

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

Civil Case 39 of 1994

ELIUD MUNYUA MUTUNGI PLAINTIFF

VERSUS

FRANCIS MURERWA DEFENDANT

RULING

The respondent in this motion brought the suit herein against the applicant for a declaration that he (the respondent) is entitled to one half share of parcel of land No. NYAKI/MULATHANKARI/442 and an order directing the applicant to subdivide and transfer to the respondent the one half share of the said suit land.

The suit was filed on 24th January 1994. The applicant filed his defence on 18th February 1994 and amended the same on 18th July 2002. The applicant has now brought the instant application asking that the suit be dismissed for want of prosecution. He argues that since 22nd October, 2002, when the hearing was stood over generally the respondent has failed to set the case down for hearing. That the respondent has lost interest in the matter.

The respondent in his replying affidavit maintains that he is still keen to prosecute the suit. That there were attempts at settling the matter out of court. The respondent further avers that given the nature of the dispute, it is only just and fair that it be determined on merit. I have considered these arguments.

The application is expressed to be brought under Order 16 Rule 5(c) of the Civil Procedure Rules, which allows the court, on application by the defendant to dismiss a suit, if the plaintiff fails, within three months after the removal of the suit from the hearing list, to set it down for hearing. The case, according to the record, was first listed for hearing after summons for directions was taken out on 4th February 1997. Subsequently, the hearings were adjourned several times until 22nd October 2002 when it was stood over generally as neither the respondent nor his counsel was in attendance yet that date was taken by consent. Since 22nd October 2002, when the hearing was adjourned generally, the respondent has not taken any steps in prosecuting the case hence this application filed nearly three years after that adjournment.

It is the policy of the court that cases brought before it be heard and disposed of expeditiously. This calls for vigilance of the parties. It is also the policy of the court to be slow in dismissing a case for whatever reason. This policy is reflected in order 16 Rule 5 of the civil Procedure Rules under which this application is made. The rule gives the defendant or the court an option of either setting the case down for hearing before resorting to its dismissal.

It has now been established by a long line of authorities that unless the delay is prolonged, flagrant and inexcusable or is such that the defendant is likely to suffer great injustice, the court will not dismiss the suit. Put differently, the court will not dismiss a suit for want of prosecution unless it is satisfied that the default has been intentional or that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers and that such delay will give rise to substantial risk, that it is not possible to have a fair trial of the issues in action and is likely to cause serious prejudice to the defendant.

See **Allen V. Sir Alfred McAlpine & Sons Ltd** (1968) 1411 ERJ 43, **Ivita V. Kyumbu** (1984) KLR

441. Although the respondent maintains that he has had the interest of moving the matter forward that interest cannot be discerned on record.

After hearing was adjourned on 22nd October 2002 he took no further steps until this application was brought nearly three years later. The allegation of attempts at a settlement is similarly not backed by any evidence.

The delay was not only prolonged but also without excuse. The suit was filed in 1994. It is my view that fourteen (14) years later it would be prejudicial to the applicant to be dragged through a trial brought by an uninterested party.

This is a case of a party who filed a suit, lost interest and went to sleep. It is not for the court to assist such litigants. I find merit in the application which is hereby allowed. The suit is accordingly dismissed for want of prosecution with costs.

Dated and delivered at Meru this 18th day of April 2008.

W. OUKO

JUDGE