



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

MISC. CIVIL APPLICATION NO. 47 OF 1999

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW BY

KANZE KAINGU FOR THE WRITS OF

PROHIBITION AND CERTIORARI

IN THE MATTER OF: REGISTERED LAND ACT CAP 300 OF THE LAWS

KENYA

PLOT NO. KILIFI/MTWAPA/601

PLOT NO. KILIFI/MTWAPA/1411

PLOT NO. KILIFI/MTWAPA/1412

A N D

R E P U B L I C

-VERSUS

COMMISSIONER

OF LANDS.....RESPONDENT

AND

ANNE GATHONI GITHUI.....INTERESTED PARTY

EXPARTE:

KANZE KAINGU.....APPLICANT

R U L I N G

The Interested Party herein through the firm of Stephen Macharia Kimani & Advocates filed a Notice of Motion dated 12th February 2003 seeking to have the ex-parte applicant's Notice of Motion dated 2nd

March 1999 dismissed for want of Prosecution. The basis of the application is set out in the application which application was further supported by the affidavit of Francis Githui Wahome. The main ground stated was that the ex-parte applicant has taken no steps to prosecute her case from the date she obtained leave to file the Notice of motion dated 2nd March 1999 the subject matter of this application. This is obviously over a period of three years. That the stay orders have caused great prejudice to the interested Party and that she may not get a fair trial due a long delay.

The ex-parte applicant oppose the Interested Party's application by filing a replying affidavit sworn by George Kithi on the 14th day of March 2003. The gist of the ex-parte applicant's justification for the delay in this case was that she was entangled by the numerous applications made by the Interested Party oscillating between the High Court and the Court of Appeal. That there is a pending application before the court of Appeal which has not been prosecuted by the Interested Party. The Interested Party has a pending application dated 8/7/2002 which is similar to the current one which the Interested Party purported to withdraw on 21.2.2002, which the ex-parte applicant submits that the purported withdrawal was in contravention of Order XXIV rule 2 of the Civil Procedure rules. The essential facts of this case can be stated as follows:- On the 11th day of February 1999, the exparte applicant was granted leave to institute a Judicial Review application by Justice Andrew Hayanga which read interalia.

“1. That leave is hereby granted to the applicant herein to apply for the writs of certiorari and prohibition against the Commissioner of Lands i n respect of Plot No. Kilifi/Mtwapa/601/1411,Kilifi/mtwapa/1412.

2. That leave granted to operate as a stay on any transaction involving plot No. Kilifi/Mtwapa/1411 and Kilifi/Mtwapa/1412 pending the hearing and determination of this suit.”

It meant therefore that from 11th February 1999 all dealings with the properties known as Kilifi/Mtwapa/601/1411, and Kilifi/Mtwapa/1412 were halted and would remain halted indefinitely so long as the substantive Notice of Motion dated 2/3/99 is still pending unheard. Pursuant to the abovementioned orders the ex-parte applicant filed the substantive Notice of Motion dated 2nd March 1999 where she sought for orders.

1. That this Honourable court be pleased to issue a writ of certiorari against the Respondent to quash the decision of the Respondent through the Registrar at Kilifi District Land Registry to cancel title deed number Kilifi/Mtwapa/601 and reinstate the same.
2. That the Honourable court be pleased to issue a writ of certiorari against the Respondent to quash its decision through the Registrar at Kilifi District Lands Registry to create two titles to wit Kilifi/Mtwapa/1411 and 1412, out of the old Kilifi/Mtwapa/601.
3. That the Honourable court be pleased to issue a writ of prohibition against the Respondent to cease recognising or dealing or transacting in the titles Kilifi/Mtwapa/1411 and 1412 as lawful or bonafide titles but recognize Kilif/Mtwapa/601 as bonafide.
4. That costs be in cause.

The application was brought under Order LIII Rules 2,3, 4,5,6 and 7 of the Civil Procedure Rules. This Notice of Motion was filed on the 4th day of March 1999 and this court fixed it for hearing on the 11th day of May 1999. It would appear that a call over was held on 16th April 1999 before Mr. Justice Waki and none of the parties concerned appeared and the Notice of Motion was taken out of the hearing list for 11th May 1999. On 21st July 1999 representatives of the parties herein took the 9th day of September 1999 for the hearing of the Notice of Motion dated 2nd March 1999. However on 20th August 1999 the ex-parte applicant and the Interested Party attended the call-over before Justice Waki and the Notice of Motion also was taken out of the hearing list of 9th September 1999. It is also apparent there was a null period in this suit until 17th September 2002 when the Interested Party attempted to have the Notice of Motion dismissed for want f Prosecution via a Notice of Motion dated 8th July 2002 and on that day the ex-parte applicant's advocate sought for an adjournment which was granted by Justice Onyango Otieno

and the application for dismissal was adjourned to 30th September 2002. The ex-parte applicant's Counsel also managed to have the said application before Commissioner Khaminwa adjourned to 3rd October 2002, the ex-parte applicant's advocate again sought for an adjournment on the ground that he wanted to withdraw acting for the ex-parte applicant. On the 21st February 2003 the Interested party filed a notice of withdrawal of the application dated 8th July 2002 which had been stood over generally by Justice Onyango Otieno on 28.11.2002. It should be noted that the Notice of Motion dated 8/7/2002 did not have a hearing date when the Interested party gave notice to withdraw. The notice of withdrawal did not indicate under what provisions of the Civil Procedure rules it is being brought. I will take it to mean that since the application had no hearing date then the Notice of withdrawal can only be brought under Order XXIV rule 1. of the Civil Procedure rules which reads:-

“At any time before the setting down of the suit for hearing, the plaintiff may by notice in writing wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.”

From the above it would appear that the Interested Party herein properly and lawfully withdrew the Notice of Motion dated 8th July 2002. It is also important to understand the meaning of the word “suit”. Under Section 2 of the Civil Procedure Act suit is described as:-

“All Civil Proceedings commenced in any manner prescribed”.

In the same section:-

“prescribed” means prescribed by rules.”

A close perusal of the court record reveals the fact that the substantive Notice of Motion dated 2nd March 1999 was last fixed for hearing on the 9th day of September 1999 but the same did not take off because it was taken out of the hearing list during a call over presided over by Justice Waki on the 20th August 1999. The ex-parte applicant seems to me to have taken no keen interest to expedite the prosecution of the substantive Notice of Motion. There was no order which stayed the prosecution of the suit. Even if there were many pending applications, that did not bar the ex-parte applicant from prosecuting her Notice of Motion. The ex-parte applicant has not been vigilant nor desirous to conclude this suit probably because she is taking advantage of the stay granted four years ago. Order XVI rule 5 of the Civil Procedure Rules states:-

“If, within three months after:

(a) Close of pleadings or

(b) the removal of the suit from the hearing list or

(c) the adjournment of the suit generally, the plaintiff, or the court of its own motion on notice to parties, does not set down the suit for hearing, the defendant may either set the suit down for hearing or apply for its dismissal.”

The above provisions perfectly apply to this suit. Obviously there was inordinate delay in prosecuting this suit and there was no reasonable nor excusable explanation. I will adopt the statement of the court of Appeal of East Africa in the case of **MUKISA BISCUIT MANUFACTURING CO. LTD. =VS= WEST END DISTRIBUTORS LTD [1969] E.A. 697.** Sir Charles Newbold, P. as he then was said at page 701.

“It is the duty of a plaintiff to bring his suit to an early trial and he cannot absolve himself of his primary duty by saying that the defendant consented to the position. In this case there was undoubtedly excessive delay.”

The ex-parte applicant cannot be heard to say that he was entangled by the interested Party from prosecuting her suit. The interested Party did not obtain any restraining orders to prohibit the ex-parte

applicant from prosecuting her suit. In the case of **NILANI =VS=PATEL AND OTHERS [1969] E.A. 341**.

The plaintiff took no step to bring the suit to hearing for a period of more than twelve months. The applicants applied to dismiss the suit for want of prosecution. The plaintiff argued that there was no power of dismissal under the rules. It was held inter alia:

(i) That there was power to dismiss the suit under Order 15, rule 6 of the Civil Procedure Rules of Uganda, which is the equivalent of the Order XVI rule 6 of the Civil Procedure Rules.

(j) That there had been inordinate delay by the plaintiff which is inexcusable and this would result in the suit being dismissed.

In this suit the ex parte applicant has not taken the necessary steps to prosecute her suit for a period of nearly four (4) years. Let me state here that under Order LIII of the Civil Procedure Rules, it is expected that parties will take advantage of the apparent steps provided for which indicate that suits brought by way of Judicial Review should be expedient otherwise it will be of no use to litigants who seek instant remedies. The Procedures to be followed are fairly simple and parties should not abuse the generosity of this law process. **LORD JUSTICE DIPLOCK IN ALLEN =VS= SIR ALFRED MCALPINE & SONS [1968] IN ALL E.R.** . page 543. At page 555 paused this question

What then are the Principles which the court should apply in exercising its discretion to dismiss an action for want of Prosecution on a defendant's application? The learned Lord Justice said:-

“Unless the court is satisfied either that the default has been intentional and contumelious , or that the inexcusable delay for which the plaintiff or his lawyers have been responsible has been such as to give rise to a substantial risk that a fair trial of the issues in the litigation will not be possible at the earliest date at which, as a result of delay, the action would come to trial if it were allowed to continue. It is for the defendant to satisfy the court that one or other of these two conditions is fulfilled. Disobedience to a peremptory order of the court would be sufficient to satisfy the first condition. Whether the second alternative condition is satisfied will depend on the circumstances of the particular case, but the length of the delay may of itself suffice to satisfy this condition if the relevant issues would depend on the recollection of witnesses of events which happened long ago.”

I will adopt and apply these principles in this case. I consider the period of 4 years in which the ex parte applicant has been inactive or dormant or reluctant to prosecute her suit as extremely excessive and inordinate and this cannot be allowed to go on infinitum. Justice Dickson had this to say in the case of **NILANI =VS= PATEL AND OTHERS [1969] E.A. P. 340 E.A. P. 340** are in particular pages 343-344.

“No rule -making authority would wish to create such an unreasonable situation of permitting actions to hang over the head of any defendant for an indefinite period, without giving him a right to move the court to have the action dismissed for want of Prosecution.”

I have had the advantage of listening to the submissions of both Counsels. I have also perused the court record, my conclusion in the final analysis is that in the circumstances of this case and considering, the subject matter of the suit I find the delay has caused the Interested Party denial of expedient justice as required under Order LIII of the Civil Procedure Rules. In the case of **EATON =VS= STORER [1882], 22 CH D.P.91 SIR GEORGE JESSEL MR.** said:-

“The Principle on which we go is clear, when the delay is prolonged and inexcusable , and is such as to do grave injustice to one side or other or to both, the court may in its discretion dismiss the action straight away leaving the plaintiff to his remedy against his own solicitor who has brought him to this plight.”

Although the step taken by the courts to dismiss an action for want of prosecution is draconian, the

affected party may take solace by seeking legal redress against his attorney. **DIPLOCK L.J** in Allen's case said at page 556

Generally the ordinary litigant, once he has consulted his solicitor, is helpless before the mysterious arcana of the law. Delay when it occurs from this stage onwards, is usually not his own fault, but that of his solicitor. If as a result of his solicitor's default, he has a remedy in an action for negligence against his solicitor and if the solicitor is financially able to meet the damages, this remedy is an adequate one. If, however, the solicitor would be unable to meet the damages, the hardship to the plaintiff, whose action against the Defendant is dismissed for want of Prosecution, is grave indeed. In strict logic the impecuniosity of the plaintiff's solicitor would not affect the Defendant's right to have an action dismissed, but in exercising a discretion, even a judicial one, the courts can temper logic with humanity and the prospect that an innocent plaintiff will be left without any effective remedy for loss of his cause of action against the defendant is a factor to be taken into consideration in weighing on the one hand, the hardship to the plaintiff if action is dismissed, and, on the other hand the hardship to the defendant and the prejudice to the due administration of justice if it is allowed to proceed."

I have considered this very wise passage and have come to the conclusion that the interest of the interested party and the due process of law will be safeguarded as opposed to the ex-parte applicant if this suit is dismissed. I hereby therefore dismiss the Notice of Motion dated 2nd March 1999 for want of prosecution with costs to the Interested Party.

Read and Delivered this 31st March 2003

J.K. SERGON

J U D G E

31.3.2003

Before Mr. Justice Sergon.

Mokaya

Holds brief for Kithii for exparte applicant.

Kimani:

For the interested party.

J.K. SERGON

J U D G E