



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE No. 122 of 2016

FENNY WAKESHO MWAKISHA & CECILIA MWAKISHA MGANGHA

(suing on behalf of the estate of Stephen Mwakisha-Deceased)PLAINTIFFS

VERSUS

COUNTY GOVERNMENT OF KWALE1ST DEFENDANT

JOSEPH CHALE MACHACHE2ND DEFENDANT

KENYA RAILWAYS CORPORATION3RD DEFENDANT

RULING

(Application by the 3rd defendant seeking to have the plaintiffs' suit dismissed for want of prosecution or in the alternative the 3rd defendant be struck out of the sui for being mis-joined; 3rd defendant claiming that the plaintiffs have not taken any steps to prosecute the case; 3rd defendant further contending that it was not involved in acquiring the suit land and plaintiffs have no cause of action against it; one year of inactivity not lapsed thus suit not liable for dismissal for want of prosecution; claim of plaintiff including the allegation that 3rd defendant participated in wrongful acquisition of the suit; there being a cause of action against 3rd defendant that requires ventilation; application dismissed)

1. This suit was instituted by way of a plaint filed on 26 May 2016 with the original plaintiff being Rebecca Mwakisha suing on behalf of the Estate of Stephen Mwakisha. In the original plaint, it was pleaded that Stephen Mwakisha(deceased) was the *bona fide* owner of 1000 acres of land situated in TARU-Samburu North (hereinafter, 'the suit land'). She pleaded that the 1st defendant conferred ownership of the suit land to the 2nd defendant, and later the 3rd defendant paid out compensation to the 2nd defendant for acquiring the suit land through the process of compulsory acquisition for purposes of building the SGR. In the original plaint, the plaintiff sought orders for a declaration of ownership of the disputed land, a permanent injunction against the 2nd defendant from dealing with the land, and an order of injunction against the 3rd defendant to stop her from releasing any further payments to the 2nd defendant. The defendants filed defences opposing the application.

2. The original plaintiff unfortunately died, and an application was filed on 16 May 2019 to substitute her. That application was allowed on 25 September 2019 and that is how Fenny Wakesho and Cecilia Mwakisha came to be the new plaintiffs representing the estate of the late Stephen Mwakisha.

3. Through an application dated 14 May 2019, the 3rd defendant seeks the following orders :-

- a) *That the plaintiff's suit against the 3rd defendant be dismissed for want of prosecution.*
- b) *That in the alternative the plaintiff's suit against the 3rd defendant be struck out for being mis-joined in the suit.*
- c) *That the cost of this application together with the suit be provided for.*

4. The application is based on the grounds that the plaintiff has not taken any step towards prosecuting this suit for over 1 ½ years, and the 3rd defendant continues to suffer loss due to this delay. It has also been contended that the plaintiff wrongly joined the 3rd defendant in this proceedings, as the 3rd defendant was not involved in acquiring land for the standard gauge railway (SGR) but only paid the compensation reward to the 2nd defendant.

5. The affidavit in support of the application is sworn by Ms. Helen Mungania, the Corporation Secretary of the 3rd defendant. She has reiterated the grounds on the application, and has further deposed that the 3rd defendant is incurring loss in terms of legal fees while the suit is pending. She has deposed that in respect of the claim herein, the 3rd defendant's role in the completed phase 1 of the SGR, was to identify the route through which the railway was to pass, while the process of acquisition of land was guided by the National Land Commission (NLC). She has averred that it is the NLC who verified the owners of the land to be acquired, and did the valuation, after which they instructed the 3rd defendant who to compensate for what property and the amount thereof. She has further deposed that in respect of the suit land, the 3rd defendant did identify the route for the SGR to pass, and the NLC acquired the suit land, and instructed the 3rd defendant to compensate the 2nd defendant for the suit land, which they eventually did. For this reason, Ms. Mungania has deposed that the 3rd defendant is wrongly enjoined in this suit as it acted on the advice of NLC.

