



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC CASE NO. 289 OF 2019

SENEWEI LIMITED.....1ST PLAINTIFF

RAYMOND BOMETT.....2ND PLAINTIFF

AARON ROTICH TUIKONG.....3RD PLAINTIFF

=VERSUS=

PETER KIPLANGAT KORIR.....1ST DEFENDANT

NATIONAL ENVIRONMENT MANAGEMENT

AUTHORITY.....2ND DEFENDANT

SHARADDNA BUILDERS LIMITED.....3RD DEFENDANT

WATER SERVICES REGULATORY BOARD.....4TH DEFENDANT

WATER RESOURCES MANAGEMENT

AUTHORITY.....5TH DEFENDANT

RULING

1. The Application for determination before this Court is the 5th Defendant/Applicant's Notice of Motion Application dated the 6th August, 2021. The Application seeks for Orders that the suit be dismissed for want of prosecution and costs of the application as well as the entire suit be awarded to the 5th Defendant/Applicant.

2. The Application is based on the grounds that;

a. No step has been made and or taken by the Plaintiffs/Respondents to prosecute this matter for over a year, despite the case having been in court for more than a year.

b. The matter was last in court on 4th November, 2019 when the matter came up for hearing of Application dated the 15th September, 2019.

c. Thereafter, the matter came up severally in court for mention for pre-trial directions but the Plaintiffs never appeared despite being served.

d. That since then, the Respondents have neglected and/or otherwise failed to set down the suit for hearing and/or failed to take any step to prosecute the suit for a period of more than a year.

e. That the continued existence and uncertainty of this suit is prejudicial to the Applicant.

3. The Application is supported by the Supporting Affidavit of the of Kemboi Kibet, the Applicant's Counsel sworn on the 6th August 2021

and premised on the grounds, inter alia;

a. That the Plaintiff was last in court on 4th November, 2019 when the matter came up for the hearing of the Application dated the 15th September, 2009.

b. That the hearing was adjourned to 13th February, 2020 and the Application was dismissed for non-attendance by the Plaintiffs.

c. That the matter came up for mention on 26th November, 2020, 9th March, 2020, 18th May, 2021 and 5th August, 2021 but neither the Plaintiffs nor their Counsel were present.

d. That since the aforesaid date, the Respondents have neglected and/or refused or otherwise not taken any material step to prosecute their claim or set it down for hearing.

4. The Application is opposed by the Replying Affidavit of Isaac Onyango Aloo, Counsel for the Plaintiffs. He avers in his response that the suit was instituted on the 11th September, 2019 under Certificate of Urgency. On the 4th November, 2019, the Court declined to grant interim orders hence they abandoned the Application.

5. The Plaintiffs thereafter requested the Court to issue Summons to Enter Appearance but to date the same has not been issued. The matter went for pre-trial on the 2nd April, 2020 but still the Court did not issue the Summons.

6. That in the year 2020, the effects of Covid-19 affected Counsel's operations at the office coupled with the restraint in physical access to Courts hence they could not follow up on the matter.

7. That on 9th March, 2021 when they were supposed to attend Court for a Mention, the Deputy Registrar was not sitting hence they did not attend.

8. Subsequently, the matter came up virtually on the 18th May, 2021 and 5th August, 2021 for mentions.

9. That the Applicant never filed a Memorandum of appearance as required. That the 5th Defendant even filed a Defence without being served with Summons to Enter Appearance.

DIRECTIONS ON THE HEARING OF THE APPLICATION

10. The Court gave directions that the Application be canvassed by way of written Submissions. The 5th Defendant/ Applicant filed its written submissions dated the 19th October, 2021. The Plaintiffs did not file any submissions.

