



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 579 OF 2017

(Formerly Nairobi ELC No. 377 of 2015)

MOSES KIRRUTI LEMPASO.....1ST PLAINTIFF

GRACE WAITHERA KIRRUTI.....2ND PLAINTIFF

VERSUS

OBADIAH K. BUNYL.....1ST DEFENDANT

OLE KASASI LIMITED.....2ND DEFENDANT

CHIEF LAND REGISTRAR.....3RD DEFENDANT

THE LAND REGISTRAR KAJIADO COUNTY.....4TH DEFENDANT

THE ATTORNEY GENERAL.....5TH DEFENDANT

RULING

What is before Court for determination is the 2nd Defendant's Notice of Motion application dated the 20th June, 2019 brought pursuant to Order 17 Rule 2(1) & (3) and Order 51 Rule 1 of the Civil Procedure Rules as well as Section 3A of the Civil Procedure Act. The Applicants seeks for orders that the suit commenced through the Originating Summons dated 8th May, 2015 be dismissed for want of prosecution. The application is premised on the grounds on the face of it and the supporting affidavit of SIMON MUKIRI a director of the 2nd Defendant where he explains that the suit was commenced through Originating Summons dated the 11th May, 2015. He confirms that they filed their replying affidavit on 28th July, 2015. He contends that on 12th June, 2018 the Court granted orders to all parties in the presence of their advocates to comply with Order 11 of the Civil Procedure Rules. Further, their Advocates wrote to the Hon. Attorney General informing them of the Court's directions. He explains that on 26th July, 2018 they filed their List of Witnesses, Witness statements and List of Documents and served the same on all the parties on 28th July, 2018. Further, the matter was subsequently mentioned on several occasions but the case could not proceed as other parties including the Plaintiffs were yet to comply with the Orders of the Court issued on 12th June, 2018. He avers that on 3rd April, 2019 the Court gave directions that all parties including the Plaintiffs' whose counsel was present in Court were to comply with Order 11 of the Civil Procedure Rules within 30 days from the said date. He reiterates that todate the Plaintiffs' are yet to comply with Order 11 of the Civil Procedure Rules and the matter cannot proceed for hearing. Further, it is a year since the Court granted the said directions and failure to comply with Order 11 of the Civil Procedure Rules is an indication that they have lost interest in the matter. He claims the Plaintiffs who are neighbours to the 2nd Defendant's property continue to interfere with the 2nd Defendant's vacant possession including use of its land by trespassing thereon and threatening the employees on the said land citing this suit as a legitimate claim. Further, that the Plaintiffs' have been indolent and their delay in prosecuting their suit is inexcusable.

The Plaintiffs opposed the application by filing Grounds of Opposition dated the 30th September, 2019 where they contend that a Court of competent jurisdiction issued a Decree dated the 21st July, 2019. Further, the subject matter Kajiado/ Kitengela/ 12922 was subjected to the jurisdiction of the Rift Valley Land Disputes Tribunal which ruled that the title was unlawfully obtained and ordered its cancellation. They contend that the said decision of the Rift Valley Land Disputes Tribunal was then adopted as a Decree of the Honourable Subordinate Court at Kajiado in Senior Resident Magistrates Case No. 69 of 2009. Further, in the Originating Summons dated 8th May, 2015 filed in this instant case, the Plaintiffs have sought for a vesting order and the issues raised by the Defendants herein were res judicata having been heard and determined by the Rift Valley Land Disputes Tribunal and adopted by a Decree of a Court of competent jurisdiction to which no appeal was preferred. They insist the Defendants herein have not raised any triable issues that qualify a case to proceed for trial as the same have been subjected to the same and judgement rendered. Further, in light of the above reasons, the Defendants' pleadings ought to be struck out in entirety and a vesting order issued in favour of the Plaintiffs as prayed in the Originating Summons.

The Plaintiffs further filed a replying affidavit sworn by MOSES KIRRUTI LEMPASO where he deposes that their supporting affidavit will be the Plaintiffs' Witness Statement and annexures will serve as their documents. He contends that the Court gave directions on 3rd April, 2019 while the 2nd Defendant filed the instant application on 23rd July, 2019. He insists in the present case one year has not elapsed since the matter was last in court and the allegations in the supporting affidavit require the hearing of the main suit. Further, it is in the best interests for the Plaintiffs' claim to be heard and determined.

The application was canvassed by way of written submissions.

Analysis and Determination

Upon perusal of the 2nd Defendant's Notice of Motion application dated the 20th June, 2019 including the rivalling affidavits, Grounds of Opposition and the respective submissions, the only issue for determination is whether this suit should be dismissed for want of prosecution. In the respective submissions, the various parties reiterated their position and relied on authorities which I deem relevant.

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 replying affidavit, it is evident that this suit has never been set down for hearing as parties are yet to comply with Order 11 of the Civil Procedure Rules. Further, I note one year has not elapsed since the suit was mentioned in court for pre trial directions. I further, note that there have been pending applications filed by various parties. In the case of **IVITA –VS- KYUMBU [1984] KLR 441 at 451**, Chesoni J. (as he then was) held as follows;

"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 even though the suit has not been set down for hearing, the parties have engaged in various interlocutory applications. Further, it is evident that the Originating Summons is supported by an affidavit with annexures thereon. Looking at the materials presented by the respective parties in their rivalling affidavits, I find that the delay in prosecuting the suit is not inexcusable nor inordinate as claimed by the Defendants. In associating myself with the decisions cited above as well as the legal provisions which I have quoted, I find there was no intention by the Plaintiffs to delay the matter and the suit mainly seeks a vesting order from a previous judgement of the court. I further, note from the Originating Summons, that there are triable issues raised therein which parties should be allowed to ventilate upon. In the circumstance, I will decline to dismiss this suit for want of prosecution.

It is against the foregoing that I find the application dated 20th June, 2019 unmerited and will disallow it. Costs will be in the cause.

I direct that the Originating Summons be set down for hearing within thirty (30) days from the date hereof.

Dated, Signed and Delivered Virtually at Kajiado this 20th Day of January, 2021.

CHRISTINE OCHIENG

JUDGE