



REPUBLIC OF KENYA

High Court at Eldoret

Environmental & Land Case 997 of 2012

JOHN SEGUTON CHELIMO & 12 OTHERS.....PLAINTIFF

VS

NGOBITWA FARMERS COOP SOCIETY LTD AND 4 OTHERSDEFENDANTS

(Application for dismissal of suit for want of prosecution – principles to be applied – appeal having been filed in the court of appeal at the time suit was not proceeding- adequate reason provided – application dismissed)

R U L I N G

The application before me is the motion dated 22 March 2012 filed by the defendants and seeking orders that this suit be dismissed with costs for want of prosecution. The application is brought under the provisions of Order 17 Rules 2(3) of the Civil Procedure Rules, 2010 and is supported by the Affidavit of Gabriel Chemweno who is one of the defendants in this suit. The application is opposed by the Replying Affidavit of Joyce Chumba who is the learned counsel on record for the plaintiffs.

This suit was filed on the 27 February 2006 by way of Complaint by thirteen plaintiffs through the firm of m/s J.C Chumba & Co Advocates. The suit seeks inter alia a declaration that a parcel of land registered as Soy/Soy/Block 10 (Navillus)/139 measuring about 36.83 hectares is the property of the plaintiffs. The defendants duly filed defence and made a counterclaim of their own seeking a declaration that the suit land belongs to the 1st defendant. For the record there are five defendants to this suit. To date the suit has never been set down for full hearing on merits but there have been several applications. Of significance to my decision is an application dated 27 February 2006 which was an application filed by the plaintiffs seeking an injunction to restrain the defendants from dealing with the suit land. The application was allowed on 8 March 2006 by Gacheche J.

The defendants being aggrieved by the said decision, filed an application for review dated 28 March 2006. This application was dismissed on 16 August 2006. The defendants were aggrieved by this decision and filed an appeal to the Court of Appeal being Eldoret Civil Appeal NO.284 of 2006. That appeal was listed for hearing on the 24 February 2012 and was dismissed for non-attendance. Between the decision of 16 August 2006 and the decision of the court of appeal on 24 February 2012, not much appears to have been happening in the court file although some of the plaintiffs filed Notices of Withdrawal. It is with this history that I have to make a decision on this application for dismissal for want of prosecution.

Order 17 Rule 2 provides as follows :-

2. (1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.

(4) The court may dismiss the suit for non-compliance with any direction given under this Order.

It will be observed from the above provisions that the threshold period for dismissal for want of prosecution is one year since the last step in the suit was made. Both the court and any party to the proceedings have the prerogative of listing the suit for dismissal for want of prosecution; the court deriving this power from Rule 2(1) and the party to the suit from Rule 2(3).

The applicants have moved the court under Rule 2(3). They have argued that this matter last came up in court on 23rd April 2007 and that "six years have lapsed" (although it is probably just over 5 years). Mr. Omusundi for the applicant argued that this delay was inordinate and urged me to dismiss the suit for want of prosecution. Mr. Barasa, who held brief for Mrs.Chumba, learned counsel for the respondents, relied entirely on the Replying Affidavit of Mrs. Chumba. He argued that the delay herein was not intentional. In her Replying Affidavit, Mrs.Chumba averred that after the filing of this suit, the defendants did file another suit emanating from the same subject matter being Eldoret HCCC No.16 of 2007 and that there was an application dated 19th November 2008 to consolidate the suits. She has deponed that there was an order of consolidation with the proceedings being recorded in a suit No.40 of 2007 which she stated has been proceeding and was last listed for hearing on 14th March 2012. None of the pleadings or orders laid out by Mrs. Chumba were annexed to her affidavit. I cannot therefore tell whether her averments are correct or not.

The order of dismissal for want of prosecution is a draconian order which should only be issued in the clearest of circumstances. I can do no better than to quote the dictum of Chesoni J, in the case of ***Ivita vs Kyumbu (1984) KLR 441***, where at 449 he stated as follows on the test to apply in an application for dismissal for want of prosecution :-

"So the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay...The defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties notwithstanding the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time. Where the defendant satisfies the court that there has been prolonged delay and the plaintiff does not give sufficient reason for the delay the court will presume that the delay is not only prolonged but it is also inexcusable and in such case the suit may be dismissed."

In the circumstances of this suit, I take the view that it will not be proper to dismiss this suit for want of prosecution . This is especially in light of the fact that there was an appeal filed by the defendants/applicants which was disposed of on 24 February 2012. It may be that the plaintiffs/respondents had an obligation to proceed with the hearing of this suit despite the appeal but I can understand that there could have been a delay in the prosecution of this suit as the decision in the court of appeal was being awaited. I have based my position on this point since this is clear from the court record. If I am to believe Mrs.Chumba that there was a consolidation and that the matter was in court on 14 March 2012, then still this application for dismissal would have been premature. I believe that on the facts, there is sufficient reason for the delay.

That being the position I cannot allow this application. I therefore dismiss the application but with no orders as to costs. I further direct the parties to appear before me on the 23 January 2013 for further orders and directions on how to proceed with this suit.

DATED and DELIVERED this 18th day of DECEMBER 2012.

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET.

Delivered in the presence of

Mrs J.C. Chumba of m/s J.C Chumba & Co Advocates for the Plaintiffs/respondents.

Mr. T.K. Kiplimo of m/s Gicheru & Co Advocates for the defendants/applicants.