



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 912 of 2002

HILDAH WANGARI GETHENJI

**(Suing as administrator of the Estate of the late
Joseph Augustine Gethenji (Deceased)PLAINTIFF**

V E R S U S

COMMISSIONER OF LANDS1ST DEFENDANT
WILSON GACHANJA2ND DEFENDANT
J. S. K. MUTITU3RD DEFENDANT
SAMMY MWAITA4TH DEFENDANT
PRINCIPAL REGISTRAR OF TITLES5TH DEFENDANT
WOODRACKS HOLDING LTD6TH DEFENDANT
MAUJI PATEL & CO.7TH DEFENDANT
MAUJI PATEL8TH DEFENDANT
SHAMJI MAUJI PATEL9TH DEFENDANT
KHIMJI MAUJI10TH DEFENDANT
MARE MAREKAMAR MAUJI PATEL11TH DEFENDANT
PRAVIN MAUJI PATEL12TH DEFENDANT

R U L I N G

The Plaintiff (suing as the Administrator of the Estate of the late Joseph Augustine Gethenji) filed this suit on 30th May, 2002 through S. K. Riitho & Company Advocates against the Defendants over Land Parcel LR. 209/9493. The Plaintiff pleaded that in 1988 the land, then unsurveyed plot No. 5 Dandora Scheme, was allocated to the deceased by the 1st Defendant. However, on 18th February, 1991 the 3rd Defendant unlawfully allocated the same to the 6th Defendant. The 1st, 2nd and 3rd Defendants then allowed the 6th Defendant to informally transfer the land to the 7th, 8th, 9th, 10th, 11th and 12th Defendants in respect of whose names the land was registered. The Plaintiff had not been repossessed of the land and claims all these transactions that led to the land being registered in the names of the 7th to 12th Defendants were fraudulent, unconstitutional and illegal. She sought a declaration in that regard and the cancellation

of the said alienation and grant. She sought that the land be ordered to revert to her and compensation paid.

The 7th to 12th Defendants filed a defence through Kirundi & Company Advocates denying the claim. Their case was that they bought the land for valuable consideration from the 6th Defendant and have a good title. They pleaded they were unaware of the other allegations by the Plaintiff.

The 1st to 6th Defendants failed to enter appearance or file defence and interlocutory judgment was entered against them.

The present motion filed under **Order 16 rule 5(c) and (d)** of the **Civil Procedure Rules** and **section 3A** of the **Civil Procedure Act** seeks the dismissal of the suit for want of prosecution on the ground that it has been 1½ years since the matter was last in court and the Plaintiff has not set it down for hearing and therefore that the Plaintiff is disinterested in it. It is alleged that the delay in prosecuting the suit has been inordinate and inexcusable. The application is by the 7th to 12th Defendants. It is supported by an affidavit sworn by DONALD O. OWANG who has conduct of the case. A replying affidavit was sworn by the Plaintiff to oppose the application.

Briefly, after pleadings closed the case came for hearing on 3rd February, 2004 when the Plaintiff's advocate successfully asked for adjournment. On 14th June, 2005 the matter again came for hearing. The Plaintiff's advocate's request to adjourn was allowed. It came on 25th September, 2007 when court was informed that parties wanted to negotiate. It was put for mention on 22nd October, 2007. Talks were going on. On 22nd November, 2007 it was mentioned to find out the position. The negotiations had apparently collapsed as parties sought a hearing date. On 20th May, 2008 the case came for hearing. It was agreed that it be taken out. On 11th September, 2009 the Defendants drew the present application. This is about 1 year and 4 months since the last adjournment. The record shows that there was an application dated 15th May, 2008 and filed on the same date when the case came for hearing on 20th May, 2008. The application was by the Plaintiff seeking to amend the plaint. That is probably the reason why the main hearing was adjourned. The application has to be disposed of before the main hearing.

The narration of events shows that the Plaintiff did not file the suit and abandon it, as it were. She has been taking dates for hearing. That her advocate has twice adjourned it is beside the point. The negotiations which eventually failed also caused delay.

The Plaintiff states that since April, 2009 her advocate, Mr. Riitho, has been unwell and under treatment. He has not been able to resume work. This is why she has now instructed the firm of Thuita Kiiru & Co. Advocates who have now filed a notice of change. This is to demonstrate she is interested in the case.

During the application M/s Njogu for the Defendants submitted there has been inordinate delay in prosecuting the suit and that the explanation given was not sufficient. Mr. Kiiru for the Plaintiff thought the delay had been explained, was excusable and not inordinate.

It should be noted that it was the Plaintiff who filed the suit and it was her responsibility to set it down for hearing. The court has the discretion to grant an application for dismissal of the suit for want of prosecution. Such application should be exercised in such a way that the Plaintiff can be given an opportunity to remedy his default unless the Defendant can demonstrate that either the default has been intentional or that there has been inexcusable delay which is such that there is a substantial risk that a fair trial of the issues in the case will not be possible. (See **TITUS NGATIA –VS- DANYLA PEREIRA AND ANOTHER, HCCC NO. 536 of 1970 at Nairobi**). The Court of Appeal of England in **ALLEN –VS- SIR ALFRED MCALPINE & SONS [1968] 1 ALL ER 543** indicated the following as the principles governing applications for dismissal for want of prosecution. It must be shown that:-

- a) the delay is inordinate;
- b) the inordinate delay is inexcusable, or
- c) the defendant is likely to be prejudiced by the delay.

In **NGWAMBU IVITA –VS- AKTON MUTUA KYUMBU, HCCC No. 340 of 1971** the High Court noted that the test is whether the delay is prolonged and inexcusable, and, if it is, whether justice can be done despite the delay. The Defendant has to show that he will be prejudiced by the delay.

In the instant case there was delay in setting down the suit for hearing, but it was not a prolonged one. The delay was interspaced by the application to amend the plaint. The illness of the Plaintiff's counsel has substantially explained the delay, and the fact that the Plaintiff has instructed another counsel to take over her case should Defendants did not demonstrate how the delay would prejudice them or affect the fair trial of the dispute.

I dismiss the application but ask that the Plaintiff takes reasonable steps to have the outstanding application disposed of so that the suit can be heard. She will also pay costs of the application.

DATED AND SIGNED AT NAIROBI

THIS 3RD DAY OF MAY 2010

A. O. MUCHELULE

J U D G E