



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 298 OF 2017

KNIGHT MORAA OMWOYO.....PLAINTIFF

VERSUS

WILLIS ABWAO ADERODEFENDANT

RULING

1. In the Notice of Motion dated on 20th March, 2019, the Defendant is seeking for the following orders:

a. That the Plaintiff's suit against the Defendant be dismissed for want of prosecution.

b. That the costs of this Application and the suit herein be awarded to the Defendant.

2. The Application is premised on the depositions of the Defendant who has stated that the Plaintiff filed this suit on 12th July, 2017; that he filed a Defence through his advocate on 13th September, 2017; that a Ruling in respect to the Preliminary Objection and the Application dated 11th July, 2019 was delivered on 2nd March, 2018 and that the Plaintiff has taken no steps to fix the suit for hearing.

3. The Defendant finally deponed that he is highly prejudiced with the delay in the prosecution of the suit because he cannot develop the suit property and that the current Application should be dismissed.

4. In the Replying Affidavit, the Plaintiff's advocate deponed that after the Ruling of the court, the Plaintiff has been making attempts to have an out of court settlement; that the Plaintiff is the wife to the Defendant and that it is a cardinal principle of law that matters should be determined on merit. The Plaintiff's advocate filed written submissions which I have considered.

5. The record shows the Plaintiff commenced this suit by way of a Plaint dated 11th July, 2017 together with an Application for injunction of the same date. The Ruling in respect to the Application dated 11th July, 2017 was delivered by this court on 2nd March, 2018.

6. Upon the delivery of the Ruling, the Plaintiff did not fix the matter for pre-trial directions or for hearing. According to the Plaintiff, the parties, being a wife and husband, they have been negotiating the dispute, thus the delay in fixing the matter for hearing.

7. The grounds for dismissal of a suit for want of prosecution are now settled. In the case of *Ivita vs. Kyumbu (1975) eKLR*, the court held as follows:

“The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if 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 notwithstanding the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”

8. In *Agip (Kenya)Limited vs. Highlands Tyres Limited (2001) KLR, 630*, the court stated as follows:

“Where a reason for the delay is offered, the court should be lenient and allow the Plaintiff an opportunity to have his case determined on merit. The court must also consider whether the Defendant has been prejudiced by the delay.”

9. As was held in the case of *Invesco Insurance Company Limited vs. Oyange Barrack (2018) eKLR*, the court should be slow to dismiss a suit for want of prosecution if satisfied that the suit can proceed without further delay, and that the Defendant will suffer no hardships.

10. The delay in prosecuting this suit after the delivery of the Ruling has been slightly over one (1) year. Although the said delay may be long, the same is not inordinate. Indeed, considering that the dispute is between a wife and husband, parties could have attempted to settle the matter out of court as submitted by the Plaintiff's advocate, thus the delay.

11. In the circumstances, and to allow parties to be heard on merit, I shall not dismiss the suit for want of prosecution. The Application dated 20th March, 2019 is therefore dismissed but with no orders as to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31ST DAY OF JANUARY, 2020

O. A. ANGOTE

JUDGE