



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 2182 of 1995

WAMERE MWANGI DADETPLAINTIFF

VERSUS

DAVID NJOGU GACHANJADEFENDANT

RULING

An application dated 8th March 2007 and filed in Court on 12th March 2007 seeks an order of this Court to dismiss the suit subject thereto for want of prosecution and costs thereof.

This application is based on the grounds on the face thereof and also on the supporting affidavit. The grounds on the face of the application are that the Plaintiff has not taken any steps to prosecute the suit and/or application dated 14th June 2006 since 26th March 2004; that the Plaintiff has never obtained and served the defendant with summons to enter appearance since instituting this suit on 14th July 1995, that since 26th March 2004 the Plaintiff has never taken any steps in this matter after this Honourable Court delivered a ruling that paved the way for the plaintiff to take further steps to proceed with this suit. That the approximately three (3) years period of delay is inexplicable, and inexcusable in the circumstances. That the pendency of this suit is most prejudicial to the defendant/applicant as the plaintiff has caused to be registered against the title to the suit properties herein being title numbers **Ruiru/Ruiru East/Block 7/3, 81, 82 and 154** unlawful and otherwise unregistrable order purportedly staying the execution of orders issued by this Honourable Court on 5th March 2002. The registration has impeded the defendant's exercise of his proprietary rights as the registered proprietor of the said parcels of land being the suit premises and that it is in the interests of justice that this Honourable Court does exercise its discretion in the defendant/applicant's favour and allow the present application.

The supporting affidavit was deponed to by the defendant who referred to the exparte order of injunction issued by the Court on 14th July 1995, that severally this matter has come up for hearing of a preliminary objection to this application for injunction and or ruling thereon delivered on 14th June 1996.

That for six (6) years after the ruling on the preliminary objection the plaintiff took no steps to prosecute the said application and/or set down the main suit for hearing.

That on 15th February 2002 the defendant filed an application which sought inter alia the dismissal of the suit for want of prosecution.

That this application was heard and the suit was dismissed with costs and earlier orders of injunction were

discharged.

That the plaintiff then filed an application for reinstatement of the suit and that this application was granted and the suit reinstated. That then the application of the defendant for dismissal of the suit for want of prosecution was fixed for hearing inter-parties on 23rd October 2003. That this was done and a ruling on this application delivered on 26th Mach 2004 whereupon the application was dismissed. Thus the suit was reinstated for hearing.

The defendant depones in the supporting affidavit that since that ruling was delivered the plaintiff had again not taken any steps to proceed with the suit or to set down the application dated 14th July 1995 and/or the main suit for hearing for a period of approximately three (3) years which period of delay the defendant verily believes to be inexplicable and inexcusable in the circumstances.

That the plaintiff's delay in prosecuting the suit clearly demonstrates lack of interest and general abandonment of the suit and that his present application is meritorious and ought to be allowed.

That this delay has prejudiced the enjoyment of the defendants rights as the registered proprietor of the suit properties as the respondent (plaintiff) herein has caused to be registered unlawfully an alleged order of stay against the titles to the said properties purportedly issued by this Court on 5th June 2002 at which point in time the suit had been dismissed and that no such order could have been issued by the Court.

That the plaintiff had never served the defendant with summons to enter appearance since this suit was filed on 14th July 1995 and that this was fatal to the suit in light of the mandatory provision of **Order V Rule 1(7)** of the Civil Procedure Rules.

The Plaintiff filed a replying affidavit on 12th June 2007 in which he adopted the grounds listed in the Chamber Summons dated 3rd June 2002 and the affidavit in support thereto sworn on the same day.

That she engaged her present advocate in June 2002 though previously she had been represented by **Messrs. Waruhiu and Muite Advocates**.

That according to an advice she received by one **Elizabeth Gicheru** an associate of Kembi-Gitura & Company Advocates; the delay in prosecuting the application dated 14th July 1995 has not been wholly occasioned by the plaintiff but by the defendant.

That that application was adjourned severally at the instance of the defendant, and that orders of injunction were not extended *ex parte* but by the Court.

That the preliminary objection raised by the Defendant was intended to strike out the suit for being *resjudicata* but that this preliminary objection was dismissed.

That the defendant sought leave to appeal and also applied for typed copies of proceedings and the ruling and that the plaintiff was to await the outcome of the appeal before proceeding with the matter further.

That at one time previously the plaintiff had been informed by her former lawyers that the file had gone missing but that they had been given a notice by the Court informing the defendant to collect typed copies therefrom.

That she was not aware that the defendant had not been served with summons, and that the application had been stood over generally on 20th February 2003.

That though the matter was fixed for hearing on 14th May 2003, it was again stood over generally and that this was the same position on Court attendance on 30th July 2003.

That the application dated 15th February 2002 was argued and a ruling thereon was delivered on 26th March 2004.

That on 2nd April 2004 the defendant/applicant filed notice of appeal to the Court of Appeal and that the plaintiff/respondent counsel filed notice of address to the same Court on 14th June 2004 and that after this came this application for dismissal for want of prosecution filed on 8th March 2007.

In Court on 13th June 2007 counsel for the parties, **Mr. Njenga** for the defendant/applicant and **Miss Machio** for the plaintiff/respondent submitted on this matter.

Mr. Njenga said that there had been undue delay in the prosecution of this matter and that after the plaintiff's counsel applied for and received temporary orders in the matter, the same was never set down for hearing.

That a similar application to the present one was filed in Court on 15th February 2007 and the suit was dismissed, for non-attendance of the plaintiff's counsel on 5th March 2002.

Then an application for reinstatement dated 23rd October 2003 was filed and heard inter-parties and this suit was reinstated on 26th March 2004.

That since then the plaintiff had not set down the suit for hearing and this is why the present application was filed on 12th March 2007 but that the plaintiff did not respond to it until 12th June 2007. Counsel said this was against **Order L Rule 16** of the Civil Procedure Rules.

Counsel stated that a three (3) year delay in the prosecution of the case was not explained was inordinate and had occasioned prejudice to the defendant.

According to counsel reasons for delay given in the first application for dismissal are the same ones advanced in the present application.

That the plaintiff had changed advocates four (4) times but that since the ruling of 26th March 2004 there had been no such change (save of course when the matter came for hearing on 13th June 2007 when new counsel appeared for the said plaintiff) which counsel termed an abuse of Court process.

That since the ex parte order of injunction, the plaintiff had registered a restriction on the defendant's land something in the nature of an order of stay which is an unfair order to bar the owner of the land from using it.

That summons to enter appearance issued in this case on 14th January 1996 had never been served upon the defendant. It expired on 13th January 1997 and was never extended hence causing the suit to abate.

That the defendant only became aware of the suit when he was served with the application for a temporary injunction.

According to counsel, notice of appeal filed by the defendant to the Court of Appeal against the ruling of **Honourable Justice Kariuki** is not good reason for failure to set the suit down for hearing because such notice of itself does not constitute stay of lower Court proceedings.

That the delay of three (3) years shows lack of interest in the case by the plaintiff. Counsel asked for dismissal of the suit for want of prosecution.

Miss Machio opposed the application and relied heavily on the replying affidavit.

According to her, after the ruling of the Court of 26th March 2004 the defendant filed notice of appeal to the Court of Appeal and the plaintiff filed address of appeal. That thereafter there was nothing until the plaintiff became aware of this application for dismissal.

That the advocate who was handling this matter on behalf of the plaintiff was elected a Member of Parliament in the year 2002 but the plaintiff was not aware of this; therefore she blamed the delay on that advocate.

According to counsel, the issue of summons not being served upon the defendant was argued 23rd October 2003 but the application for dismissal for want of prosecution then was dismissed.

That the defendant was properly served on 17th July 1995 and an advocate for him came on record on 20th July 1995;

That a notice of preliminary objection filed on 24th January 1996 shows the defendant was aware of the suit.

That land is of sentimental value and that the plaintiff has been having problems with her counsel and/or acting on advice from her counsel.

She prayed for the dismissal of the application.

There is a record in this file showing that there was an earlier application for an order for dismissal of this suit for want of prosecution. It was dated 15th February 2002.

This application was scheduled to be heard on 5th March 2002 but the plaintiff's counsel did not turn up on that date necessitating that the order for dismissal be granted.

There was an application filed on 5th June 2002 seeking to set aside the dismissal order of 5th March 2002. This application came *before Judge Mbito* who heard it and set aside the order of 5th June 2002 but directed that the application dated 15th February 2002 be heard on a date to be fixed.

