



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 39 OF 2019 Consolidated with ELC 937 OF 2017

IN THE MATTER OF THE PROPERTY KNOWN AS PLOT NO. NGONG/4480 (ORIGINALLY KNOWN AS NGONG TOWNSHIP BLOCK 2/88 WITHIN NGONG TOWNSHIP, KAJIADO COUNTY

AND

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT (CAP) 22 OF THE LAWS OF KENYA AND ORDER 37 RULES (1), (2), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (16), (17), (18), & (19) OF THE CIVIL PROCEDURE RULES OF LAWS OF KENYA.

BETWEEN

SANKALE ALFRED KARASHA.....APPLICANT

VERSUS

SIMON JOSEPH KARASHA.....RESPONDENT

RULING

What is before Court for determination is the Respondent's application dated the 3rd April, 2019 brought pursuant to Order 17 Rule 2 (3) and Order 51 of the Civil Procedure Rules; Section 1A, 1B including 3A of the Civil Procedure Act and Article 159 of the Constitution. The Respondent/ Applicant seeks to have the suit dismissed for want of prosecution and the Applicant including his agents and employees be evicted from the Respondent's land parcel number Ngong/ Ngong Town/ 2/88 hereinafter referred to as the 'suit land'. The Application is premised on the grounds on the face of it and the affidavit of SIMON OLE JOSEPH KARASHA where he deposes that he is the registered proprietor of the suit land. He contends that the suit was last in Court in November, 2016 and should hence be dismissed. He explains that he is unable to litigate his claim in ELC 14 of 2019 due to the pendency of this suit. He confirms having purchased the suit land in 1960 and developed it by putting up the Laiser Bar and Restaurant with the objective that it would earn an income to support his family in old age. He insists the Applicant has taken unlawful possession of the suit land. Further, that he has continued to support the Applicant and his Children but they have breached his trust. He claims to suffer ill health and unable to cater for himself. Further, that he has tried to resolve the dispute herein but in vain.

The Applicant/ Respondent ALFRED KARASHA opposed the application by filing a replying affidavit where he deposes that the application lacks merit. He confirms that the Respondent/ Applicant is indeed the proprietor of suit land but he has been running a business thereon since 1991 in the name of 'Laiser Farmers Bar & Restaurant. He claims that he has not caused the delay of the matter since the Respondent/ Applicant sought to negotiate the matter with the Council of Elders which did not materialize. Further, that they have given the Respondent/ Applicant time to file the replying affidavit in accordance with the Order of the Court issued in November, 2016. He explains that the Respondent/ Applicant has filed a multiplicity of suits. The Respondent/ Applicant filed a further affidavit reiterating his claim and insisting they never went to negotiate with the Council of Elders. Further, that he has proprietary rights over the suit land.

The application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Notice of Motion dated 3rd April, 2019 including the parties affidavits and submissions, I find that the issues for determination is whether the suit should be dismissed for want of prosecution and whether the Applicant should be evicted from suit land.

I note from the Court records that parties herein have filed a multiplicity of applications without setting the suit down for hearing. Further, the parties are yet to comply with Order 11 of the Civil Procedure Rules. The Applicant/Respondent claims that they had been negotiating with the Council of Elders but did not resolve the dispute, which fact is disputed by the Respondent/ Applicant. I however note that there are other suits which had been filed by the Respondent/ Applicant which have been stayed pending the outcome of this suit.

Order 17 rule 2(1) (2) (3) 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.**

The decision in the case of **Ivita vs. Kyumbu [1984] KLR 441** set the test to be applied by the courts in an application for the dismissal of a suit for want of prosecution. Firstly, whether the delay is prolonged and inexcusable, and, secondly if the delay is excusable, whether justice can still be done to the parties despite the delay.

Further in the case of **Jimmy Wafula Simiyu v Fidelity Commercial Bank Limited [2014] eKLR** Justice Gikonyo stated as follows: ' **the fact of delay per se does not seal the fate of the case. Other factors should be considered by the Court such as; whether the delay 1) is inordinate and inexcusable; and 2) will cause substantial prejudice to the fair trial of the case. The latter involves a delicate balancing act of the prejudice the dismissal of the case would cause on the plaintiff on the one hand, and real hardships to the Defendant on the other. The Court will be interested in the nature and importance of the case, the right of the Plaintiff to be heard and the fact that summary dismissal of a suit drives away the Plaintiff from the seat of judgment; an arbitrary and draconian act comparable only to the proverbial "sword of the Damocles". And, for the Defendant, in order to complete the balancing, the Court will seek to be told of the actual hardships, loss and prejudice the defendant has suffered and will suffer by the delay; here it will be incumbent upon the Defendant to show the prejudice is substantial and results to, impediment of fair trial, aggravated costs, or specific hardships.'**

I note that the act of dismissing a suit is a draconian measure which should be exercised cautiously but the court is bound to do justice to both parties without undue delay. However, it is also pertinent for the parties to be allowed to ventilate their claim herein.

The Respondent has not shown the prejudice or hardship they have suffered by the delay in setting the suit down for hearing.

In so far as the Plaintiff has failed to adhere to the provisions of Order 17 rule 2 of the Civil Procedure Rules, 2010 but in the interest of justice, I am inclined to grant the Plaintiff an opportunity to prosecute his suit and will give him a last chance to set the suit down for hearing and final determination. I further order that the Plaintiff do expeditiously proceed to set the suit down for hearing within the next 30 days from the date hereof, failure of which the suit will stand dismissed with costs.

On the issue of eviction. since this is a substantive issue in the suit, I am unable to make an order to that effect and direct that this abides the outcome of the suit.

Costs of this application will be in the cause.

Dated signed and delivered in open court at Kajiado this 27th day of February, 2020

CHRISTINE OCHIENG

JUDGE

IN THE PRESENCE OF:

Njaoko holding brief for Mung'ao for the defendant in 77 of 2018 holding brief for Mung'ao for the plaintiff in 937 of 2017 and holding brief for Mung'ao for Plaintiff.

Maina for Chege for respondent.