REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Case 31 of 2004

GREGORY KYALO MWOLOLO ……...…… PLAINTIFF

VERSUS

LILIAN MULI ……..……...…. 1ST DEFENDANT

GRACE MWEWA ……...…. 2ND DEFENDANT

RULING

1. The Application dated 23/2/2007 seeks orders that the suit herein be dismissed for want of prosecution under Order XVI Rule 5 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

2. In the affidavit in support sworn on 23/2/2007 by Dorcas Musila, Advocate and in submissions by Mrs Nzei, Advocate for the Applicant it is deponed and argued that the suit was last listed for hearing of a certain Chamber Summons on 3/5/2004 and when it was stood over generally, the Plaintiff completely failed to take any action and that therefore the suit is one which is fit to be dismissed for want of prosecution.

3. In the Replying Affidavit sworn on 30/4/2008 and in submissions by Mr Kitonga advocate for the Respondent, the response to the Application is that he is interested in the suit and that the only reason why nothing has been done in the last four (4) years is because his former advocates who are unnamed, moved offices in Nairobi and although he wrote letters to them, he never received any response. No copy of any letter is however attached.

4. The Respondent also depones that in October 2007, he visited the Machakos High Court Registry and he was informed that the present Application had been filed and that no hearing dates could be given in any event as the diary for the year was full. That also because he works in Nakuru, he was unable to attend court due to post-election violence.

5. Mr Kitonga has relied on the decision in Njuguna vs Magichu & 3 Others (2003) KLR 507 for the argument that a litigant who wishes to be heard should not be penalized for the mistakes of his advocates.

6. I have seen the Plaint in this matter and I note that it was filed on 17/3/2004 by the Plaintiff through his advocates M/S Kasyoka & Associates. An injunction was sought by a Chamber Summons filed on the same day. On 18/3/2004, 24/4/2004 and 3/5/2004, the Application was before Wendoh J and on the

latter date, it was stood over generally. Nothing happened until the present Application was brought.

7. Order XVI Rule 5 of the Civil Procedure Rules provides as follows:-

"If, within three months after-

(a) the close of pleadings: or

(b) (deleted by L.N. 36/2000)

(c) the removal of the suit from the hearing list; or

(d) the adjournment of the suit generally, the plaintiff, or the court of its own motion on notice to the parties, does not set down the suit for hearing, the defendant may either set the suit down for hearing or apply for its dismissal."

8. In Mukisa Biscuit Co. vs West End Distributors Ltd (1969) E.A. 696, Sir Newbold V-P held that "it is the duty of a Plaintiff to bring his suit to early trial…" and in this case, it is admitted that the delay of four (4) years was indeed occasioned by the Plaintiff and his advocates. Can he expect sympathy or as Sir Newbold quipped? "I wish to make it clear that in future a Plaintiff, who, for whatever reason delays for over six years before bringing his suit for trial can expect little sympathy."

9. In this case, the Plaintiff says that he wrote to his advocates who had moved offices but gives no copies of the letters. He also says fails to name the advocates but we know that it is M/S Kasyoka & Associates. If so, why did it take the filing of the Application before me to get the Plaintiff to remember his suit? In any event post-election violence only happened in 2008 and not 2004, 2005, 2006 or 2007 and so why inaction?

10.Having so said, I am persuaded that where a party relies on his advocates to handle a matter on his behalf, it is the advocates to keep an eye on the matter and despite my misgivings, the fact of change of advocates to defend the present Application may well vindicate the Plaintiff. In any event as was said in Njuguna (supra) disputes as to land should be finally determined in the Court of Appeal and that is why Waki J.A. quoted with approval the decision in Kenya Canners Ltd vs Titus Muiruri Doge C.Appl. NAI 64/1990 where it was stated thus:-

"this court has held on many occasions that any litigant who wishes to be heard by this court should not be prevented or penalized due to the mistakes of his counsel. The advocate has admitted his mistake in failing to interpret the rules properly. This court has also held that appeals relating to disputes in land should finally be determined by this court."

11.In the present case, the advocates are to largely blame for the delay and yet the dispute relates to land that is said to belong to the Plaintiff but which the Defendants have allegedly encroached upon. The dispute would be best resolved on its merits despite my misgivings as to the conduct of the Plaintiff's conduct.

12.In the end, sympathy and the law must merge to lead me to exercise discretion and decline to dismiss the suit for want of prosecution.

13.I will disallow the Application dated 23/2/2007 but will grant costs assessed at Kshs.5,000/= to the Defendant because as I have said the Plaintiff has a share of the blame for the delay in finalizing the suit.

14.Orders accordingly.

Dated and delivered at Machakos this 29th day of September 2008.

ISAAC LENAOLA

JUDGE

In the Presence of: Miss Musila for Defendant/Applicant

N/A for Plaintiff/Respondent

ISAAC LENAOLA

JUDGE