REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Civil Case 316 of 1992

MOSES MURIIRA MAINGI ……………………..…1ST PLAINTIFF
FRANCIS MUTUMA MAINGI …………………… 2ND PLAINTIFF
NAHASON NDEREVA MAINGI ………………… 3RD PLAINTIFF

VERSUS

MAINGI KAMURU …………………………… 1ST DEFENDANT
GEOFFREY MWIGI MAINGI PAUL ……….. 2ND DEFENDANT

RULING

The Plaintiffs sued the 1st defendant, their father, who is now deceased and the 2nd defendant, their brother claiming that they two had fraudulently registered parcel number *ABOTHUGUCHI/KATHERI/293* into the name of the 2nd defendant. They therefore sought for rectification of the register of that parcel of land by sharing the land between them and the 2nd defendant. The court was informed that the 1st defendant died pending the determination of this case. What is before court is the Chamber Summons dated 17th August 2006. That is an application by the defendant seeking for the dismissal of the suit for want of prosecution. In the short affidavit in support of the application, learned counsel, Leonard Ondari stated that this matter was adjourned generally on 11th July 2001. There was a ruling delivered by the court on 31st July of the same year in the absence of the parties. That since that ruling was read, the plaintiffs have lost interest in this action. In support of that application, learned counsel for the defendant stated that the fact that the parties were related, was not reason not to proceed with this case. He denied that there has been negotiations. All in all, he stated that there had been a delay of 6 years. The plaintiff's counsel relied on the replying affidavit by the 3rd plaintiff. In that affidavit, the said plaintiff stated that their father before passing away had beseeched them to sit down and resolve this matter amicably. They heeded to the advice of their father and begun having family meetings with a view to settling this matter. That they have had no less than 4 meetings. That the negotiations are on going. He stated that had the defendant indicated that he was not interested in negotiations, they would have pursued hearing of the suit. That the failure to fix the matter for hearing was not deliberate but that it was an honest belief that all parties were committed to the negotiations. In further support to that affidavit, learned counsel for the plaintiffs sought to rely on the following cases:-

1. ***Sunflag Textiles & Knitwear Mills Ltd & Ano. Vrs. Johnstone Etale Lijutsa*** Civil Case No. 251 of 1991:-

In this case, Justice Osiemo, in considering an application for dismissal for want of prosecution stated thus:-

"Mr. Gikandi counsel for the defendant conceded that proposals for settlement were made but this was done after this application for dismissal of the suit for what of prosecution had been filed. This suit was filed in court about 17 years ago and obviously this is an inordinate delay."

But the power to dismiss an action for want of prosecution without giving the plaintiff the opportunity to remedy his fault will not be exercised unless the court is satisfied that there has been inordinated and inexcusable delay on the part of the plaintiff."

2. ***Empress Dawdger Company Ltd Vs. Kenya Cultural Centre*** Civil Suit No. 670 of 2001.

In this case, Justice Ringera, as he then was, quoted from a passage of Halsbury's Laws of England, 4th Edition as follows:-

"The power to dismiss an action for want of prosecution, without giving the plaintiff the opportunity to remedy his default, will not be exercised unless the court is satisfied: (1) that the default has been intentional and contumelious, or (2) that there has been prolonged or inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause to or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and third parties. The power to dismiss an action for want of prosecution, other than in a case of contumelious conduct by the plaintiff, should not usually be exercised within the currency of any relevant limitation period, and, since the plaintiff may avail himself of his right to issue a fresh writ, the none expiry of the limitation period is generally a conclusive reason for not dismissing an action that is already pending."

As stated by the defendant, this case before the filing of the present application was last in court on

31st July 2001. From the age of the case, one can tell that indeed there has been inordinate delay in the matter. There has been no reasonable explanation for that delay. The plaintiffs have conceded that the first defendant is now deceased. The allegations by the plaintiffs is that the first defendant together with the 2nd fraudulently transferred the suit property to the 2nd defendant. It is clear that the evidence of the first defendant would be vital in a case such as this to help the court understand the circumstances under which the 2nd defendant was registered as the owner of the property. If the case was to go for hearing now that the first defendant has died, undoubtedly, the 2nd defendant would be prejudice since he would not be able to rely on the very vital evidence of the first defendant who was the father of all the parties in this action. I find that in that circumstance fair trial would not ensue. I find that the plaintiffs have failed to diligently prosecute their case to the detriment of the defendant. The plaintiff's advocate faulted the affidavit in support of the application saying that the counsel for the defendant should not have filed the affidavit and further that he had no authority from the defendant to file the same. The advocates (Practice Rules) provides that no advocate may appear before any court where he has reason to believe that he may be required as a witness to give evidence. In other words, an advocate can appear in a matter where he is unlikely to be called as a witness. Learned counsel, Mr. Ondari, stated in his affidavit that he was aware of facts and the history of this case. He then proceeded to simply state in the affidavit the facts that can be discerned from the proceedings of this case. He simply stated the date when the matter was adjourned general and the date when it was last before court. The matters he deponed to were not controversial. I find that I am not entirely in agreement with the decision relied upon by the plaintiff in opposition to the said affidavit. The plaintiffs relied on the case of **Oduor Vs. Afro Freight Forwarders** [2002] 2KLR. In that case it was held:-

"The replying affidavit was sworn by the plaintiff's advocate and it is not stated that he had the plaintiff's authority to do so. That affidavit was therefore sworn by a stranger as the deponent fails to reveal his source of authority to sear it."

The learned counsel Mr. Ondari cannot be said to be a stranger in this matter. He is the advocate on record for the defendants. And having that mandate, in my view, did not necessitated him getting specific authority from his client to swear the affidavit. After all, the matters as I

have said that he deponed to were not controversial. My finding in this matter is that the plaintiffs have failed to prosecute their case with due diligence and accordingly it is only just that the application be allowed. The following is the ruling of the court:-

1. ***The plaintiff's suit is hereby dismissed for want of prosecution.***

2. ***The costs of the suit and of the Chamber Summons dated 17th August 2006 are awarded to the defendant.***

Dated and delivered at Meru this 19th day of March 2010.

MARY KASANGO
JUDGE