



JAVAN LEWA MUYE..... PLAINTIFF/RESPONDENT

VERSUS

- 1. SHIVA ENTERPRISES LTD**
- 2. COMMISSIONER OF LANDS**

3. KILIFI COUNTY COUNCIL..... DEFENDANTS/APPLICANTS

RULING

The Applicants seek to dismiss Plaintiff's suit for want of prosecution and its therefore brought under Order XVI rule 2 and rule 5(c) and (d) of the Civil Procedure Rules.

The Application is premised on 6 major grounds listed on the Notice of Motion dated 28th January 2010 and also supported by the affidavit of the 1st Defendant's Chairman of the Board of Directors one Joseph Muturia sworn on 29th January 2010.

The grounds are as follows:

- (a) The delay in prosecution of this case has been inordinate and in excusable.**
- (b) That the Plaintiff's failure to prosecute this matter since 1995 has caused real prejudice to the 1st Defendant which cannot be compensated by an award of costs as the 1st Defendant has been unable to develop the suit land and the Plaintiff has therefore commercially oppressed and intimidated the 1st Defendant and he intends to continue doing so as demonstrated by his deep slumber.**
- (c) The Plaintiff is guilty of intentional and contumelious default in prosecuting the suit thereof.**
- (d) That it is apparent that either the Plaintiff has no confidence in the merits of his case or has lost the desire to pursue it.**
- (e) That the Plaintiff's conduct in failing to prosecute this matter over such a long period of time amounts to serious abuse of the court process.**
- (f) That the Plaintiff is guilty of laches and equity frowns at the indolent.**

Facts supporting the above grounds are well set out in the supporting affidavit of Joseph Muturia sworn on 29th January 2010.

The Applicant submitted that the Plaintiff's suit be dismissed with costs for the following reasons:-

- (a) The pendency of the Plaintiff's suit unprosecuted for 15 years is against rules of this honourable court devised in public interests to provide expeditious dispatch of litigation and in particular order XVI rules 2,5 and 6 of the Civil Procedure Rules.**
- (b) The inordinate delay also amounts to serious abuse of the court process.**

(c) This Honourable court has a judicial obligation to dismiss the Plaintiffs suit as no sufficient or any explanation at all has been given by the Plaintiff for the inordinate delay in prosecuting the suit hereof.

(d) The Plaintiffs delay prejudices the fair trial of the suit and is commercially oppressive to the 1st Defendant/applicant.

(e) The Plaintiff's suit has very limited chances of success if any as it is trite law that a party cannot obtain prescriptive land rights (adverse possession) against the Government.

The Applicant is offended that this suit has been pending in court for many years and that the Plaintiff had opportunity to finalize the case but opted to leave it like that. The counsel for the Applicant accuses the Plaintiff of abusing the court process by intentionally avoiding to prosecute the suit.

There is no doubt in my mind that the suit has not proceeded for trial as required by law within reasonable time. The Respondent in reply to this application made written submissions which primarily dealt with the history of the case and how the Applicant has always been wrong in the matter. The most serious accusations against the 1st Defendant/Applicant is that he processed his title deed in breach of court orders. The learned counsel for the Respondent submitted that the issuance of the said title in the name of the 1st Defendant amounted to fraud and contempt of court. Astonishingly, the Counsel for the Plaintiff submitted that this suit is incapable of being dismissed as there are injunctive orders issued in the matter on 26th day of July, 1995 by the Court of Appeal in C.A. Appl. No. 153 of 1995 at Mombasa (70/95UR) **Javan Lewa Muye VS. Shiva Enterprises & 2 Others.**

The Plaintiff believes that by virtue of the subsisting injunction orders issued by the Court of Appeal, this court cannot entertain any other issue before the subsisting orders are discharged. I am not persuaded by this kind of submissions. In other words, the Plaintiff suggests that he can let the case remain pending in court without action on his part as long as there are injunction orders by the Court of Appeal. This kind of thinking is wrong. The suit should be concluded in one way or another. Unless the Plaintiff takes steps to set down the case for hearing, the suit will be liable for dismissal even without anyone moving the court. The court might as well act on its motion. The Plaintiff also accuses the 1st Defendant of filing many applications without saying if the applications prevented him from prosecuting his suit within reasonable time.

Nevertheless, when this particular ruling was pending before the court, the Applicant filed a fresh application. The Application is a Notice of Motion dated 25th July 2011. It is yet to be heard. It is asking for orders inter alia the matter to be marked as adjudicated wholly in terms of an agreement reached on 17th March 2010.

Although there exists no cogent reasons given by the Plaintiff as to why the suit has been pending without action, I exercise my discretion and give the Plaintiff a chance to take reasonable steps to set down the case for hearing in view of the history of the case, the subject-matter and issues involved. The Applicant may as well prosecute his application dated 17th March 2010 in which case, the matter might be concluded earnest.

From the foregoing, I disallow the 1st Defendant's Application dated 28th January 2010. Costs shall be in the cause.

Dated AND Signed At Nairobi ON This 14TH Day Of AUGUST 2012.

M. K. IBRAHIM
JUDGE

DATED AND Delivered At Mombasa on This 31ST Day Of

AUGUST 2012.

J.W. MWERA

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JUDGE

Delivered in the presence of: