



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 108 OF 2016

ESTHER NJERI CHEGE (Suing as the personal representative

of the Estate of JULIUS CHEGE KIONGO (Deceased).....PLAINTIFF

VERSUS

JAMEN KIYAGI AMAINGU.....DEFENDANT

RULING

1. This is a ruling on two applications one dated **14/5/2019** and the other dated **11/6/2019**.
2. The application dated **14/5/2017** has been brought by the defendant who seeks the following orders:-
 - (a) **That this application be certified urgent and service shall be dispensed with in the first instance.**
 - (b) **That the plaint dated 5/7/2016 and filed on 6/7/2016 be struck out and judgment be entered for the defendant with an order that the plaintiff's suit is dismissed for being otherwise an abuse of the process of the court.**
 - (c) **That the costs of the suit and of this application are awarded to the defendant.**
3. The application is brought under **Order 2 Rule 15(1) (b), (c) and (d), Order 17 Rule (2) and Order 51 Civil Procedure Rules 2010, Section 3A of the Civil Procedure Act, Cap 21 and Section 3 of the Environment and Land Act No. 19 of 2011.**
4. The application is supported by the affidavit of the defendant sworn on **14/5/2019**. That affidavit reiterates the same matters set out in the grounds at the bottom of the application.
5. The grounds are that the plaintiff's husband subdivided land parcel No. **Trans Nzoia/Cherangani/11** in August, 2014 into 3 parcels bearing new numbers; that the defendant has never owned plot No. **Trans Nzoia/Cherangani/11** yet an injunction is sought by the plaintiff in respect of that parcel; that the plaintiff was not forcefully evicted from the land parcel known as **Trans Nzoia/Cherangani/11** by the defendant in **1965** or forcefully relocated to **Trans-Nzoia/Cherangani/13** as claimed; that the plaintiff's husband had filed another similar suit, that is, Nairobi Civil Case No. 1523 of 1998 against the defendant in which he claimed to have been evicted from the same parcel which suit was subsequently withdrawn; that the plaintiff's suit is statutorily time barred, the cause of action having allegedly occurred in 1965 and that the plaintiff has failed to take the necessary steps to fix this matter for hearing and failure to prosecute this suit for over one year is an abuse of the process of the court. It is also alleged that the plaintiff has filed an additional suit being **Kitale ELC No. 34 of 2019** in which the same relief is sought in respect of the same land. The defendant contends that the plaintiff's claim is frivolous as she was never forcefully evicted whether by the defendant or any other person in authority.
6. In response to application dated **14/5/2019** the plaintiff filed replying affidavit dated **20/6/2019** on **21/6/2019** and a further affidavit dated **17/7/2019** and filed on the same date. Her response as contained in those affidavits is that failure to prosecute the instant suit was not intentional; that she initially filed the suit in person and started prosecuting the same until December, 2016 when the court file went missing and her effort to trace it proved futile; that she did not know what to do because the response given by the registry staff each time she visited was that the file had been misplaced; that in April, 2019 she instructed her advocates to file another suit **Kitale ELC No. 34 of 2019** which was filed on **12/4/2019** (hereinafter also referred to as "the new suit") to recover the suit land; that upon serving the applicant with the summons to enter appearance in the new suit he was served with the current application seeking to have the instant suit dismissed yet she had failed to trace the court file for two years; that she believes her claim to be genuine and she has not lost interest in this suit and would prefer that this suit be consolidated with the new suit for hearing and determination on the merit; that a new survey conducted on 12/1/2019 has revealed fraud on the part of defendant and other persons not parties to the suit and that the defendant acted illegally by evicting her from **Trans-Nzoia/Cherangani/11** and relocating her to **Trans-Nzoia/Cherangani/13** which was of lesser acreage.

7. The further affidavit of the defendant/applicant was filed on **29/7/2019**. In that affidavit the deponent dismisses as untrue the plaintiff's claim that the court file went missing; that it is against the law for a party who is aware that they have another suit pending to file another similar suit; that the plaintiff in the new suit did not disclose the pending suit or allege that the alleged court file thereof had gone missing and that is only revealed in the amended plaintiff. Further the defendant casts doubt on the propriety of the surveyor's report allegedly made on 12/1/2019 which does not show that the surveyor visited the plot on which he resides, that is, Plot No. 13. The surveyor's work is also doubted on the basis that the plaintiff has not produced any plan made by the surveyor who visited the suit land; that the Court of Appeal in **Eldoret Civil Appeal No. 18 of 2005 - Julius Chege Kiongo -vs- James Waiharo Kiongo** held that the plaintiff's husband held only 10 acres and that her husband had in compliance with the recommendation of Court of Appeal in that decision subdivided the land into three portions; and that therefore the plaintiff's claim for 14.8 acres is unjustified and in any event parcel No. Trans-Nzoia/Cherangani/11 which she claims to have been evicted from does not measure 14.8 acres; that the true history of Trans-Nzoia/Cherangani/11 was deliberately hidden.

8. The defendant filed submission on the application dated **14/5/2019** on **29/7/2019**. The plaintiff's submissions on applications dated **14/5/2019** and **11/6/2019** were filed on **17/9/2019**. The issues that arise from the application dated **14/5/2019** are as follows:

(a) Whether the suit should be dismissed for want of prosecution.

(b) Whether the suit should be otherwise struck out for failing to disclose a reasonable cause of action, being frivolous and vexatious likely to prejudice embarrass and delay a fair trial, or and an abuse of the court process.

(c) Should this suit and Kitale ELC No. 34 of 2019 be consolidated?

(d) What orders should issue?

(a) Whether the suit should be dismissed for want of prosecution.

9. Under this ground the defendant quotes **Order 17 Rule 2(3)** of the Civil Procedure Rules to the effect that in any suit where no application has been made or step taken by either party for one year any party to the suit may apply to the court for its dismissal for want of prosecution. His submission is, and in this court's opinion correctly so, that the burden is upon the plaintiff to show why the suit should not be dismissed. He maintains that pleadings closed after the defendant's reply to defence was filed on 8/8/2016 and service effected via courier on 11/8/2016. He dismisses the plaintiff's assertion that she was acting in persons as a ploy to buy time by "putting up appearances of not knowing her way around the court and its processes and filing a new suit in 2019 when the court file allegedly went missing." He cites **Ivita -vs- Kyumbu [1984] KLR 441** as having frowned on such a practice. The defendant pokes holes in the plaintiff's response to his application as follows: the plaintiff does not state the dates she visited the registry and found the court file missing or the person she spoke to who informed her that the file was missing; that she accuses as aspersion on the defendant and the court staff that they may have colluded to hide the court file; that the plaintiff has, contrary to overriding objective in **Sections 1A and 1B** of the Civil Procedure Act demonstrated her lethargy in her conduct with regard to failing to serve the application dated 11/6/2019 (seeking consolidation of this suit and the new suit); that no application for reconstruction of the file in this suit was filed; that this suit was knowingly misrepresented as "fast track" yet she abandoned it after being served with the defendant's documents on 1/12/2016; that the time limit for disposing of a fast track suit has expired and under **Article 159 2(b)** of the Constitution justice should not be delayed; that the plaintiff has not satisfactorily explained the delay and especially why she did not comply with **Order 11** of the Civil Procedure Rules. The defendant cites **Joseph Mwangi Kimari -vs- Shammi Kanjirapparambil Thomas & 2 Other Civil Case No. 38 of 2010; Ivita -vs- Kyumbu (supra)** and **J.P. Machira T/A Machira & Co. Advocates -vs- Wangethi Mwangi & Another [1998] eKLR 18** and submits that it is the duty of the plaintiff as the owner of the suit to activate the suit and that the defendant has a right to seek dismissal of a delayed suit. Further, the defendant maintains that the plaintiff must explain the delay adequately and properly. To all these, the plaintiff in her submission maintains her explanation that she had filed the suit in person and that she was informed that the court file went missing afford a good explanation or the delay in prosecuting the suit.

