



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT MOMBASA

CASE NO. 103 OF 2007

CONSOLIDATED WITH HCCC NO 352 OF 1998

TEITA ESTATE LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

MNJALA MWALUMA & 91 OTHERS.....DEFENDANTS/APPLICANTS

RULING

The application is dated 17th August 2021 and is brought under Order 17 Rule 2 (1) and (3) and Order 51 Rule 1 of the Civil Procedure Rules and Section 1A and 3A of the Civil Procedure Act seeking the following orders;

1. That the plaintiff's suit against the defendants be dismissed for want of prosecution.
2. That the Honourable Court be pleased to grant such and/or further orders it deems fit in the interests of the justice.
3. That the plaintiff/respondent to bear the costs of this application and of the appeal.

It is based on the grounds that it is more than 14 years since the plaintiff filed this suit citing that he defendants/applicants trespassed in the suit property and need to be evicted from the suit property. That in 2011 after a long battle in court, the court ordered for a joint survey which was to be conducted by the three surveyors, the government surveyor, the Teita Sisal Estate Limited Surveyor and defendants surveyor which orders are yet to be implemented since the plaintiff refused, neglected and/or failed to comply and/or cooperate with the government and defendants' surveyor. That in 2014 after 3 years of silence and unnecessary applications brought to court by the plaintiff, the defendants decided to pursue an alternative way of solving this case, and they made a petition in the 11th parliament. That the petition was heard by the relevant Parliamentary Committee and the committee did make their proposal to the Cabinet Minister for Land and Environment who then made his final recommendation for which the plaintiff has continued to frustrate its implementation. That in 2019, after the Cabinet Minister's recommendations were issued, the plaintiff sought an order for purposes of exploring a possible out of court settlement and the court did issue orders for parties to explore out of court negotiations in 2019 and 2020. That when the court issued the orders for negotiations which were sought by the plaintiff herein, the plaintiff has since failed, neglected and/or refused to reach out to the defendants or the defendants counsel for negotiations to settle this matter once and for all. That is it now 14 years since this suit was filed in court and the plaintiff has proved that it is not willing to take this matter for full hearing and/or the same be settled out of court. That the continued pendency of this suit is not only against the principles of justice but also prejudicial to the defendants and that even if the respondents were to have this suit set down for hearing, it will be of no use since the plaintiff has failed to prove the ownership of the suit parcel of land. That the defendants have continued to suffer irreparable loss and damages, whereas the plaintiff continues to enjoy the use of the suit property by making enormous profits from its operations and business. That it is only fair and just that the orders are granted as prayed

The respondent submitted that in compliance with the directions of the Court of the 13th June 2011, a survey on the plaintiff's property, being, Land Reference Number 2880, 2881, 6924, 9847 and 1137 by the Eleventh Parliament Departmental Committee.(attached and produced a PK 1 is a true copy of the title).That the survey was conducted by the Eleventh Parliament's Departmental Committee; on lands, on the 2nd December 2014, issued directives/recommendations for the re-establishment of boundaries owned by Teita Estate Limited by the Ministry of Lands, Housing and Urban Development through the Director of survey with a view to establish the true acreage and limits of land owned by Teita Estate Limited. The re-survey of the land parcels was carried out by Survey of Kenya. The community and the estate were both represented by Practicing Licensed Surveyors during the survey work as follows; the Mwasima Mbuwa Welfare Association was represented by Mr. John D. Obel a senior and reputable Licensed Land Surveyor, Washington Weere a specialist in Remote Sensing and Geographic Information systems (GIS) and Mr. Thomas Nduku an investigator of profound experience and reputation. Teita Estate Limited was represented by Mr. Wallis Hime a senior and reputable licensed surveyor. The County Government of Taita Taveta was represented by Mr. Sammy J Wambua a senior land surveyor who is the designate county surveyor. Mr. Richard K Amati a Principal Land Surveyor and a licensed land surveyor led the team of experts from the Ministry of Lands. All the parties were present in the field throughout the survey exercise. The report concluded that the total acreage of the four parcels of land under investigation are legally owned by the plaintiff (L.R. No. 3800/5(3880/4R), LR N. 1137, LR No. 6924 and LR No. 9487 (Dam) was 30,284 acres. That Teita Sisal (plaintiff) is operating within part of the four parcels under investigations. This was because the estate was not utilizing part of LR No. 3880/5 that is to the north between

Voi-Taita road and Voi River. There was also no encroachment by the estate into neighbouring trust/private land found; and that the settlement at Singila Majengo and other settlements mentioned under findings all fall within LR No. 3880/5 which belongs to Teita Estate was no encroachment whatsoever by the Sisal Estate into community land noted. In other word persons/defendants had in fact encroached on private property. A defendant seeking dismissal of suit on the ground of want of prosecution must satisfy the legal requirement of one year threshold stipulated in order 17 Rule 2 of the Civil Procedure Rules. That the above conditions have not been satisfied by the defendant in their application for the reason that on the 2nd February 2021 the main suit was set down for hearing on the 23rd September, 2021. That for the reasons and facts deposed hereto it is in the interest of justice that the application be dismissed with costs.

This court has considered the application and the submissions therein. The applicant seeks to have the plaintiff's suit against the defendants be dismissed for want of prosecution. I have perused the court record and find that on the 2nd February 2021 the main suit was set down for hearing on the 23rd September, 2021. Order 17 Rule 2 of the Civil Procedure Rules provides that;

"2. (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."

In the case of **Ivita vs Kyumbu(1984) KLR 441** the court held as follows:

"The test is whether the delay is prolonged and inexcusable and, if it is, can Justice be done despite such delay".

In the case of **Mwangi S. Kimenyi vs Attorney General and Another, Civil Suit Misc. No. 720 of 2009**, the court restated the test as follows:-

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."

I concur with the respondent that a defendant seeking dismissal of suit on the ground of want of prosecution must satisfy the legal requirement of one year without prosecution stipulated in order 17 Rule 2 of the Civil Procedure Rules. This application was filed on the 19th August 2021. I find it is an abuse of the court's process and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 9TH NOVEMBER 2021.

N.A. MATHEKA

JUDGE