

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT 451 OF 1992

PEKESHE NDEJA NDARA PLAINTIFF

VERSUS

MWANDORO MWAMBO KUCHEGULA..... DEFENDANT

RULING

The Defendant in the main suit seeks the dismissal of the plaintiffs suit for want of prosecution under Order 16 r 5 Civil Procedure Rule. The suit was filed 9 years ago on 25th June, 1992, seeking the exhumation of a dead body allegedly buried in the plaintiffs land, and general damages for trespass. A Chamber Summons was also filed on 25th June, 1992 seeking interlocutory mandatory injunction for exhumation of the body but the Application was withdrawn on 29th June, 1993. A statement of defence was filed on 2nd September, 1992 and by consent of both parties summons for Directions was dispensed with on 14th February, 1994.

That opened the way for the hearing of the main suit. It was set down for hearing on 28th June, 1994 but was adjourned to 12th July, 1994 on Account of the defendants' illness. On the adjourned date the court found that the suit was premature since the Land Adjudication process was still going on in the area. It was marked Stood Over Generally. Nothing happened for the next two years until an attempt was made to have the case heard on 29th August, 1996 when the court found that there were no agreed issues. There is nothing else on record to show that the plaintiff took steps to have the case listed for hearing since August 1996. That is 5 years ago.

But the plaintiff says through learned counsel Mr. Wanyonyi that he has written two letters dated 23rd February, 2000 and 28th February, 2000 inviting the defendants Advocates to fix a hearing date. He does not say whether any representative of his attended the Registry to fix the dates and if so why the dates were not given or taken. At any rate it is now more than 17 months since those letters were written but no action has been taken. Indeed Mr. Wanyonyi concedes that there has been no follow up of the matter but prays for the Court's favourable discretion. It is within the courts power to exercise such discretion but it can only do so upon sound legal basis, or as is usually put, judicially. No reasons have been given by the plaintiffs as to why the hearing of the suit has been delayed so inordinately.

I am tempted to agree with learned counsel for the Defendant/Applicant Mr. Ongera that the plaintiff has lost interest in the matter. And so he has in my view. Perhaps the Land Adjudication process resolved his doubts about the positioning of the grave complained about. Perhaps not. Either way the suit cannot be allowed to remain on record indefinitely. I see no good reason why I should not strike it out. I grant the application with costs of the main suit and of the application to the defendant.

Dated this 18th day of July, 2001.

P. N. WAKI

JUDGE