



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

MISC. APPLICATION NO. 7A OF 2018

IN THE MATTER OF: AN APPLICATION BY THE APPLICANT FOR LEAVE TO APPLY FOR AN ORDER OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA ARTICLES 3(1); 40, 50(1), 47(1), 47(2), 73(1) (a) & (b), 67 (1), 159(2) (e), 162 (2) & (3) AND 165 (5) (b)

AND

IN THE MATTER OF: THE LAND ACT NO. 6 OF 2012

AND

IN THE MATTER OF: THE DECISION OF THE NATIONAL LAND COMMISSION AND KAJIADO LAND REGISTRAR TO ARBITRARILY DELETE THE NAME OF DAVID WANJALA WANAKUTA FROM THE LAND REGISTER WITH RESPECT TO LAND REFERENCE NO. KJD/ KITENGELA/ 16163

AND

IN THE MATTER OF: A DECISION CONTAINED IN THE GAZETTE NOTICE NO. 12526 OF VOL CXIX NO. 190 DATED 22ND DECEMBER 2017

BETWEEN

DAVID WANJALA WANAKUTA.....APPLICANT

AND

THE COUNTY LAND REGISTRAR, KAJIADO COUNTY.....1ST RESPONDENT

CHIEF LAND REGISTRAR.....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

NATIONAL LAND COMMISSION.....4TH RESPONDENT

AND

THE COFFEE WORKERS COOPERATIVE SAVINGS AND

CREDIT SOCIETY LIMITED.....1ST INTERESTED PARTY

LAWRENCE MUCHIRI MWANIKI.....2ND INTERESTED PARTY

RULING

By a Notice of Motion dated the 11th September, 2020, the 3rd Interested Party seeks to have this suit dismissed for want of prosecution. The application is premised on the grounds on the face of it and the supporting affidavit of JOSEPH MWANIKI GITAU an Advocate acting for the 3rd Interested party where he deposes that the Ex parte Applicant sought for leave to apply for an order of certiorari, prohibition and mandamus which application was directed against the three respondents including the interested parties. He confirms that on 5th March, 2018 when the matter came up for hearing, the Ex parte Applicant had not served the 2nd Interested Party while the 1st Interested Party failed to show up. Further, a hearing date was fixed for 4th April, 2018. He explains that on 4th April, 2018 the Ex parte Applicant filed an application seeking an order for substituted service upon the 2nd Interested Party and he was ordered to advertise the application within fourteen (14) days and a mention date was fixed on 17th May, 2018. Further, on 17th May, 2018, the Ex parte applicant failed to appear in court. He contends that the Ex parte Applicant thereafter fixed a mention date for the 4th October, 2018 and served them with a mention notice on 7th August, 2018, to that effect. Further, on 4th October, 2018, the Ex parte Applicant failed to attend court. He reiterates that no leave was ever granted in the first instance and the Ex parte Applicant never complied with the Order directing him to serve through substituted service. He avers that the Ex parte Applicant lost interest in the matter and it is in the interests of justice that the same be dismissed with costs to the 3rd Interested Party.

The ex parte applicant opposed the application by filing a replying affidavit sworn by MUHALIA MUGADIRI an Advocate conducting the matter on his behalf where she deposes that the firm of Musyoka Murambi & Associates received the original file from messrs Maura, Muthoni, Mikhala, Faraji & Associates on 20th September, 2018. Further, the firm of messrs Musyoka Murambi & Associates came on record for the Ex parte Applicant via a Notice of Change of Advocates dated the 19th November, 2018. She avers that the suit was originally filed in the Environment and Land Court at Kajiado under ELC Case No. 126 of 2018 and was later transferred to the Chief Magistrate's Court at Kajiado and allocated a new case number ELC No. 37 of 2019 DAVID WANJALA WANAKUTA V COFFEE WORKERS COOP SAVINGS & CREDIT SOCIETY & 2 OTHERS. Further, this case has since progressed and the matter fixed for mention on 22nd October, 2020 for purposes of a pre-trial conference. She contends that since coming on record the firm of messrs Musyoka Murambi & Associates have endeavoured to progress ELC No. 37 of 2019 DAVID WANJALA WANAKUTA V COFFEE WORKERS COOP SAVINGS & CREDIT SOCIETY & 2 OTHERS and the present suit. She contends that the grounds relied upon in the application dated the 11th September, 2020 are based on facts prior to the firm of messrs Musyoka Murambi & Associates coming on record for the ex parte applicant. She states that the prayers sought in the amended plaint dated 3rd July, 2019 are the same orders sought in the present suit (Miscellaneous 7A of 2018). She deposes that the Miscellaneous 7A of 2018 should be stayed pending the hearing and determination of ELC No. 37 of 2019 DAVID WANJALA WANAKUTA V COFFEE WORKERS COOP SAVINGS & CREDIT SOCIETY & 2 OTHERS. Further, that if this suit is dismissed, the Plaintiff stands to suffer irreparable loss.

The Application was canvassed by way of written submissions but it is only the ex parte Applicant that filed his.

Analysis and Determination

Upon consideration of the 3rd Interested Party's Notice of Motion application dated the 11th September, 2020 including the rivalling affidavits and Submissions, the only issue for determination is whether this suit should be dismissed for want of prosecution.

In the ex parte Applicant's submissions, he reiterated that there has been no inordinate delay in prosecuting the case. Further, that the delay was not intentional and therefore excusable. To buttress his averments he relied on the following decisions: **George Gatere Kibata V George Kuria Mwaura & Another (2017) eKLR; Naftali Onyango V National Bank of Kenya (2005) eKLR; Ednah Adaka Ismail Vs Equity Bank Limited (2014) eKLR; Ivita Vs Kyumbu (1975) eKLR; Azhar Mohammed Sheikh & 8 others V Velji Narshi Shah & Another (2017) eKLR; Mwangi S. Kimenyi v Attorney General & another [2014] eKLR and Moses Otsyula Vs Children of God Relief Institute (2015) eKLR.**

I deem the said decisions relevant and will proceed to rely on a few of them in this instance.

Order 17, rule 2 of the Civil Procedure Rules stipulates thus: **'(1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit. (2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit. (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1. (4) The court may dismiss the suit for non-compliance with any direction given under this Order.'**

From the court records and explanation in the rivalling affidavits, it is evident that the application dated the 24th January, 2018 which sought for leave to apply for orders of certiorari, prohibition and mandamus has never been set down for hearing. I note on 5th April, 2018, the Court ordered the Ex parte Applicant to serve the 2nd Interested Party through the Daily Nation Newspaper within fourteen (14) days from the said date which order was not adhered to. From the 19th April, 2018 to date, the Ex parte Applicant has failed to set the application dated 24th January, 2018 for hearing and this suit has been inactive until 1st October, 2020 when the 3rd Interested Party's instant application was scheduled for hearing. In the case of **IVITA –VS- KYUMBU [1984] KLR 441 at 451**, Chesoni J. (as he then was) provided parameters for the court to consider while faced with an application for dismissal of suit for want of prosecution and stated thus;

"The instant case is now 4½ years less two months. It has been left to go to sleep for 14 months and in my opinion where an action has been dormant for twelve months or more the defendants are entitled to apply to the court for its dismissal, and, unless

the plaintiff shows sufficient reason for reviving it, the suit may be dismissed. Each case must be decided on its own facts and the matter is one of the discretion of the court, but this court will frown at any inexcusable delay, and it will do everything possible to enforce expedition of trial."

Further, in the case of **Mwangi S. Kimenyi v Attorney General & another [2014] eKLR** it was held that:

'Consequently, upon the analysis of all legal considerations, it is clear the direction the court is taking on this matter. But before I close, I will re-state; the acceptable test is that; 1) When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the Defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties. 2) Invariably, what should matter to the court, is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and 5) what prejudice will the dismissal cause to the plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.'

In the current scenario and from the court record, I note that the Ex parte Applicant only fixed the application dated the 24th January, 2018 once for hearing. From the averments in his affidavit he claims there is a related suit pending in the Chief Magistrate's Court being ELC No. 37 of 2019 **DAVID WANJALA WANAKUTA V COFFEE WORKERS COOP SAVINGS & CREDIT SOCIETY & 2 OTHERS** and annexed the Plaintiff to the replying affidavit. From the contents in the replying affidavit including the annexures therein, I find that the Ex parte Applicant has not provided any plausible reasons as to why he failed to set the application dated the 24th January, 2018 for hearing nor even serve the 2nd Interested Party as the Court had ordered. From the reasons I have highlighted above, I find that the delay has been intentional and the conduct of the Ex parte Applicant amounting to an abuse of the court process. I opine that this delay has been inordinate, inexcusable and prejudicial to the Respondents including the Interested Parties. As a court, where an indolent party has lost interest in his matter, it cannot aid him. In associating myself with the decisions cited above as well as the legal provisions which I have quoted, I find that the Ex parte Applicant has indeed lost interest in this matter. Further, that the issues raised in this matter are related to the dispute being dealt with in Kajiado Chief Magistrate's Court ELC No. 37 of 2019 **DAVID WANJALA WANAKUTA V COFFEE WORKERS COOP SAVINGS & CREDIT SOCIETY & 2 OTHERS**. I hence opine that the Ex parte Applicant still has another forum where he can ventilate his issues.

It is against the foregoing that I find the application dated 11th September, 2020 merited and will allow it. I will proceed to dismiss this suit for want of prosecution. The costs are awarded to the 3rd Interested Party .

Dated, Signed and Delivered virtually at Kajiado this 28th Day of January, 2021.

CHRISTINE OCHIENG

JUDGE