



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 144 OF 2018

LILIAN AKINYI ABUTO & ANOTHER.....PLAINTIFFS

VERSUS

PETER KINYANJUI GITAU & 2 OTHERS.....DEFENDANTS

RULING

(Application for dismissal of suit for want of prosecution; more than one year having lapsed since the last action in the file; plaintiffs explaining that they did not take steps to prosecute the suit owing to the Covid pandemic; benefit of doubt given to the plaintiffs but directed to proceed to take steps in the suit; 1st defendant cannot be faulted for filing the application and will have costs thereof)

1. The application before me is that dated 3 September 2020 filed by the 1st defendant. It is an application brought pursuant to the provisions of Order 17 Rule 2 (3) and it seeks orders that this suit be dismissed for want of prosecution.

2. To put matters into context, this suit was commenced through a plaint which was filed on 14 June 2018. The plaint was later amended on 17 September 2018. In the plaint, the plaintiffs averred that on 23 January 2004, they purchased from Warehousing Investment Limited the land described as Subdivision No. 13078/3 (original No. 13030/50), title No. CR 37340 (the suit land). They pleaded that in February 2018, they realized that the defendants had invaded the property and commenced construction. In the suit, they have sought orders for a declaration of ownership of the suit land, a permanent injunction to restrain the defendants from the land, cancellation of the title of the 1st and 2nd defendants to the land Subdivision No. 13079 (Original No. 13030/50) CR No. 37340/1, general damages, costs and interest. Alongside the plaint, the plaintiffs filed an application for an interlocutory injunction to stop the 1st and 2nd defendants from further construction pending hearing and determination of the suit. That application for injunction was heard and a ruling was delivered on 9 April 2019. That application for injunction was dismissed. Nothing has happened in this case from the date of delivery of that ruling until this application was filed on 7 September 2020.

3. In this application, the 1st defendant points out that more than one year has lapsed without the plaintiffs taking any step to prosecute the matter and avers that this is an indication that the plaintiffs no longer have any interest in this suit.

4. To oppose the motion, the plaintiffs filed a replying affidavit sworn by the 1st plaintiff. She deposes that her advocate was in the process of setting down the matter for hearing when courts closed down business owing to the Covid pandemic. She has deposed that the delay has not been occasioned by lack of interest or indolence on her part or her advocate.

5. At the hearing of the application, counsel relied on the affidavits filed. No affidavit was filed by the 3rd defendant but counsel stated that he supports the application.

6. I have considered the matter. Order 17 Rule 2 provides 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 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.

7. It will thus be seen from the above, that where a suit remains dormant for more than one year, the same may be the subject of an order for dismissal for want of prosecution.

8. From the record, it is apparent that more than one year has lapsed since the matter was last in court. The plaintiffs have however stated the inactivity was due to the crippling effect of the Covid pandemic. I will give benefit of doubt to the plaintiffs. I will therefore not proceed to dismiss the suit but the plaintiffs must take steps to prosecute the case, and they cannot now be heard to cite Covid, as litigants and courts have, after the initial shocks, found a way to proceed with matters despite the pandemic. One cannot however fault the 1st defendant for filing this application and the plaintiffs will thus bear the costs of this application.

9. Orders accordingly.

DATED AND DELIVERED THIS 17TH DAY OF MAY 2021.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA