REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (MILIMANI LAW COURTS

ENVIRONMENTAL & LAND CASE 459 OF 2009

DUNCAN NG'ANGA NJENGA………………………………..PLAINTIFF

VERSUS

NJIHIA NJOROGE……………………...………………..DEFENDANT

RULING

This is an application brought by the Defendant under Order 17 rule 5 of the revised Civil Procedure Rules to set aside the suit filed by the Plaintiff for want of prosecution. When this matter came up for hearing on 11th October 2011 Mr. Wesonga holding brief for Mr. Mwaura who is the Counsel for the Plaintiff, and Ms. Mwai, Counsel for the Defendant asked for the ruling to be given on the written submissions filed by the parties.

The suit was filed by the Plaintiff on 15th September 2009 by way of Originating Summons. The main grounds for the application are that the Plaintiff has not taken steps to set down the suit for hearing since 9th November 2009, and is therefore guilty of inordinate and excessive delay in prosecuting the suit. This, the Defendant avers, is causing him injustice.

The Plaintiff in his Replying Affidavit sworn on 14th January 2011 and filed on 18th January 2011 gives the reasons why he did not prosecute this suit. He avers that there were several suits pending in the lower courts (SPMC (Limuru) Civil Suit No. 257 of 2009) and in this High Court (Judicial Review Application no 22 of 2o1o) involving the same parties and subject matter of this suit. The Plaintiff's Counsel in his written submissions filed on 11th October 2011 further submitted that he thought it prudent to finalise the matters in the subordinate court and then prosecute this suit.

The Defendant has responded to the issue of the pending suits in his Further Affidavit sworn and filed on 14th July 2011. He states that one of the suits in the lower courts (SPMC (Limuru) Civil Suit No. 257 of 2009) was filed by the Defendant before the commencement of this suit, and judgment was given in his favor on 10th February 2011. In addition the Defendant in his Replying Affidavit to the Originating Summons sworn and filed on 6th October 2009 does make reference to this pending case. The court also notes from the copy of the plaint which is annexed to the said Replying Affidavit, that the prayers sought were for the eviction of the Plaintiff from the suit property. The Plaintiff has admitted that judgment was given in the case in his written submissions filed on 11th October 2011.

I have read and carefully considered the pleadings, evidence and written submissions filed by the respective parties to this application, as well as the authorities cited. There are two tests to be satisfied under Order 17 rule 2 of the Civil Procedure Rules for the dismissal of a suit for want of prosecution. The first one is whether there has been delay. The delay in prosecuting the suit at the time of filing of the application for dismissal was a period of one year and one month. The Defendant's counsel has relied on various authorities where there was dismissal for prolonged delay. (**Hortiquip vs Edward Ukiru Chasia** Civil Appeal 67 of 1999 reported in 2008 eKLR and **Barey Ali Habashow vs Godfrey Gichuhi,** Civil Case no 591 of 1992 reported in 2008 eKLR). Counsel for the Plaintiff has sought to distinguish these authorities and submits that one of the reasons they are inapplicable is because the delay in the two cases was for periods of two years and fifteen years respectively. Counsel further submits that the delay in the present suit was not inordinately long. My opinion on this issue is that as long as the threshold of one year's delay in prosecuting a suit has been met, there is culpable delay and the suit is subject to dismissal.

The second test to be satisfied under Order 17 rule 2 is that the delay must be inexcusable. I am also persuaded in this respect by the ruling of this Court in **Ivita vs Kyumbu (1984) KLR 441** that even if there are good reasons for the delay, the court must also be satisfied that justice will still be done to the parties despite the delay. I find that the reasons given by the Plaintiff for not prosecuting this suit are of themselves based on an irregularity. Section 6 of the Civil Procedure Act is clear on the issue of multiplicity of suits, and it was not prudent as the Plaintiff argues to have filed this suit, nor to have continued with the prosecution of other suits after having filed this suit. Indeed it is an abuse of the court process, and one of the main reasons why section 6 of the Civil Procedure Act exists in our statutes is to avoid the delayed justice, costs and backlog of cases that arise from multiple suits involving the same parties and issues.

The court does acknowledge that the Defendant also had equal responsibility to prosecute the case, but as stated in the foregoing the Defendant did specifically plead to the existence of the pending case.

I therefore find that the Plaintiff has delayed in prosecuting the suit filed as ELC No 459 (OS) OF 2009 for no good excuse, and order the dismissal of the suit for want of prosecution as prayed in the Notice of Motion dated 7th December 2010. Costs are awarded to the Defendant.

Dated, signed and delivered in open court at Nairobi this 25th day of October, 2011.

P. NYAMWEYA

JUDGE