It came up for hearing before **Judge G. B. M. Kariuki** on 23rd October 2003.

Judge Kariuki heard the application and delivered a ruling on 26th March 2004 wherein he dismissed the application of dismissal of suit for want of prosecution and allowed the suit to go on to full hearing on merits for the end, of justice to be better served.

Since 26th March 2004 the plaintiff or counsel has never set the suit down for hearing.

One reason given for this delay is that after **Judge Kariuki's** ruling, the plaintiff's counsel filed a notice of appeal to the Court of Appeal but such notice of appeal does not in itself constitute a bar to the proceedings in the superior Court.

No application for stay has been made or obtained from the Court of Appeal.

On the other hand a notice of appeal to the Court of Appeal is not meant to remain for more than sixty (60) days unless more time is sought due to delay in obtaining certified copies of proceedings and Judgment from the lower Court.

The Plaintiff also blames her lawyer for the delay. But here, counsel representing his/her client is an agent of the client and has austansible authority to do all that is necessary to ensure the ends of justice are met and as per instructions from the client.

If as in this case, the plaintiff's advocate had instructions to appeal which, he did not pursue, why didn't he proceed with the suit in the superior Court?

And is the client supposed just to sit back and wait for his/her advocate to do this or that or is she supposed to give his/her advocate instructions on the way forward?

This was the plaintiff's case relating to land, a very sentimental issue. After being given a chance to proceed with it on merit by **Judge Kariuki**, it would appear she does not seem to have seen the urgency in it as she did when she filed the suit in July 1995 because then she had even filed an application for interim injunction therein under a certificate of urgency:

In fact since the ruling of **Judge Kariuki**, there have been no appearances on the Court file except on 13th February 2007 when the present application was fixed for hearing for 13th June 2007.

The Plaintiff has been surely lax in this matter and this is demonstrated by the fact that though the plaintiff was served with the present application, on 14th March 2007 through counsel, she never even responded to it until 12th June 2007, clearly in breach of **Order 50 Rule 16** of the Civil Procedure Rules.

In fact counsel for the plaintiff was not supposed to be heard in this application but the Court allowed her to submit in order to do what is commonly known as substantial Justice.

The respondent has not denied that the main suit has never been served upon the defendant in order to enable him file an appearance.

This issue was raised in a similar application argued before **Judge Kariuki** yet up to now the plaintiff has not seen it fit to rectify the situation.

This is not the first time I am hearing on this kind of issue. In many land cases where plaintiffs appear in Court and obtain interim orders exparte, they think they have already won such cases and may not remember that they are required by law to serve summons on the opposite party to enter appearance.

In an application under **Order XVI Rule 5** of the Civil Procedure Rules, the Court exercises Judicial discretion. This being so, what explanation has the plaintiff given for not taking any step for the facilitation of the hearing of this case? None has been offered.

Filing of notice of appeal to the Court of Appeal or that it was her advocate who delayed the case is not such step as envisaged under **Order XVI Rule 5(d)** of the Civil Procedure Rules.

Surely she could not write even a letter to Court to find out how far the Court of Appeal case had gone?

Or even to mention the case with a view to fixing a hearing date! There is at all nothing of this nature on the file.

It is true to say that the Court should be slow to dismiss a suit for want of prosecution if the suit can be heard without any further delay, if the defendant will not suffer any hardship and if there has been no flagrant and culpable in activity – see **Victory Construction Company v. A. N. Duggai [1962] E.A. 697.**

But in this case where the plaintiff and/or counsel has taken no action not even a mere letter to the Court to move forward, except to change counsel on the day the application has come for hearing; what does one call this conduct if not flagrant and culpable in activity? **Civil Appeal No. 72 of 1988 Kimani v. Bakatasi.**

The defendant has no obligation to fix the case for hearing under **Order XVI Rule 5(d)** of the Civil Procedure Rules. He has elected one of the options open to him and I feel the circumstances of the present case warrant that he takes that option.

I allow the application dated 8th March 2007 and dismiss the suit filed herein on 14th July 1995 for want to prosecution with costs to the applicant.

Delivered, dated and signed at Nairobi this 5th day of July 2007

D. K. S. AGANYANYA

JUDGE