



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELCC No. 139 OF 2015

BENJAMIN KIPKECH KIPKULEIPLAINTIFF

VERSUS

ALEX KUNGU KIMANI & 39 OTHERS.....DEFENDANTS

RULING

1. This ruling is in respect of the defendants' Notice of Motion dated 7th January 2021, an application seeking dismissal of this suit for want of prosecution.

2. The application is supported by an affidavit sworn by David Kihungu Kariuki, the 30th defendant. He deposed that the present matter was filed on 25th May 2015 and since then the plaintiff has failed to prosecute it despite the court issuing to him a notice to show cause why the suit should not be dismissed dated 31st December 2019.

3. The plaintiff responded to the application through a replying affidavit sworn by Siboe Z Makokha, advocate. He deposed that he has conduct of the matter on behalf of the plaintiff and that although the plaintiff has been desirous to have the matter heard and determined, in early 2017 a directive was given that the registry would be fixing dates and serving them upon litigants and their advocates and that they were giving priority to old matters. That until March 2018, the court was giving priority to election petitions and that this being an emotive land matter, it ought to be heard and determined on its merits. He deposed further that the defendants filed a counterclaim which also ought to be heard and that the plaintiff was never served with the notice to show cause. He also stated that a substantive part of the year 2020 was full of inactivity due to the covid 19 pandemic that brought all court proceedings to a standstill.

4. The application was heard through oral submissions. Counsel for the applicants relied on the material on record and added that the plaintiff has been indolent despite obtaining interim orders. He urged the court to allow the application.

5. On his part, counsel for the plaintiff/respondent submitted that the defendants have a counterclaim and a dismissal of the suit would be counterproductive since it would mean that the counterclaim proceeds to trial. He submitted further that Order 17 Rule 2 is not framed in mandatory terms and that delay does not result in automatic dismissal. He relied on **Article 159** of the Constitution and **Section 1A** and **1B** of the Civil Procedure Act and submitted that the dispute on the ground will not be solved through a dismissal and that no prejudice will be suffered if the suit is heard on its merit. He urged the court to dismiss the application.

6. I have considered the application, the affidavits and all the material on record. **Order 17 Rule 2** of the Civil Procedure Rules 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. As per the plaint on record, the plaintiff's suit was filed on 29th May 2015 together with an application dated 27th May 2015 seeking an interlocutory injunction. In a ruling delivered on 10th February 2016, the court allowed the application and granted an injunction pending hearing and determination of the suit. The record shows that the plaintiff did not make any step to set the matter down for hearing after the ruling and as a result a notice to show cause why the suit should not be dismissed was issued by the court on 31st December 2019. The

parties were required to attend court to show cause on 10th February 2020.

8. Although Mr Makokha claimed in the replying affidavit that the plaintiff did not receive the notice to show cause, the record shows the contrary. Mr Karanja Mbugua attended court on 10th February 2020 holding brief for Mr Cheptumo for the plaintiff for the plaintiff and pleaded that the plaintiff be given a chance to prosecute the suit. There was no attendance on the part of the defendants. The court ordered that a hearing date be fixed at the registry before the end of the year 2020 and in default the suit shall stand dismissed for want of prosecution with no order as to costs. That order has never been set aside and remains on record.

9. The record further shows that come the end of the year 2020 the plaintiff had not fixed any hearing date. Consequently, the plaintiff's suit stood dismissed for want of prosecution with no order as to costs as at the end of the day on 31st December 2020.

10. In view of the foregoing, Notice of Motion dated 7th January 2021 is overtaken by events and is therefore spent. I make no order as to costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 7TH DAY OF OCTOBER 2021.

D. O. OHUNGO

JUDGE

Delivered through Microsoft Teams video link in the presence of:

No appearance for the defendants/applicants

Mr Odhiambo for the plaintiff/respondent

Court Assistant: E. Juma