is provided under section 27 of the Civil Procedure Act which is that costs follow the event. The Plaintiffs have argued that the family ties existing between the parties provide an exception to this general rule. Even though family relations are sometimes considered in the award of costs, I find that the Plaintiffs cannot be availed of this exception as they were aware of the other pending suits touching on the suit property, and still proceeded to file the present suit.

For the reasons given in the foregoing, I hereby order the dismissal of the suit filed herein for want of prosecution as prayed in the Notice of Motion dated 1st March 2011. Costs of the suit are awarded to the Defendant.

Dated, signed and delivered in open court at Nairobi this ____3rd____ day of ____May____, 2012.

P. NYAMWEYA

JUDGE