

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 456 of 2003

MAVOKO DISTRIBUTORS COMPANY LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

RUCINA MUMBUA MBEVI.....DEFENDANT/APPLICANT

R U L I N G

The defendant brings this application under Order XVI rule 5 of the Civil Procedure Rules for orders that the plaintiff's suit be dismissed for want of prosecution. The application is based on the ground that there has been inordinate delay. In support of the application RUCINA MUMBUA MBEVI has sworn an application giving grounds.

Miss Muteti appearing for the applicant submits that this suit was filed on 19th May 2003 and defence was filed on 6th June 2003 and since then the plaintiff has not taken any step to set the suit down for hearing. The application is opposed by the plaintiff who has filed a replying affidavit upon which he relies entirely and in which he avers that the delay was due to the illness of his father who was the director of the plaintiff company.

The facts that gave rise to this litigation briefly may be stated. The plaintiff is the registered proprietor of land parcel LR No 337/2858 within Mavoko Municipality while the defendant is the registered proprietor of the adjacent plot being Plot No. 7 was desirous of developing her plot and she submitted building plans in respect of Plot No. 7 to Mavoko Municipal Council and the same was approved after inspection was carried out by the officials.

The plaintiff alleged that the defendant in the process of constructing a building on her plot she has encroached on public access road and has wrongfully extended her construction to the plaintiff's land a fact which is denied. Since the suit was filed on 19th May 2003 no steps has been taken to set the suit down for hearing.

The defendant alleges inordinate delay on the part of the plaintiff in bringing its suit to a speedy conclusion.

The question of delays in bringing civil action to speedy conclusions has been considered various decision of the Court of Appeal when the delay is prolonged and inexcusable, and is such as to do grave injustice to the one side or to the other or to both, the court may in its discretion dismiss the action straight away. On the other hand, the courts have held that this power should not be exercised unless the court is satisfied in that the default has been intentional and that such delay will give rise to substantial risk that it is not possible to have a fair trial of the issues in the action or in such as is likely to cause or to have caused serious prejudice to the defendants either between themselves and the plaintiff or between each other or between them and a third party.

In the instant suit the cause of action arose on 19th May 2003. The defendant had submitted her building plans for approval which was done and she started construction. The plaintiff filed this suit to stop the construction but since then about 6 years it has not taken any step to set the suit down for hearing. The excuse given is that one director was ill which illness culminated to his death.

But the plaintiff being a limited liability company the illness of one director could not prevent the other directors from taking action. Further as gathered from the pleadings what is in issue is the head of access and encroachment. The plaintiff ought to have petitioned the local authority to assist it identify the boundaries.

Having considered the application amid the submissions by both counsel I am satisfied that the delay of over 5 years is excessive and the plaintiff has been guilty of inordinate and inexcusable delay. There being no reasonable explanation for the delay there is no way the court can exercise its discretion otherwise.

Accordingly I allow the application and dismiss the suit for want of prosecution. I award the defendant costs of suit as well as this application.

Dated and delivered at Nairobi this 17th day of June 2008.

J. L. A. OSIEMO

JUDGE