



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 351 OF 2017

STEPHEN MUEMA MUTHUSI

KENNEDY MARUCHA OMUGA

ROCKY MUOKI MUTUKU

(Suing on behalf of WELFARE ASSOCIATION NGUNYUMU)....PLAINTIFF/RESPONDENT

VERSUS

PHILIP JOHN TILLEY.....1ST DEFENDANT/APPLICANT

DIRECTOR OF CRIMINAL INVESTIGATIONS

ATHI RIVER POLICE STATION.....2ND DEFENDANT/RESPONDENT

O.C.P.D ATHI RIVER POLICE STATION.....3RD DEFENDANT/RESPONDENT

O.C.S ATHI RIVER POLICE STATION.....4TH DEFENDANT/RESPONDENT

RULING

1. Vide a Notice of Motion dated 19th August, 2020 that was brought pursuant to the provisions of Sections 1A, 1B & 3A of the Civil Procedure Act and Order 17 Rule 2 (3) of the Civil Procedure Rules, the 1st Defendant/Applicant sought for the following orders:

a) That the Plaintiff's suit herein be dismissed with costs for want of prosecution.

b) That the interim orders issued on 24th August, 2017 and on 18th September, 2014 against the Defendants/Respondents be vacated.

2. The Application was supported by the Affidavit of Phillip John Tilley, the 1st Defendant's Director who deponed that on 30th July, 2014, the Plaintiff filed ELC No. 79 of 2014 by way of Originating Summons and that on 23rd August, 2017, it filed ELC No. 351 of 2017 (*this suit*).

3. The 1st Defendant/Applicant deponed that the Plaintiff obtained interim orders of injunction restraining it from accessing the suit property on 31st October, 2017 and that having perused the file, he noted that the last action on the suit was on 11th June, 2018 when the matter came up for mention to confirm compliance with Order 11 of the Civil Procedure Rules 2010.

4. It was deponed that a period of more than 2 years has lapsed since the Plaintiff last took action in the matter; that upon obtaining interim orders of injunction on 31st October, 2017, the Plaintiff has deliberately refused to prosecute the case which is inexcusable and that this suit and the order of injunction has occasioned him extreme prejudice, loss and suffering because he cannot transact any business and or enjoy quiet possession of land parcel L.R. No. 24718 whose correct L.R. No. is 7590/6.

5. Despite being served, the Plaintiff did not file any response. The Application proceeded for hearing as undefended. The 1st Defendant's advocate relied on the pleadings and urged the court to allow the Application.

6. Having considered the pleadings, the only issue that arises is whether the suit should be dismissed for want of prosecution. Order 17 Rule 2 (1) of the Civil Procedure Rules provides as follows:

“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 dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.”

7. This suit was commenced by way of a Plaint and an Application for conservatory and prohibitory orders dated 23rd August, 2017. The 1st Defendant filed his Replying Affidavit on 2nd November, 2017. The record shows that on 31st October, 2017, this court allowed the Plaintiff's Application for conservatory orders.

8. After the Ruling of the court of 31st October, 2017, the Plaintiff did not fix the matter for pre-trial directions or hearing. Indeed, by the time the court issued a Notice for dismissal of the suit for want of prosecution on 28th August, 2019, the matter had remained inactive for over one (1) year.

9. When the matter came up for the notice to show why it should not be dismissed for want of prosecution on 4th October, 2019, the Plaintiff's advocate informed the court that they had not fixed the matter for hearing because they could not trace the court. The court directed the Plaintiff to fix the matter for hearing *‘within 90 days of the new term, and if not the matter will stand dismiss.’*

10. Despite being granted 90 days to fix the suit for hearing, the Plaintiff did not take any step in the matter. Instead it is the 1st Defendant who has filed the Application dated 19th August, 2020 to have the matter dismissed with costs for want of prosecution.

11. As was held by Gikonyo J. in the case of ***Fran Investments Limited vs. G4S Security Services Limited [2015] eKLR***, the dismissal of a suit without hearing it on merit is a draconian act. However, the court has to balance the right of a party to a hearing and the constitutional demand that cases should be disposed of expeditiously, and without delay.

12. In ***John Mwangi Muhia & 2 others vs. Director of Public Prosecutions & 5 others [2019] eKLR***, the Court of Appeal while dismissing the Appeal quoted Mumbi J., the trial court, with approval, as follows:

“28. In my view, a party who brings a matter before the Court under a Certificate of Urgency, thus obtaining the immediate attention and assistance of the Court, has an obligation to proceed expeditiously with his matter. He cannot allow the matter to remain pending before the court without taking any steps for its prosecution and ignoring attempts of other parties who are affected by the orders issued by the court in his favour to prosecute the matter. The dictates of justice demand that any matter filed before the court under Certificate of Urgency be prosecuted expeditiously and with the same urgency with which it was filed. The Court is not and cannot be at the beck and call of an indolent party who feels no obligation to proceed with a matter with expedition or to offer an explanation for his failure to proceed with a petition alleged to be urgent. To hold otherwise would be to allow an abuse of the Court process which this Court is not prepared to do.”

13. In determining civil rights and obligations, a person is entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law. A *“speedy hearing”* means conducting a trial within a reasonable time. The Plaintiff in this case has not given any reason why he has not fixed this suit for hearing since he was given the opportunity to do so by the court on 4th October, 2019.

14. For those reasons, I allow the Application dated 19th August, 2020. The Plaintiff's suit is hereby dismissed with costs for want of prosecution.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 19TH DAY OF MARCH, 2021

O.A. ANGOTE

JUDGE