



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC NO 173 OF 2018

MARIAM BAKARI KISUSE.....PLAINTIFF/RESPONDENT

VERSUS

MOMO MOHAMED MATARI.....DEFENDANT/ APPLICANT

RULING

1. By a Notice of Motion dated 16th November, 2020, the Defendant/Applicant seeks from this court for orders that:

a. The plaintiff's suit be dismissed forthwith with costs for want of prosecution.

b. The costs of the application and for the entire suit be borne by the plaintiff.

2. The application is brought under Order 17 rule 2(3) of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil procedure Act and all other enabling provisions of the law. The said application is supported by the affidavit of Sophia Saeta sworn on 16th November, 2020 and is premised on the grounds:

i. That the plaintiff has not taken any practical steps to prosecute this matter since the ruling was delivered on 26th March, 2019 on their application dated 25th July, 2018.

ii. That that was the last action in this matter and since then, the plaintiff has not taken any further steps towards the finalization of this suit.

iii. That the plaintiff has clearly evidenced by her conduct that she is no longer interested in the prosecution of this matter and it is only just and fair for the court to dismiss this suit.

3. It is the defendant's case that the plaintiff's delay in prosecuting this suit is inordinate and inexcusable and the continued delay will violate the Applicant's constitutional right to have the trial concluded without unreasonable delay and that the prolonged pendency of the matter and the plaintiff's reluctance to proceed is prejudicial to the defendant/applicant as getting witnesses in future may prove difficult. That it is only fair that the suit is dismissed for want of prosecution.

4. In opposing the application, the plaintiff filed a Replying Affidavit sworn by herself on 10th February, 2021. She avers that her advocates on record have informed her that they have on several occasions sought to have this matter fixed for pre-trial directions and on each occasion the court file could not be located and/or traced. That they sent out several correspondences to have the matter fixed for pre-trial directions and subsequently taking a hearing date in vain. That the plaintiff's advocate on record came to the conclusion that the court file was lost and/or misplaced and subsequently sought a certificate of loss in order to prepare a formal application for a skeleton file to be opened. The plaintiff noted that the advent of Covid-19 pandemic experienced countrywide for a better part of the year 2020 meant that most court processes were greatly affected. The plaintiff denied losing interest in prosecuting this matter, adding that she was ready and willing to prove in court her proprietary rights over the suit property herein. The plaintiff blamed the failure to locate and/or trace the court at the Registry for the delay. The plaintiff contented that courts are inherently inclined to sustain and proceed with suits to their logical conclusion over and above summarily dismissing them. The plaintiff has annexed letters addressed to the Executive officer of the court dated and received on 4th September, 2019, 3rd December, 2019, 20th May, 2019, 15th April 2019 and 10th March, 2020.

5. I have considered the application. The only issue for determination is whether the defendant has made out a case to warrant grant of orders sought for dismissal of the plaintiff's suit for want of prosecution. The legal basis for dismissal of suits for want of prosecution is the requirement of expediency in the prosecution of civil suits and can be found in Article 159(2) (b) of the constitution which provides that justice shall not be delayed. The courts are also empowered by Section 1A and 1B of the Civil Procedure Act to ensure that the overriding

objectives of the Civil Procedure Act and Rules are attained in the administration of justice in a just, fair and expeditious manner.

6. The procedural underpinning to the above substantive provisions of the constitution and the Law is Order 17 Rule 2 of the Civil Procedure Rules which allows the court on its own motion or on notice to the parties, where no action in a suit has been taken for one year to either have the suit set down for hearing or apply to have it dismissed for want of prosecution. **Order 17 Rule 2** of the **Civil Procedure Rules** stipulates thus:

“(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 is clear from the above provisions of the law that it is permissible for a party to a suit to move the court for dismissal in situations where no application has been made or step taken by either party for one year. Article 159 of the Constitution and Order 17 Rule 2(3) give the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity.

8. In the case of *Ivita – VS- Kyumba [1984]KLR 441*, it was held:-

“The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the Plaintiff’s excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court.”

9. The court record does show that this suit was instituted on 26th July, 2018 vide a Plaint dated 25th July, 2018. The Plaintiff’s claim against the Defendant is for a declaration that there is a trust created in favour of the Plaintiff in over an area measuring 0.0876 hectares occupied by the Plaintiff; a declaration that the Defendant cannot use the title deed KWALE/UKUNDA/3621 without mutations documents and/or a map from the Survey Department reflecting the Defendant’s map area on the ground to evict and/or harass the Plaintiff; permanent injunction and costs. This suit was filed simultaneously with an application under certificate of urgency on the same day seeking for temporary injunctive orders. The said application was subsequently allowed vide a Ruling delivered by the court on 26th March, 2019. The record indicates that on 20th June 2019, the Defendant’s advocates fixed the matter for pre-trial directions on 4th October, 2019. However, the record does not indicate what transpired on 4th October, 2019. Thereafter, the Defendant filed the present application on 18th November, 2020.

10. Whereas the Defendant has averred that the Plaintiff has not taken any practical steps to prosecute the matter since the Ruling was delivered on 26th March, 2019, I note that the last time the matter was supposed to be before court was on 4th October, 2019. The period from 4th October, 2019 upto 18th November, 2019 is about one year and slightly over one month. It is manifest therefore that for purposes of Order 17 rule (1) and (3) of the Civil Procedure Rules, the suit was ripe for dismissal for want of prosecution as sought by the Defendants.

11. The Plaintiff in his response to the application herein has explained that her advocates sought on several occasions to fix the matter for pre-trial directions but the court file could not be traced. The Plaintiff has exhibited copies of letters written to the court. The Plaintiff has also blamed the advent of Covid-19 Pandemic experienced countrywide and indeed worldwide, for better part of the year 2020 that greatly affected court operations. This Court also takes judicial notice that Mombasa Law Courts was at some point closed for a few weeks in 2020 due to Covid-19 Pandemic.

12. I note that this is a dispute over land and the delay was only for some short period. Dismissal of the suit without hearing the merits would be a draconian act. In this regard, I wish to associate myself with the sentiments of Gikonyo, J. in the case of *Utalii Transport Company Ltd & 3 Others –VS- NIC Bank |& Another [2014] eKLR*, in which he stated as follows:-

“I am guided by a high sense of promoting the principles of substantive justice enshrined in the Constitution and therefore convinced that the circumstances of this case deserved a lenient exercise of discretion by the court in favour of sustaining rather than dismissing the suit.”

13. Although there has been delay on the part of the Plaintiff to set down the matter for hearing, this Court has not been shown that the delay is deliberate, contumelious and therefore inexcusable. In my view, in as much as there was some delay, the interest of justice can still be served if the Plaintiff is given an opportunity to prosecute her case.

14. Accordingly, I decline to grant the application dated 16th November, 2020 and hereby dismiss it. Costs of the application to be in the cause. The parties are directed to comply with Order 11 of the Civil Procedure Rules within 30 days and thereafter the matter shall be set down for hearing.

15. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 22ND DAY OF JUNE, 2021.

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C. K. YANO

JUDGE

In the presence of:

.....for Plaintiff

.....for Defendant

Court Assistant – Yumna

C. K. YANO

JUDGE