6. The plaintiffs have opposed the application vide an affidavit sworn by the then counsel for the plaintiffs, Seth Joel Ongiri, and another sworn by Fenny Mwakisha. In his affidavit, Mr. Ongiri deposed that the plaintiffs are fully committed in prosecuting the matter to its logical conclusion. Mr. Ongiri deposed that there has been no delay in prosecuting the matter, as prior to the application being filed on 15 May 2019, the matter was last in court on 28 November 2018, when the court was notified of the demise of the original plaintiff, Rebecca Mwakisha. He has further deposed that thereafter, Fenny Mwakisha and Cecilia Mwakisha applied for a limited grant *ad litem*, and the same was issued on 16 April 2019 following which the application dated 13 May 2019 for substitution was filed. In her affidavit, Fenny Mwakisha, has deposed that the issue of whether or not the 3rd defendant was wrongly enjoined in the suit was addressed by the court in a ruling delivered on 26 June 2017. She has further deposed that Ms. Mungania, in her affidavit, has admitted that it was the 3rd defendant which identified the route for the SGR was not a question for consideration anymore, as the same was determined in paragraph 12 and 13 of the ruling dated 26 June 2017, where the court noted that the 3rd defendant admitted to engaging in construction works, and was willing to provide compensation to the plaintiff. She has further deposed that the 3rd defendant admits that it is the 3rd defendant that contracted the construction of the SGR. She wants the suit to proceed to its logical conclusion.

7. The 1st defendant vide a replying affidavit sworn by Kevin Dzumo the head of legal department of the 1st defendant, agreed with the application and added that the 1st defendant should also be struck out of the proceedings as it played no role in the acquisition of the suit land. He deposed that the 1st defendant only held the suit land in trust for the community. I invited counsel to canvass the application by way of written submissions.

8. Counsel for the 3rd defendant submitted that the 3rd defendant was wrongly enjoined in the suit as they only identified the land, and the role of acquiring the land and verifying the owner of the land was done by NLC which is not party to the suit. Counsel referred me to the Constitution on the functions of the NLC, and further submitted that after NLC acquired the suit land, it advised the 3rd defendant to compensate the 2nd defendant. Counsel maintained that the 3rd defendant did not participate in the verification process of the owner of the suit land, hence, the proper party to this suit ought to be NLC. He cited the case of Patrick Musimba vs. NLC and 4 others to buttress his claim. He added that the plaintiff has incurred costs in form of legal costs and incidental costs for a suit that the plaintiff is not desirous to prosecute.

9. I have not seen any submissions by counsel for the 3rd defendant nor the plaintiffs who are now acting in person.

10. The first order sought in the application is that the plaintiff's suit against the 3rd defendant should be dismissed for want of prosecution. The law on dismissal for want of prosecution is provided for under Order 17 Rule 2, which is drawn as follows:

“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 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.”

11. The conditions that an applicant should meet for such application to be allowed is the one year threshold of inactivity in the suit. From the record, the matter came to court on 28 November 2018 before Omollo J when it was announced that the original plaintiff is deceased. This application was filed on 15 May 2019 before lapse of one year. It is apparent that the applicant cannot thus sustain a cause for dismissal of this suit for want of prosecution for failing to meet the lapse of one year test. There is no need of saying more in so far as this application seeks the dismissal of the suit for want of prosecution for that prayer is clearly premature.

12. The second order sought by the 3rd defendant is that the plaintiff's suit against the 3rd defendant be struck out for being mis-joined in the suit. This appears to have support from the 1st defendant who also seeks to be removed from this case.

13. The cause of action of the plaintiff is that the land of the deceased was taken over for construction of the SGR without compensation. Instead, compensation was paid to the 2nd defendant. I think the original plaintiff was in the circumstances herein fully entitled to sue all parties that she believed were involved in the acquisition of the land and compensation to the 2nd defendant. What role each party played, and whether their role would make them culpable, I am afraid, is not an issue that I would wish to go into deeply at this stage, for that will require evidence. On the face of it, all the parties herein were in one way or another involved, and how deep their involvement may have been, and whether that involvement would enable them be liable to the plaintiffs is a matter that can only be decided after a full hearing on merits. I think the plaintiffs have demonstrated a cause to be tried and I would not wish to summarily dismiss their suit without first giving them a hearing.

14. I am aware that the 1st and 3rd defendants argue that the entity involved was the NLC. I am aware that the NLC has not been enjoined to this suit, but this suit is yet to commence and an amendment can be made. Indeed, the plaintiffs need to seriously consider enjoining the NLC unless they are certain that the NLC was not in any way involved in the issues at hand. But I will let the plaintiffs make that decision for themselves.

15. I think I have said enough to demonstrate that I find no merit in this application. It is hereby dismissed with costs to the plaintiffs.

16. Orders accordingly.

DATED AND DELIVERED THIS 21ST DAY OF MAY 2021.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA