

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL CASE 10 OF 2009

IBRAHIM MUKULU WANCHAPLAINTIFF

VERSUS

TIEDORA KATEGI alias KALASINA

CYRIL OTIS SARI

TASSYSIA SARI KUDIRADEFENDANTS

R U L I N G

The plaintiff filed suit against the defendants seeking an order of eviction of the defendants from the parcel of land known as Bunyala/Bukoma/418 (hereinafter referred to as the suit parcel of land). The plaintiff, inter alia, averred that the defendants had wrongfully and illegally entered and occupied the suit parcel of land. The suit was filed on 2nd April 2009. After filing the suit, the plaintiff served the summons and a copy of the plaint to the defendants. The defendants duly entered appearance and filed a defence denying the allegations made by the plaintiff that they had been in illegal occupation of the suit parcel of land. They, inter alia, averred that they had been in occupation of the suit parcel of land for more than fifty (50) years. The defence was filed on 23rd November 2009. A reply to the defence was filed on 8th December 2009. From the court record, it was clear that the plaintiff took no action to prosecute the case since pleadings were closed.

On 10th November 2011, the defendants filed an application pursuant to **Order 17 Rule 2(3)** of the **Civil Procedure Rules** seeking the dismissal of the suit herein for want of prosecution. The defendants argued that since the close of pleadings, the plaintiff had not taken any step to prosecute the suit hence their decision to file the present application. It was their view that the plaintiff appears no longer interested in prosecuting the case. The plaintiff filed grounds in opposition to the application. The plaintiff stated that the application lacked merit because there was a pending Judicial Review application between the same parties over the same parcel of land. The plaintiff had prioritized over the current suit. The plaintiff argued that it would be futile for this court to dismiss the plaintiff's suit because the plaintiff's cause of action would still be sustained as the tort that the plaintiff was seeking to enforce was that of unlawful occupation which gives rise to a continuous cause of action. The plaintiff urged the court to dismiss the application.

At the hearing of the application, this court heard rival submissions made by Mr. Fwaya for the defendants and by Mr. Jumba for the plaintiff. Having carefully considered the said submission, the issue for determination by this court is whether the defendants laid sufficient basis for this court to dismiss the plaintiff's suit for want of prosecution. Under **Order 17 Rule 2 (1)** of the **Civil Procedure Rules**, this court may dismiss a suit for want of prosecution if no action is taken by either party one (1) year after the close of the pleadings. Under **Order 17 Rule 2 (3)** of the **Civil Procedure Rules**, any party to the suit is granted the liberty to make an application to the court for the dismissal of a suit for want of prosecution if one (1) year has lapsed since any party took any steps to prosecute the case. In the present application, while conceding that they had not taken any steps to prosecute the suit, the plaintiff explained that he had expended his energy in prosecuting a Judicial Review application whose subject matter was the parcel of land in the present case. The plaintiff urged the court to take into consideration the fact that the dispute between the plaintiff and the defendants is over land and therefore, it should be determined on its merits. The plaintiff urged the court instead of dismissing the suit, to give directions that will enable the suit to be

expeditiously disposed of. On their part, the defendants argued that they had exercised the option to have the suit dismissed for want of prosecution instead of fixing the same for hearing because it was apparent that the plaintiff was not interested in prosecuting the case.

This court has the discretion to dismiss a suit for want of prosecution if it is satisfied that the plaintiff took no action to prosecute the same, without any reasonable explanation, for more than a year after the close of pleadings. In the present case, it was clear from the court record that the plaintiff made no effort for more than two (2) years to prosecute the case. His explanation to the effect that he had concentrated his effort on prosecuting a Judicial Review application involving the same parties on the same subject matter instead of the present suit is not convincing. There was nothing that prevented the plaintiff from at least completing the pre-trial requirements like discovery and the filing of witness statements in the present suit so that this court can make at least see that the plaintiff is indeed interested in the prosecution of this case. The plaintiff's lack of interest in this case was exhibited by the fact that the plaintiff took no action for more than six (6) months to complete any pre-trial preparation of the case even after being served with the defendant's application seeking to have this suit dismissed for want of prosecution.

Having evaluated the facts of this application, it was clear that the plaintiff has been indolent. He has not been diligent in the prosecution of this case. The defendants' application has merit and is hereby allowed. The plaintiff's suit is dismissed for want of prosecution. The defendants shall have the costs of the suit and of the application.

DATED AT BUSIA THIS 25TH DAY OF JULY, 2012.

L. KIMARU
J U D G E