10. I have considered the issue above. It is the correct position that the suit remained unprosecuted for a period in excess of one year and that **Order 17 rule 2(1)** of the Civil Procedure Rules provides that that a suit may be dismissed upon application by any party if no cause is shown. It is also correct upon by application by a defendant the burden is shifted to the plaintiff's shoulders to explain the delay in prosecuting her suit.

11. Is the plaintiff's explanation for the delay plausible?

12. It is the plaintiff's case that she filed this suit in person on **6/7/2016**. I have not heard the defendant assert that the plaintiff is possessed of such expertise as to be able to single handedly and flawlessly drive her litigation to a conclusion after she faced the hurdle of countering the defendant's documents served on. I have also not heard the defendant deny that upto the point of filing of the instant application she was acting in person.

13. The explanation that the plaintiff gave is likely to be genuine. In the case of **Ivita -vs- Kyumbu** the court stated that the test is whether the delay is prolonged and excusable and if it is, can justice be done despite that delay. In my view the mere lapse of time is not sufficient to warrant the dismissal of a matter for want of prosecution where a litigant has arisen to oppose an application seeking such dismissal; the court must consider whether the delay is inexcusable. Even when found to be inexcusable, the court must consider whether justice can be done despite the delay.

14. Computed from the expressed date of filing of the defendant's list of issues, that is, **1/12/2016** upto the date of the filing of instant application the delay occasioned by the plaintiff inaction in this matter is a period of one year and six months. However if her explanation that the court file was missing is taken to be true and that the new suit was filed on **12/4/2019** then the plaintiff may be deemed to have satisfactorily explained the delay.

15. The very fact the plaintiff was acting in person is no warrant for credulity in the part of this court. However it is occasionally the case that one or other file record may be misplaced in the registry. Though there is an exchange of words and suspicions regarding the claim of the

missing file, it is not in all cases that such misplacing of a file should be deemed to connote willful and nefarious action on the part of any person, litigants, their advocates and court staff included; inadvertent mistakes in filing do occur from time to time and since it has not been shown conclusively that this was not the case this court is inclined to accord the plaintiff a benefit of doubt regarding her allegation that the court file went missing. To buttress this belief this court observes that the new suit was filed at least one month before the instant application was filed. Had there been no new suit the plaintiff's task of convincing this court of the probability of the truth of that claim would have been more arduous. For the above reasons I find that this suit should not be dismissed for want of prosecution.

(b) Whether the suit should be otherwise struck out for failing to disclose a reasonable cause of action, being frivolous and vexatious likely to prejudice, embarrass and delay a fair trial, or an abuse of the court process.

16. Regarding this ground the defendant cites numerous cases including **D.T. Dobie Company Ltd -vs- Joseph Mbaria Muchina [1982] KLR 1, Yaya Towers Ltd -vs- Trade Bank Ltd (in liquidation) Civil Appeal No. 35 of 2000, Trust Bank Ltd -vs- H.S. Amin & Company Ltd & Another [2000] eKLR.**

17. On the allegation that the suit is frivolous the defendant cites **Mpaka Development Company Ltd -vs- Abdul Gaful Kana T/A Anil Kapuri Pan Coffee House [2004] 1 EA 161** where Ringera J described a frivolous pleading as follows:

“I would say a pleading is frivolous if it lacks seriousness. If it is not serious then it would be unsustainable in court.”

18. It is averred that in the instant case lack of seriousness is evinced by: the plaintiff's failure to annex documentary evidence to prove that the defendant has ever owned or occupied **Trans-Nzoia/Cherangani/11**; the plaintiff's failure to enjoin the alleged government officials who colluded with the defendant to evict her from the suit land; that her husband had in a different suit in **1998** sought the same orders she seeks in the instant suit; that the passage of more than **12** years since the date of the discontinuous her husband's cause of action makes the suit unmaintainable as it is time barred since the suit by her husband and the instant suit state that the cause of action occurred in **1965** and no illegality survived beyond the life time of the plaintiff's husband which the plaintiff can now raise. It is also argued that the defendant, going by the contents of the plaint acquired **Trans-Nzoia/Cherangani/13** in 1980s. On that basis it is alleged that the plaintiff's claim that the defendant jointly with others evicted the plaintiff from **Trans-Nzoia/Cherangani/11** in 1965 is frivolous and vexatious.

19. The defendant delves deeply into the contents of the defendant's witness statement, the plaintiff's annexures including the consent to transfer parcel No. **Trans-Nzoia/Cherangani/13** and the failure of the plaintiff to plead in the plaint or in the defence any specific date or time of the occurrence of the alleged forceful eviction. The defendant faults the plaintiff for claiming *mesne profits* from as far back as 1965 while her evidence shows that the defendant was not occupying **Trans-Nzoia/Cherangani/11** which was occupied by Humphrey Lugadiru Omino. He cites **Order 2 Rule 15 (2)** of the **Civil Procedure Rules** and maintains that the plaintiff's suit should fail on only this ground.

20. On the issue of whether the plaint is scandalous the case of **Mpaka Road** (supra) is also cited where Ringera J held that:

“I would hold that the matter would only be scandalous if it would not be admissible in evidence to show the truth in any allegation in the pleading which is sought to be impugned.”

21. The issues in **paragraph 6** of the plaint if faulted as scandalous and the plaintiff's claim is alleged to be false since the defendant was the registered proprietor of **Trans-Nzoia/Cherangani/13** which was closed upon subdivision in September, 2015. Again, in his argument the defendant heavily relies on documentation supporting subdivision of that parcel of land and argues that a search at the Lands Registry before institution of this suit would have revealed that plot No. **Trans-Nzoia/Cherangani/11** had been registered in the name of her late husband and that title was closed on subdivision on **16/8/2014**. Further citing the **Trust Bank case** (supra) and the **J.P. Machira case** (supra) it is averred that the suit is scandalous because plaintiff was aware of a Court of Appeal decision that gave her husband only 10 acres of **Trans-Nzoia/Cherangani/11** and that plot No. **Trans-Nzoia/Cherangani/11** was registered in the name of her husband and it was subdivided in **2014**.

22. Again citing the **Mpaka Road Case** (supra) and **Mercy Nduta Mwangi T/A Mwangi Keng'ara & Co. Advocates -vs- Invesco Insurance Co. Ltd [2019] eKLR Machakos High Court CA No. 110 of 2016**, the defendant describes the matters in **paragraph 8** of the plaint as annoying in that the defendant has never owned or occupied that land. Quoting the doctrine of *stare decisis*, he also avers that the plaint can possibly lead to no good in the light of Court of Appeal decision in **Eldoret Civil Appeal No. 18 of 2005 Julius Chege Kiongo -vs- James Waiharo Kiongo** and the plaintiff as an administrator cannot claim more than the estate of her husband is entitled to; he avers that a trial of this suit would be vexatious since the main witnesses *Humphrey Lugadiru* and *Julius Chege Kiongo* are now deceased and it might be hard to get evidence of how the alleged eviction of 1965 took place. He maintains that the Provincial Surveyor, the Settlement Land Trustees and Land Registrars have repeatedly pointed out boundaries, location and acreage of **Trans-Nzoia/Cherangani/11** to the plaintiff and her family.

23. Finally, citing **Machira -vs- National Newspapers Ltd** (supra) the defendant avers that the plaint would prejudice, embarrass and delay the fair trial. The grounds for this assertion are that the defendant occupies **Trans-Nzoia/Cherangani/13** while the plaintiff, while at the same time providing evidence of transfer to the defendant by Humphrey L. Omino of **Trans-Nzoia/Cherangani/13**, seeks an injunction against the defendant to restrain him from occupying **Trans-Nzoia/Cherangani/11**. It is said that even Humphrey would have to be made a party and that would be time barred suit which would prejudice an already hopeless claim. It is argued that the plaintiff's husband withdrew his previous suit **HCCC No. 1523 of 1998** after an application was filed seeking to strike out the suit out of his concession that the suit was vexatious. It is also alleged that the suit cannot be brought **50 years** after the alleged cause of action arose and it is statute barred.

