



REPUBLIC OF KENYA

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

Civil Case 221 of 2007

ROUTE THREE CO-OP LTD. 1ST PLAINTIFF

GOSEPL CELEBRATION CENTRE 2ND PLAINTIFF

VERSUS

NARIOBI CITY COUCIL 1ST DEFENDANT

REUBEN NJUGUNA 2ND DEFENDANT

RULING

APPLICATION TO DISMISS SUIT FOR WANT OF PROSECUTION

I: Background

1. The respondents filed this suit on the 24th January 2000 in which they claimed that the 1st plaintiff was originally the owner of the land parcel LR Plot No. CP8/1 Kayole Estate Zone Block 14. They sold the same to the plaintiff No.2.

2. Defendant No. 1 without colour or right proceeded to demolish any structures on the land and put defendant No.2 in possession.

3. The said parties came to court before Githinji J on

21 July 2000 whereby the said parties agreed to withdraw pending applications and proceeded to the main suit.

4. Hearing dates were thereafter taken for 6.3.01 (Gacheche CA as she then was, not reached) 30 and 31 October 2001, 16 and 17 April 2002, 17 April 2002, 20 May 2002. The latter dates parties entered into negotiations. New dates of 2 and 3 December 2002;

1 and 2 July 2003, 28 and 29 January 2004, 23 and 24 June 2004, 7 and 8 December 2005, 30 and 31 October 2006 and 21 and 22 March 2007 were taken.

5. There being no action for one and a half years the 2nd defendant filed this present application seeking to dismiss the suit for want of prosecution.

II: Application under Order XVI r5 (d) and 6, L r1 and 3.

6. Under order XVI and 5(a) Civil Procedure Rules a suit where no action has taken place after 3 months when the case was generally adjourned it may be set down for hearing or the defendant apply for it to be dismissed.

7. The appellant applied for the case to be dismissed by way of summons.

8. No reply was filed by the respondents who were served through their advocates but were absent on the day the application was called out for hearing.

9. The 1st defendant supports the application.

II: Opinion

10. The issue herein is whether the respondent has failed and or are unable to prosecute this matter diligently. I note that since the year 2000 an attempt to hear this matter had been made by the parties. I have counted 21 days up to the year 2007 in which the dates for hearing of the case was not effected. This is the courts availability to reach the case. At times the dates were taken out and no actual hearing would be heard without the case reaching a judge.

11. I am aware that the rules state that after 3 months where no action is taken an application may be made to have the matter dismissed or alternatively set the matter down for hearing. I find, looking at the conduct of the courts diary that it be always advisable to have the matters set down for hearing.

12. In a situation where 3 years have lapsed the court of its own motion may have the suit dismissed.

14. Where an application has been filed as was in this case it is prudent for the party who has been made a respondent to file a reply explaining the situation as to why they were unable to prosecute the matter. Clearly from the file the issue of being heard arose. The respondents nonetheless were served through their advocates. They have in effect failed to appear to court after being duly served with a hearing notice. This is an indication to court that they are no longer interested in the matter.

15. I would accordingly allow the application with costs to the Defendant No./applicant and defendant No.2.

DATED THIS 28TH DAY OF OCTOBER 2008 AT NAIROBI.

M.A. ANG'AWA

JUDGE

M/s Kahiu & Mbugua & Co. Advocates for the Plaintiff– absent

J.W. Kahari instructed by Kahari Kiai & Co. Advocates for the 1st defendant – present

Mathenge Gitonga instructed by Mathenge Gitonga & Co. Advocates for the 2nd defendant- present