



REPUBLIC OF KENYA

High Court at Nakuru

Civil Case 352 of 2008

FANUEL OOKO RARINGO.....PLAINTIFF

VERSUS

GUYO SARR HUKA.....1ST DEFENDANT

COMMISSIONER OF LANDS.....2ND DEFENDANT

THE ATTORNEY-GENERAL.....3RD DEFENDANT

RULING

This Ruling relates to the 1st Defendant's Notice of Motion dated 20th May 2011 and filed on 5th July 2011 for orders that -

(a) *the Plaintiff's suit herein be dismissed for want of prosecution, and*

(b) *that the costs of the Motion as well as the entire suit be granted to the Applicant.*

The Application is supported by the Affidavit of Lawrence Macharia Karanja, counsel on record for the 1st Defendant, and the grounds on the face thereof.

The Application was however opposed by the plaintiff's counsel Mr Tombe who pleaded from the Bar that the Applicant be granted an opportunity to ventilate his case.

It was urged before me on 11th July 2012 when the Ruling was reserved. The application is brought under the provisions of Order 17 rule 2 of the Civil Procedure Rules. That rule empowers a defendant to either set down the suit for hearing or apply for its dismissal if the plaintiff fails to do set it down for hearing.

In this case the matter was last in court on 18th January 2010 when the court made orders for maintenance of the status quo. Since then the Plaintiff has taken no action for over one year, to set down the suit for hearing. The 1st Respondent, is therefore entitled to approach the court for dismissal of the suit.

I have however read the pleadings herein including the Defence and Counter-claim by the 1st Defendant herein.

Though the Plaintiff/Respondent appears to be the allottee of the land in dispute Nakuru Municipality Block 22/662 in or about May 1996, and complied with the terms of the Allotment Letter, he did not process Title thereto until on or about 25th August, 2008.

In the meantime through means which can only be revealed through evidence, one ZAKAYO KARIUKI NGUITU of Nakuru, procured an allocation (*not yet proved*) to the same plot, and procured a Certificate of Lease on 20th June 2005, and proceeded to sell and transfer the same property to the Plaintiff a year later on 3rd July 2006. It is unclear what the plaintiff was doing all this time without procuring title to the plot.

There will therefore be issues, why the plaintiff did not proceed to obtain title after the allocation to him on 31st May 1996, and how the Commissioner of Lands re-allocated (*if at all*), the same parcel of land to the 1st Defendant. So far, there is no Defence by the Commissioner of Lands or his counsel, the Attorney-General.

I have considered authorities cited to me by counsel for the 1st Defendant. I am hesitant to grant the orders sought. The court will not exercise its inherent jurisdiction to dismiss the Plaintiff's suit for want of prosecution unless the delay has caused a real risk of prejudice to the Defendant (**PROTEIN & FRUIT PROCESSORS LTD VS. CREDIT BANK LTD [2004] 2 K.L.R. 409**).

In this case the anxiety by the 1st Defendant is understandable. He has made massive investment into the suit property. He is in possession. He has title subject to inquiry like that of the plaintiff. One of these titles was issued fraudulently or by mistake. It is necessary to make inquiry into them rather than sweep the issues down on technicalities of the law. The court will not be doing justice to either the Plaintiff or the 1st Defendant.

In the circumstances, I decline to strike out the Plaintiff's suit, and direct that the same be set down for hearing by the Defendant who is the Applicant herein, or the Plaintiff herein within the next 120 days.

In fairness to the 1st Defendant, I grant the costs of the Application to the 1st Defendant, the Applicant herein.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 26th day of October, 2012

M. J. ANYARA EMUKULE

JUDGE