24. In response to defendant's claim that the plaintiff's suit is scandalous, frivolous, vexatious and an abuse of the process of the court, the plaintiff cites **County Council of Nandi -vs- Ezekiel Kibet Ruto & 6 Others [2013] eKLR** and **Michael Juma Otieno -vs- Executive director N.G.O. Coordination Board Kisumu Petition No. 6 of 2012** and maintains that there is no evidence that the instant suit can be described as such. She states that there is documentary evidence to support the plaintiff's case and that the suit cannot be grossly hopeless in

the light of those documents and the pleading as well as the defendant's defence. It is stated that the defendant has not demonstrated that the plaintiff's claim is bound to fail or that it cannot be remedied.

25. Regarding the defendant's claim that the suit is time barred and it should be struck out the plaintiff while admitting the power to strike out pleadings, maintains that that power is discretionary and that the recognized principle is that court should be slow to strike out pleadings as that is draconian measure. She cites **D.T. Dobie -vs- Muchina** (supra). She submits that the present suit can be saved through either an amendment or consolidation with **ELC No. 34 of 2019** (the new suit). The plaintiff maintains that she established fraud vide a survey carried on **12/1/2019** and fraud was not part of the claim in this suit. She states that allegation of fraud are new and weighty matter that may lead to amendments of pleadings and extension of time and that since this suit has not been heard the plaintiff still has a chance to amend the pleadings to introduce fraud which amendments can save the plaintiff's suit.

26. I have considered the arguments of both parties on the issue at hand. There are concerns by the defendant that a hearing of this matter would be futile in the light of the apparent inconsistencies that he brings to the fore in his submissions and the fact that the supposed prime witnesses in this case are deceased and there may be no person to give the requisite evidence to prove the claim or defence respectively. Starting with the latter category of ground thought this court agrees that the demise or translocation of witnesses may have a great impact on any litigation pending before court, but where the case has already been filed in court, the court is of the respectful view that these two factors do not warrant a striking out of the claim or defence or counterclaim as the case may be. However regarding the first category, it must be remembered that it should be the last recourse of the court in any litigation to strike out any pleading or claim without hearing the party who put forward such claim.

27. The other concern that a court must always harbour in its mind is that whenever the striking out of any claim or pleading on any ground without according the party a substantive hearing on the merits is the probability of violating the principles of natural justice hovers around it and any slip may occasion irreparable harm to a party. Our Civil Procedure Act Cap 23 of the Laws of Kenya appears to have recognized this a long time ago and appropriate provisions were included which constantly call upon the court to do what may be just to the parties in all circumstances. In the case of **Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers [2016] eKLR** Mativo J. had this to say:

“Procedural laws refer to rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties.[31] It was this strictness of having due regard to the rules of Civil Procedure that occasioned the loss of many legitimate claims by plaintiffs thus denying them access to justice.

The overriding concept however came to cure this. Michael Howard [32] defines the Overriding Objective “as a principle from the civil procedure rules. The purpose of the overriding objective is for the civil litigation and dispute resolution process to be fair, fast and inexpensive. The principle is that each case should be treated proportionately in relation to size, importance and complexity of the claim and the financial situation of the parties. The courts must consider the overriding objective when they make rulings, give directions and interpret the civil procedure rules.”

The double O's in the phrase Overriding Objectives are what coined what is today famously known as the term Oxygen Principle. In Hunker Trading Company Limited vs Elf Oil Kenya Limited, [33] perhaps the first case to be grounded on the new provisions the Appellate Jurisdiction Act (Sections 3A and 3B), it was held that section 1A of the Civil Procedure Act came in to provide facilitation of just, expeditious and proportionate resolution of civil disputes in Kenya as the overriding objective of the Act. The courts' duty in performing such mandate under section 1B of the Civil Procedure Act are:-

- a. The just determination of the proceedings,**
- b. The efficient disposal of the business of the Court,**
- c. The efficient use of the available judicial and administrative resources,**
- d. The timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties,**
- e. The use of suitable technology.”**

