



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 44 OF 2017

RAPHAEL MUSYOKI NDETI (*Suing as the personal representative
of the Estate of PETER NZOKI NDETI (Deceased)*).....**PLAINTIFF**

VERSUS

CECILIA SITUMAI NDETI (*Sued as the personal representative
of the Estate of KIVUTO NDETI (Deceased)*).....**1ST DEFENDANT**

MICHAEL KYENDE NDETI (*Sued as the personal representative of the
Estate of KIVUTO NDETI (Deceased)*).....**2ND DEFENDANT**

RULING

1. In the Notice of Motion dated 17th January, 2019, the 1st Defendant has prayed for the following orders:

a. This case against the Defendants/Applicants be dismissed for want of prosecution.

b. The costs of this Application and of the case against the Defendants/Applicants be paid by the Plaintiff/ Respondent to the Defendants/Applicants.

2. The Application is premised on the grounds that the Plaintiff has refused to take any steps to prosecute the case against the Defendants since 10th May, 2017 when the Application for injunction was dismissed for non-attendance; that the Defendants continue to suffer unnecessary anxiety due to the delay in prosecution of the case and that it is more than one (1) year since the last action was taken in the matter.

3. In response to the Application, the Plaintiff deponed that the property subject matter of the suit forms part of the Estate of the late Peter Nzuki Ndeti pursuant to an Agreement dated 24th May, 2007 between the late Kivuto Ndeti and the late Peter Nzuki Ndeti and that the Ndeti family has been engaged in protracted probate proceedings in Succession Cause No. 261 of 2015 which has led to the delay in giving instructions on the matter herein.

4. The Plaintiff deponed that he has diligently prosecuted the suit from when it was filed to date; that the delay in fixing a date for hearing was not deliberate and that his counsel inadvertently failed to attend court on 10th May, 2017 when the matter came up for mention for directions on filing submissions whereupon the court dismissed the Application dated 6th November, 2015 for want of prosecution.

5. The Plaintiff deponed that Article 50 of the Constitution provides for the right to fair hearing; that the court should hear this suit on merit and that the power to dismiss the suit is discretionary, which discretion should be exercised judiciously.

6. The Plaintiff's advocate filed a Replying Affidavit in which he stated that he has diligently prosecuted the suit on behalf of the Estate of the late Peter Nzuki; that on 10th May, 2017, the matter was coming up for directions on filing of submissions on the Plaintiff's Notice of Motion dated 6th November, 2015 and that the said Application was dismissed for want of prosecution.

7. Counsel deponed that the non-attendance on his part was not deliberate; that the delay in prosecuting the matter has been occasioned by the dispute within the Estate of the late Peter Nzuki Ndeti and that it is only on 10th May, 2017 that he missed attending court. Counsel deponed that it is in the interest of justice and fairness that the suit is heard and determined on merit.

8. The Defendants'/Applicants' counsel submitted that dismissal of a suit for want of prosecution may appear draconian. However, it was submitted, for this case to continue hanging on the heads of the Defendants is also unfair and unjust.

9. Counsel submitted that the Defendants have demonstrated a delay of over two (2) years; that the delay is inordinate; that the Plaintiff has not given a satisfactory explanation for the delay and that the case ought to be dismissed. Counsel relied on the cases of *Ivita vs. Kyumbu (1984) KLR 441*; *Naftali Opondo Onyango vs. National Bank of Kenya (2005) eKLR* and *Argan Wekesa Okumu vs. Dima College Limited & 2 Others (2015) eKLR* which I have considered.

10. The Plaintiff's advocate submitted that he did not have proper instructions on which to act on due to the internal wrangles within the Estate of the late Peter Nzuki Ndeti; that the said Probate dispute is still ongoing before Kemei J. in Machakos Succession Cause No. 261 of 2015 and that the Plaintiff's advocate has endeavoured to fix the matter for hearing.

11. Counsel submitted that on 18th February, 2019, the court issued a Notice on its own motion why the suit should not be dismissed for want of prosecution; that on 8th March, 2019, the Plaintiff filed a response and that the court was convinced and the Notice to show cause why the suit should not be dismissed was withdrawn.

12. Counsel submitted that the Applicants have not shown the prejudice they are likely to suffer due to the delay; that the Applicants are in possession of the suit property and that it is the Plaintiff's Estate that will be gravely prejudiced if the suit is dismissed. Counsel relied on several authorities which I have considered.

13. The suit was commenced by way of a Plaint dated 6th November, 2015 and filed on 20th November, 2015. On the same day the Plaint was filed, the Plaintiff also filed an Application dated 6th November, 2015 for injunctive orders.

14. The record shows that on 1st July, 2016, the Plaintiff's advocate filed a Certificate of Urgency in which he expressed his frustration in tracing the file for the purpose of fixing the Application for injunction for hearing.

15. On 15th November, 2016, this matter was placed before Gacheru J. who directed parties to file their written submissions in respect to the Plaintiff's Application dated 6th November, 2015. On 8th February, 2017, Obaga J., on his own motion, transferred the matter to this court. The matter was then mentioned before this court on 22nd March, 2017 and 10th May, 2017.

16. After this court dismissed the Plaintiff's Application dated 6th November, 2015 for want of prosecution on 10th May, 2017, the matter stayed in abeyance until 17th January, 2019, when the current Application was filed.

17. The principles governing Applications for dismissal of a suit for want of prosecution were laid down in the case of *Ivita vs. Kyumbu (1984) KLR 445* as follows:

a. The Applicant must show that the delay complained of is inordinate and inexcusable.

b. The Defendant is likely to be prejudiced by the delay.

18. The Plaintiff and his advocate deponed that the delay in prosecuting this matter was occasioned by the internal wrangles amongst the beneficiaries of the Estate of the late Peter Nzuki Ndeti in the ongoing Machakos High Court Succession Cause No. 261 of 2015, in the matter of the Estate of Peter Nzuki Ndeti. It was deponed that due to the said wrangles, and the ongoing succession cause, the Estate of Peter Nzuki did not give to its advocate adequate instructions, thus the delay in prosecuting the case.

19. I accept the explanation given by the Plaintiff's advocate that he could only prosecute the suit after obtaining instructions from the Estate of the late Peter Nzuki Ndeti who died on 4th March, 2015. Indeed, the reason given by the Plaintiff's counsel is excusable. That being the case, I will exercise my discretion in favour of the Plaintiff and him to prosecute the suit.

20. For those reasons, I dismiss the Application dated 1st July, 2016 but with no order as to costs. The Plaintiff to fix the suit for hearing within 120 days of the date of this Ruling, and if not, the suit will stand dismissed.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 15TH DAY OF MAY, 2020.

O.A. ANGOTE

JUDGE