



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
ENVIRONMENTAL & LAND CASE 527 OF 2007

ALEX NJOGU.....PLAINTIFF

- **VERSUS** -

CITY COUNCIL OF NAIROBI.....1ST DEFENDANT

FRANKLINE MUTHOMI.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

RULING

1. This suit was scheduled for hearing on 18th April 2012. Upon perusal of the court record, I noted that the court had issued a notice dated 17th November 2011 under order 17 of the Civil Procedure Rules for dismissal of the suit. That notice to show cause was listed for hearing on 2nd December 2011 before the Hon. Lady Justice Martha Koome. After hearing counsel for the plaintiff, the Honourable Judge ordered;

“Matter S.O.G to enable the plaintiff fix it for hearing”

2. I was of the view that the order was ambiguous. The defendants had stated through their counsel that the matter had been dismissed. The plaintiff was of the view that the court had vacated the notice for dismissal. But the order was not express. And it was also a little odd to have stood over the matter generally on 2nd December 2011 when the suit was up for dismissal. I thus directed that the original notice to show cause be re-listed for full hearing on 11th May 2012.

3. The plaintiff has filed a replying affidavit sworn by his counsel Victor Omwebu on 25th April 2012. It is deponed that the plaintiff invited the defendants to take a hearing date on 21st November 2011 but the court file could not be traced. Another attempt was made on 6th December 2011. In the meantime, the matter was listed for dismissal on 2nd December 2011. The plaintiff’s counsel explained his predicament to court. It is averred that although the order of court of that date is not conclusive, there was a direction that the suit be set down for hearing. The plaintiff submitted that the delay was also due to the fact that he was outside the courts jurisdiction. He had granted a power of attorney to a resident in Kenya who, unfortunately, had not given the plaintiff’s lawyers sufficient instructions to proceed with the suit. Subsequently, the plaintiff fixed the matter for hearing for 18th April 2012. The plaintiff has

complied with discovery and inspection. The plaintiff thus avers that he is keen on prosecuting the suit, and should be retained on the seat of justice.

4. The 1st defendant disagrees and has implored the court to dismiss the suit. The 3rd defendant took up cudgels on the delays occasioned by the plaintiff. The 3rd defendant submitted that the matter was last in court in the year 2009. The court had thus properly issued a notice for dismissal. It was also submitted that the plaintiff had donated a power of attorney to someone resident in Kenya. The absence of the plaintiff from jurisdiction should thus not be a ground for the inordinate delay in prosecuting the suit. The 2nd defendant did not appear at the hearing.

5. I take the following view of the matter. Order 17 rule 2 (1) of the Civil Procedure Rules 2010 provides that if no step is taken in a suit for one year the court shall issue a notice for dismissal. Under subrule (2), if no cause is shown to the satisfaction of the court, the suit may be dismissed or the court can make orders for expeditious hearing of the suit.

6. Until 2nd December 2011 when the matter came up for dismissal, the last action on the record was 26th November 2009. On that date an amended plaint was filed. On 14th December 2009, an amended defence was filed. No other step was taken to fix the suit for hearing. The court was thus entitled to issue the notice for dismissal. The court also has inherent powers to dismiss a suit. Mukisa Biscuit Manufacturing Company Vs West End Distributors Ltd [1969] E A 696.

7. I do not think the explanations offered to Hon. Lady Justice Koome on 2nd December 2011 or to this court on 11th May 2012 are sufficient. But I take into consideration that the court on 2nd December 2011 may have decided to be kind to the plaintiff. That may explain why the plaintiff was ordered to set down the suit for hearing. But by standing over the suit generally, the court failed to set a timetable for expeditious hearing of the suit as required by order 17 rule 2 (2). But I make no criticism as I have no such jurisdiction. The plaintiff has since fixed the matter for hearing. He has filed his bundle of documents and complied substantially with order 11 of the Civil Procedure Rules 2010. He seems now set to go. I also take into consideration that the plaintiff has obtained an interlocutory judgment against the 2nd defendant. This court is now enjoined by articles 50 and 159 of the constitution as well as sections 1 A and 1B of the Civil Procedure Act to do substantial justice to the parties. But justice is also a two way street. The defendants have been prejudiced by the inexcusable and inordinate delays of the plaintiff. It is now 5 years or thereabouts since the suit was filed. But I think the defendants can be assuaged by an appropriate order for costs. The ends of justice will be better met by retaining the plaintiff on the throne of justice. But the plaintiff will suffer costs.

8. In the result, I order as follows;

1. **THAT** the notice to show cause dated 17th November 2011 for dismissal of the plaintiff's suit is hereby vacated. The plaintiff's suit shall proceed for hearing on the merits.

2. **THAT** the plaintiff shall take a date for hearing of the suit within 90 (ninety) days in default of which the suit shall stand dismissed.

3. **THAT** the plaintiff shall pay the 1st and 3rd defendants costs assessed at Kshs 15,000 each within 30 (thirty) days of today's date and in any event before the next hearing date.

It is so ordered.

DATED and DELIVERED at NAIROBI this 21st day of June 2012.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

No appearance for the Plaintiff.

Ms Osoro for Murugu for the 1st Defendant.

No appearance for the 2nd Defendant.

No appearance for the 3rd Defendant.