28. It is no wonder that the “*just determination*” of proceedings heads the list of factors considered vital in the effective dispensation of justice in Kenya. In the instant case a trial of the matters involved in the entire litigation at this interlocutory stage would be necessarily based on a mere examination of documents by a court that was not present at the time of their being made without any attendant explanations by parties or their proposed witnesses. Would that be just in view of the fact that this has been a long running dispute that began when the plaintiff's husband was alive? Would that settle the rancour that the parties have had over the subject matter with finality or would it leave them, or at least one of them dissatisfied? The court already has a claimant before it who as a mark of respect for the justice system of the land is saying: “*At least hear my case, and give me a decision I can abide by.*” She has subjected herself to the jurisdiction of the court, and won credit for her respect for the system to do what is just. Natural justice requires that all parties be heard before a determination is arrived at. Whatever the merits of the analysis put forward by the defendant in the instant application, would justice be seen to have been done in the eyes of all onlookers if the claim were summarily struck out at this stage without a substantive hearing being conducted?

29. The defendant's arguments for dismissal may not be discounted in any way, but whatever decision this court arrives at in the instant application, it must remember the words of Nyamu J, who quoted the dicta of Megarry J in the case of **John v Rees [1970] Ch 345 at page 402** in his decision in the case of **Kenya Bureau Of Standards V Societe Generale De Surveillance Sa [2005] eKLR** as follows:

“It may be that there are some who would decry the importance which the courts attach to the observance of the rules of

natural justice. "When something is obvious, 'they say, 'why force everybody to go through the tiresome waste of time involving in framing charges and giving an opportunity to be heard? The result is obvious from the start.' Those who take this view do not, I think do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with open and shut cases which, somehow, were not, of unanswerable charges which, in the event were completely answered; of inexplicable conduct which was fully explained: of fixed and unalterable determinations that, by discussion suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events."

30. There is thus sufficient cause in the instant matter to warrant the dismissal of the instant application dated 14/5/2019 in favour of a determination of the suit on its merits.

(c) Should this suit and Kitale ELC No. 34 of 2019 be consolidated?

31. The application dated 11/6/2019 has been filed by the plaintiff seeking the following orders:

(1) That this court be pleased to order a consolidation of this suit with Kitale ELC No. 34 of 2019 - Esther Njeri Chege (Suing as administratrix to the Estate of the late Julius Cege Kiongo -vs- Benjamin Karangathi (Sued as an administrator of the Estate of James Waiharo Kiongo (deceased), Jamin Kiyagi, the Director of Land Adjudication & Settlement, the Land Registrar, Trans-Nzoia and Hon. Attorney General.

(2) That further proceedings in this suit be stays until further orders.

(3) That Costs of this application be in the cause.

32. The grounds are that the said suits involve the same and/or similar questions of fact and/or law; that the rights of reliefs claimed in them are in respect of or arise out of the same transaction and that both the aforesaid suits are pending before the Environment and Land Court at Kitale.

33. The application is supported by the sworn affidavit of the plaintiff dated 11/6/2019. The defendant opposed the application dated 11/6/2019 through grounds of opposition dated 28/6/2019. In response to application dated 14/5/2019 the plaintiff filed replying affidavit dated 20/6/2019. The plaintiff filed further affidavit to the application dated 14/5/2019 on 17/7/2019. The defendant filed further affidavit on 29/7/2019.

34. I have considered the application and the response including submissions on the issue. I do not consider the application as one that should take up much of this court's time for one reason. In view of the very fact that the plaintiff has explained that her filing of a new suit was based on misapprehension that the original file in respect of the earlier suit had gone missing, and thus acknowledged that the same cause of action forms the basis of both suits this court has no other recourse but to order that the two suits be consolidated.

(d) What orders should issue?

35. The upshot of the above is that the application dated 14/5/2019 is dismissed with no orders as to costs and the application dated 11/6/2019 is allowed in terms of prayer No. (1) thereof. The plaintiff shall however bear the costs of the application dated 11/6/2019.

It is so ordered.

Dated, signed and delivered at Kitale on this 4th day of November, 2019.

MWANGI NJOROGE

JUDGE

4/11/2019

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Teti for the plaintiff

Mr. Mwenesi for the defendant

COURT

Ruling delivered in open court.

MWANGI NJORGE

JUDGE

4/11/2019.