



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELCC NO. 294 OF 2018

(FORMERLY HCC NO. 261 OF 2005)

NATIONAL CEREALS & PRODUCE BOARD LIMITED.....PLAINTIFF

VERSUS

JAMES MURANGA.....1ST DEFENDANT

PETER WACHIRA.....2ND DEFENDANT

STEPHEN MWENJE.....3RD DEFENDANT

R U L I N G

1. Before me for determination is the defendants/applicants Notice of Motion application dated 19th April 2021 made under Order 17 Rule 2 (5) of the Civil Procedure (Amendment) Rules 2020 and Section 1A & 1B of the Civil Procedure Act. The applicants sought the following orders:

1. That the suit herein against the defendants be dismissed for want of prosecution.

2. That the costs of this application be borne by the plaintiff/respondent.

2. The application was supported on the grounds set out in the body of the application and the supporting affidavit sworn by counsel for the applicants. He averred that the present matter was instituted against the defendants vide the plaint dated 24th October 2005 seeking for eviction orders against the defendants among other prayers. He averred that the defendants filed their defence on 25th October 2006 which was subsequently amended on 29th June 2012.

3. He further averred that the last time the matter was in court was on 27th May 2019 and therefore a period of over two years had lapsed since the matter was last in court which period was prolonged and unreasonable. Counsel for the defendants further averred that the plaintiff had not taken any steps to prosecute the suit and that amounted to abuse of the court process and urged the court to dismiss the suit for want of prosecution.

4. The plaintiff/respondent filed a replying affidavit sworn on 28th May 2021 by its general manager Alexander Mulei Mutangili who deposed that the matter was transferred for mediation on 20th February 2019 by the court and that they filed their case summary on 11th March 2019 but the defendants refused and/or failed to participate in the mediation. He further deposed that on 3rd September 2019, they attended the session before the mediator who indicated he would file his report and have the file transferred back to the court since no settlement had been reached.

5. The matter was scheduled for mention on 24th March 2020 for further directions but did not proceed due to the Covid-19 outbreak. He deposed further that the plaintiff was still interested in pursuing the matter to its full conclusion.

6. The defendants filed a supplementary affidavit sworn by their counsel who deposed that the defendants filed their case summary on 20th March 2019 at the High Court Registry and on 21st March 2019 at the mediation registry. He further deposed that on 3rd April 2019 there was a mention before the deputy registrar who confirmed that both parties had filed their case summaries and set the matter for another mention on 13th May 2019 to confirm the progress of the mediation but the plaintiff failed to appear. On 25th May 2019 there was another mention before the Deputy Registrar who informed the parties that the mediator was yet to give a date for the mediation session. The defendant's advocate deposed that the last time the matter was in court was on 27th May 2019 and that the plaintiff had not taken any steps to prosecute the suit since then.

7. The application was canvassed by way of written submissions. The defendants/applicants in their submissions reiterated the contents of their supporting and supplementary affidavits and submitted that **Order 17 Rule 2** of the Civil Procedure Rules 2010 provided that a suit stands dismissed after two years if no step is taken. The defendants relied on the case of **Mwangi S. Kimenyi vs Attorney General and another Civil suit Misc No.720 of 2009 (2014) eKLR** where the court stated at paragraph 21 of the ruling as follows:

(1) When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties

(2) Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues;

(1) whether the delay has been intentional or contumelious;

(2) whether the delay or the conduct of the plaintiff amounts to an abuse of the court;

(3) whether the delay is inordinate and inexcusable;

(4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the defendant; and

(5) what prejudice will the dismissal cause to the plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties'

8. The defendants/applicants also relied on the case of **Argan Wekesa Okumu vs Dima College Limited & 2 Others [2015] eKLR** where the court held that the principles governing applications for dismissal for want of prosecution include; that the applicant must show that the delay complained of is inordinate, that the inordinate delay was inexcusable and that the defendant is likely to be prejudiced by the delay. The defendants in concluding their submissions asserted that the delay by the plaintiff was inordinate and inexcusable and urged the court to dismiss the suit with costs for want of prosecution.

9. The plaintiff/respondent in its submissions relied on the case of **George Gatere Kibata vs George Kuria Mwaura & another [2017] eKLR** where the court held that when a defendant is seeking dismissal of a suit for want of prosecution, he must satisfy the condition that there has been a one year delay, the delay was inordinate and inexcusable and that he was prejudiced by the delay. The plaintiff submitted that the matter was last in court on 3rd September 2019 before the mediator who indicated he would file a report and directed a further mention date on 24th March 2020 when unfortunately, the matter could not proceed because the courts were temporarily closed owing to the outbreak of Covid 19.

10. The plaintiff further submitted that time begun to run on 15th June 2020 when the Chief Justice issued a directive that court activities should resume and therefore since the present application was filed on 20th April 2021, a period of two months was remaining before the one year mandatory requirement under **Order 17 Rule 2** of the Civil Procedure Rules was met. The plaintiff/respondent relied on other cases and submitted that the application did not meet the threshold required by the court to dismiss the suit for want of prosecution.

11. After reviewing the application, affidavits and submissions filed, the singular issue for determination is whether this suit should be dismissed for want of prosecution. **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.”

