



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Misc Civ Appli 213 of 1998

ZACHEOUS SURE MBOYA APPLICANT

- Versus -

COMMISSIONER OF LANDS DEFENDANT

Coram: Before Hon. Mr. Justice L. Njagi

(Mr. Gichana for the 3rd Interested Party) absent

(Mr. Muturi Gakuo for 1st and 2nd Interested Party) absent

Mrs. Momanyi for the Applicant

Court clerk – Kinyua

RULING

The application before the court is by a notice of motion dated 28th September, 2005. It is expressed to be made under sections 3A and 63(e) of the Civil Procedure Act; Orders L rule 1 and XVI rules 2, 5 and 6 of the Civil Procedure Rules; and all other enabling provisions of the law. By the notice of motion, the third interested party moves the court to dismiss the main application herein for want of prosecution as no step has been taken for a period exceeding three years with effect from 13th July, 2000. The application is supported by the annexed affidavit of Fanuel Chamwoma Wapwoko, the director of the third interested party.

At the hearing of the application, Mr. Gichana appeared for the third interested party. The other parties did not appear. The record shows that by an affidavit of service sworn on 3rd July, 2006 by Ntenga Marube, Advocate, the Commissioner of Lands who is the Respondent herein was served with the application and hearing notice on 30th June, 2006. By another affidavit sworn on 3rd July, 2006, by George Otieno, a court clerk in the firm of E.M. Gichana & Co., Advocates, M/s Muturi Gakuo & Co., Advocates for the 1st and 2nd interested parties, were served with the hearing notice on 23rd May, 2006. The said affidavit further discloses that on the same day, the firm of L.N. Momanyi & Co. Advocates for the Applicant in the application sought to be dismissed, were also served.

Both the 1st and 2nd interested parties' advocates as well as the advocates for the applicant were served in sufficient time to attend. Even though M/s Muturi & Gakuo received the notice under protest as

the date was taken ex parte and was not convenient, they did not indicate why it was inconvenient. The Commissioner of Lands was given a very short notice. However, the application now before the court is not prejudicial to the interests of his office. For these reasons, the court proceeded ex parte.

Mr. Gichana argued that the last time that this matter for hearing was 13th July, 2000, when a consent was recorded in respect of the 1st and 2nd interested parties. Since then, the applicant has not bothered to list the matter for hearing. Counsel submitted that this shows that the applicant has lost interest in the matter and asked the court to dismiss the same under order XVI rule 6.

I have considered the application and the submissions of counsel for the applicant. The last time that the main application came to court was on 13th July, 2000. That was almost six years ago. Since then, no step has been taken with a view to proceeding with the action. Order XVI rule 6 of the Civil Procedure Rules provides as follows:-

“In any case not provided for in which no application is made or step taken for a period of three years by either party with a view to proceeding with the suit, the court may order the suit to be dismissed ...”

This matter falls squarely within the ambit of this rule. Public policy and the interests of justice demand that court actions be prosecuted with reasonable expedition. The responsibility of taking steps to fix a matter for hearing rests upon the party who brought the matter to court. In this case, the applicant in the matter sought to be dismissed has neither filed any replying affidavit or grounds of opposition, nor did he deem it appropriate to attend court at the hearing of this application. In the context of the matter sought to be dismissed, I find this to be very strange. An unexplained delay of more than five years is inordinate and inexcusable.

In the circumstances, Miscellaneous Civil Application No. 213 of 1998 is hereby dismissed with costs. The applicant therein will also bear the costs of this application.

Dated and delivered at Mombasa this 14th day of July, 2006.

L. NJAGI

JUDGE