11. The 1st, and 2nd Defendants support the Application by the 5th Defendant but did not file any submissions.

12. In its written submissions, the Applicant restates the averments contained in the Supporting Affidavit and prays that the Application be allowed as prayed. It relies on the cases of **Nilesh Prechand Mulji Shah & Another t/a Ketan Emporium vs M.D. Popat and Others (2016) eKLR** as well as **Argan Wekesa Okumu vs Dima College Limited & 2 Others (2015) eKLR**.

ISSUES FOR DETERMINATION

13. The Court is of the opinion that the only issue for determination in regard to the Notice of Motion Application herein is whether or not the suit herein should be dismissed for want of prosecution within the framework of Order 17 Rule 2 of the Civil Procedure Rules.

ANALYSIS AND DETERMINATION

14. The legal framework on dismissal of suit for want of prosecution is found in Order 17 Rule 2 which provides as follows: -

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."

15. My understanding of the framework contained in Order 17 Rule 2 is that a court may *on its own motion* dismiss a suit for want of prosecution. Within the same framework, the court may dismiss a suit on the same grounds on the application of a party to the suit.

16. Besides the legal framework set out in Order 17 Rule 2, the guiding criteria to be applied in considering whether or not a suit should be dismissed for want of prosecution has been articulated and settled in a number of leading authorities, among them, the case of **Ivita -vs- Kyumbu(1984) KLR 441** where the Court expressed itself as follows:

“The test is whether the delay is prolonged and inexcusable and, if it is, can justice be done despite such delay.”

17. In **Argan Wekesa Okumu vs Dima College Limited & 2 others [2015] eKLR**, as quoted by J. Mabeya in the case of **Ceven Limited v Erastus Gichuhi & 4 others [2021] eKLR**, the court observed: -

“The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the defendant is likely to be prejudiced by such delay. As such the 3rd defendant in this case must meet the burden of proof in seeking the dismissal of the Plaintiff’s case for want of prosecution see the case of Ivita –vs- Kyumbu (1984) KLR 441. Further to this, the decision of whether or not to dismiss a suit is discretionary and this Court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same.”

18. In **Mwangi S. Kimenyi - vs- Attorney General and Another, Civil Suit Misc. No. 720 of 2009**, the court restated the test 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 and 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.

19. The present suit; it appears from the record has come up for mention on a number of occasions prior to the 5th Defendant’s Application. The matter was slated for mention on 26th November, 2020 when only the Counsel for the 5th Defendant appeared; on the 16th March, 2021, no party appeared; on the 18th May, 2021 and the 5th August, 2021 respectively when only the 5th Defendant was represented.

20. The Plaintiffs rejoinder is that all the delay has been occasioned by the failure of the Court to issue Summons to Enter Appearance to enable them serve the Defendants.

21. The Plaintiff Advocates with a lot of respect should familiarize with the provisions of Order 5 of the Civil Procedure Rules. It is the responsibility of the Plaintiffs or their Advocates under Order 5 rule 1(5) to prepare the summons and file them together with the plaint to be signed and sealed by the Deputy Registrar. This is something that the Plaintiffs have not done. No wonder the summons have not been issued.

22. I agree that the Plaintiffs have not diligently pursued the prosecution of their case. However, for purposes of serving substantive justice, this Court disallows the 5th Defendant’s Application but with no orders as to costs.

23. The Court will proceed to give directions for the purposes of facilitating the expeditious hearing and disposal of this suit as follows:

a) The Plaintiffs shall present to the Deputy Registrar the summons in accordance with the provisions of Order 5 rule 1(5) in the next 7 days.

b) The summons once signed and sealed by the Deputy Registrar shall be served upon the Defendants within 14 days thereof.

c) The matter shall be mentioned before the Deputy Registrar for pre-trial conference in the next 45 days.

It is ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF DECEMBER 2021.

M.D. MWANGI

JUDGE

In the Virtual Presence of:-

Mr Onyango for the Plaintiffs/Respondents

None appearance for the Defendants

Chepngetich for the 5th Defendant/Applicant

Court Assistant: Hilda

M.D. MWANGI

JUDGE