

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

Civil Suit 12 of 2005

NAHASHON CHELULE TOLE.....PLAINTIFF

VERSUS

MESHACK ROP.....1ST DEFENDANT

MOSONIK TIGIREN.....2ND DEFENDANT

LIVINGSTONE SUIYON.....3RD DEFENDANT

RULING

This is a notice of motion made under Order XVI Rule 5(a) and (d) and Order L Rule 1 of the Civil Procedure Rules by the defendants seeking the order of this court to have the plaintiff's suit dismissed with costs for want of prosecution. The defendants have stated that the plaintiff had not taken any steps to have the suit listed for hearing more than three months from the time pleadings were closed. The defendants contend that the plaintiff has not shown due diligence in the prosecution of the case and therefore it would serve the interest of justice for the suit to be dismissed for want of prosecution. The application is supported by the affidavit of the 3rd defendant, Livingstone Suiyon.

The application is opposed. The advocate for the plaintiff, George Moturi has sworn a replying affidavit in opposition to the application. He has deponed that the plaintiff fell ill soon after filing the suit and was therefore unable to fix this suit for hearing. He deponed that he had advised the plaintiff to execute a power of attorney to enable one of his sons to prosecute this suit on his behalf on account of his illness. He stated that the plaintiff had followed his advice and was in the process of registering the appointment of one of his sons as one of his attorneys in the suit. He deponed that the delay in the prosecution of the suit was not deliberate since it had been occasioned by the illness of the plaintiff.

At the hearing of the application, Mr. Kipyegon for the defendants and Mr. Maengwe for the plaintiff relied on the pleadings filed in court in support of their opposing positions in the application. The issue for determination by this court is whether the plaintiff has given sufficient reasons that would persuade this court not to dismiss the plaintiff's suit for want of prosecution. It is not in dispute that the plaintiff made no attempt to list the case for hearing since the suit was filed on the 2nd February 2005. The plaintiff has not complied with the rules that require him to have concluded discovery soon after the close of the pleadings. The defendants are justified in their assertion that the plaintiff appears to be disinterested in the pursuit of the prosecution of this suit. Mr. Moturi, counsel for the plaintiff, has however explained that the plaintiff is ailing and has been unable to prosecute his case. He explained that the plaintiff's illness was such that his recovery could not be ascertained within a specified period. The plaintiff has decided to donate a power of attorney to one of his sons so that the said son could prosecute this case on his behalf. This court has noted that the matter in dispute between the plaintiff and the defendant is a parcel of land of approximately 101 acres. This court is aware that land is a sensitive issue in this country. In most instances, courts have leaned towards deciding land cases on its merits and not on technicalities.

In the present case, the plaintiff has persuaded this court that he was prevented by his illness from pursuing the prosecution of this case. However, this court has noted that unless the plaintiff is issued with an ultimatum, this suit will remain pending for an indefinite period of time. For the time being, I will disallow the application for dismissal of the suit for want of prosecution. The plaintiff is ordered to

conclude discovery and take the necessary steps to fix this suit for hearing within three months from today's date in default thereof, the defendants shall be at liberty to renew the application for the dismissal of the suit for want of prosecution. The defendants shall have the costs of this application.

DATED at KERICHO this 7th day of November 2007

L. KIMARU

JUDGE