12. Having regard to the above provisions it is clear the applicant must, firstly, satisfy the one-year delay requirement and secondly, there has to be an inordinate and inexcusable delay on the part of the plaintiff and in case he is allowed to proceed, the defendants would suffer grave injustice. On whether there has been a delay of over one year, the defendants/applicants submit that the matter was last in court on 27th May 2019 while the plaintiff/respondent contends that the last time the matter was in court was on 3rd September 2019 and was to be mentioned on 24th March 2020 when it could not proceed because of the Covid 19 pandemic.

13. It does appear the parties reference as to when the matter was in court must be the dates the parties appeared before the mediator. The record of proceedings before the mediator is not part of the court record before the court. The court record has no minute indicating when the file was referred to mediation. As per the court record, the last time this matter was in court, before the present application was filed, was on 4th September 2019 when the court in the absence of the parties noted as follows:

“This file had been referred to court annexed mediation. The mediator has issued a certificate of non-compliance as against the defendants. This file is therefore returned to the trial court for directions.”

14. There is no indication that the parties were notified that the mediator had issued a certificate of non-compliance. The minute made on the file record on 4th September 2019 was made in the absence of the parties by the Deputy Registrar. The next minute on the Court record was made by the Deputy Registrar on 30th April 2021 when the defendant’s instant application was fixed for hearing on 24th May 2021. In the replying affidavit filed by the plaintiff, the plaintiff deposes that on 3rd September, 2019 when they appeared before the mediator a further mention date was given for 24th March, 2020 when they were to ascertain whether the mediator had filed his report and the file transferred back to the trial court. The plaintiff stated that no directions were taken on 24th March 2020 as Covid -19 pandemic had struck and court sessions had been disrupted. The record before the mediator does not form part of the court record and the court therefore cannot verify how the proceedings before the mediator went.

15. Under Order 17 Rule 2 an application for dismissal of the suit for want of prosecution may only be made where a period of one year has elapsed and neither party has made any application or taken any step in the matter. In the instant matter the plaintiff asserts that the matter had a mention date before the mediator/Deputy Registrar on 24th March 2020 which however could not take place owing to the outbreak of Covid-19 pandemic. It is common ground that following the outbreak of Covid-19 in March 2020, court functions were for some duration of time virtually shut down and/or were down skilled with the courts only handling urgent matters and even then electronically. The Honorable Chief Justice issued Practice Directions during the height of the Covid infections and Court stations Countrywide issued locally adoptable directions during the height of the Covid -19 pandemic. The directions to a large extent directed how urgent matters could be handled and discouraged any in person and/or physical proceedings and where such occurred there was to be strict adherence to Ministry of Health Protocols issued relating to Covid-19.

16. During the period March 2020 upto and including June 2021 the court takes judicial notice that court operations were not normal owing to interruptions occasioned by the Covid-19 pandemic. It was not unusual for courts to be virtually shut down when cases for Covid-19 infectious struck staff at the stations.

17. That unless the delay in taking any action or step in the prosecution in the matter was such as was unreasonable and the delay was inexcusable, the plaintiff ought not to be shut out from the seat of justice. Considering the Covid situation that I have highlighted herein above, I do not think the failure of the plaintiff to have taken any proactive step within a period of one year could be described as unreasonable. The manifestation of Covid-19 is something that was new and people took time to adjust operating in the midst of the pandemic. The delay by the plaintiff was not unreasonable or inordinate and was excusable. The defendants in my view will not be prejudiced if the matter is allowed to proceed to trial where each party will have the opportunity to present their respective cases. The cardinal function of the courts is to do justice to all the parties who come before it. If the plaintiff’s suit was to be dismissed on account of want of prosecution, I do not consider that justice will have been served as the dispute will not have been determined on merits.

18. In the instant matter and relying on the sentiments expressed by my brother F Gikonyo, J in the case of *Mwangi S Kimenyi -vs- Attorney General & Another (2014) eKLR*, at paragraph 21 of his ruling (reproduced earlier) regarding the test to be applied in exercise of discretion in applications to dismiss a suit for want of discretion, which I fully associate myself with, I will exercise my discretion in disallowing the defendant’s application.

19. A dismissal of a suit for want of prosecution is a drastic step as the court terminates the suit without hearing the same on its merits. Unless there is clear demonstration of the injustice the defendant would suffer if the suit is allowed to proceed, the court should in my view be slow in allowing such applications particularly where the plaintiff has shown a desire to prosecute the suit as in the present matter. Land matters are sensitive and as much as possible ought to be fully ventilated and adjudicated on merits.

20. Although I have indicated I will disallow the application, I am of the view that this is a matter where the plaintiff could have with exercise of diligence been able to obtain a hearing date if he had been keen to have the case heard. Notwithstanding Covid-19 the courts have been functioning and those people who were eager to have their matters heard were able to have them heard. The plaintiff was in a slumber and was awakened by the defendants’ instant application. The defendants deserve the costs of the application and I award them costs of Kshs.10,000/= to be paid within a period of 30 days from today failing which the suit will stand dismissed for want of prosecution.

22. Orders accordingly.

RULING DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 16TH DAY OF DECEMBER 2021.

J M MUTUNGI

JUDGE