



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 477 OF 2013

ALOYS CHEPKWONY.....PLAINTIFF/RESPONDENT

VERSUS

DEVELOPMENT BANK OF KENYA LTD....1ST DEFENDANT/APPLICANT

LYDIA WANJIKU GICHOBO2ND DEFENDANT/RESPONDENT

RULING

1. This Ruling relates to a Notice of Motion Application dated 6th July 2017, brought under the provisions of Order 17 Rule 2(3) and Section 1A, 1B and 3A of Civil Procedure Act. The Application is based on the grounds thereon, and an affidavit sworn by Celestine Aoko Otieno, the Company Secretary of the 1st Defendant's Bank and the in-charge of Legal Services.
2. The Applicant is seeking for orders that the suit be dismissed for want of prosecution and the costs of the suit and this Application be borne by the Plaintiff.
3. The Applicant avers in a nutshell that, the cause of action herein arose on 10th March 2004, after the auction of the suit property and the suit was initially filed in Environment and Land as Case No. 646 of 2012, it was subsequently transferred to the Commercial & Tax Division, where it was assigned Case No. HCCC No. 477 of 2013. That it has been close to four (4) years ever since, and yet the Plaintiff has not taken any active step to prosecute the suit. As a result, the 1st Defendant (herein the Applicant) is prejudiced owing to the time that has lapsed and seeks that, in the interest of justice, the prayers sought be granted.
4. The 2nd Defendant (herein 2nd Respondent) supported the Application vide an Affidavit dated 12th September 2017, sworn by Lydia Wanjiku Gichobo. She joined issues with the 1st Applicant, as to the sale of the suit property by auction on 24th March 2004, and the subsequent filing of the suit in the Environment and Land Court and the transfer thereof as aforesaid. That a suit filed as HCCC No. 387 of 2008, was subsequently dismissed on 10th December 2009 for non-attendance whereupon the Plaintiff then filed another suit in the Environment and Land Court suit No. 646/2012 seeking for orders similar as those sought for in the original suit. The subsequent suit was then transferred as aforesaid.
5. She averred that the case was last heard in Court on 4th December 2013, when the Plaintiff's Advocates

were granted sixty (60) days to substitute the Plaintiff who is deceased, with the Personal representative of his estate. That has not been done and neither has any step been taken since then to prosecute the suit. That the suit is “like a burden/load” on her back and is prejudicial to her, hence the support to the Application for dismissal of the same.

6. The Application was disposed off vide filing of submissions. I have considered the Application and I note from the Court record that, after this Application was filed, the Parties appeared before the Court on 18th September 2017; but the Plaintiff/Respondent was not present. Upon hearing the Learned Counsel appearing for the Applicant informed the Court that, they had served the Plaintiff/Respondent and filed an Affidavit of Service to that effect. The Court then directed the parties to file submissions on the Application and the matter was stood over to 5th October 2017 to confirm compliance and for further orders. Subsequently, the matter was fixed for mention on several occasions with the last mention falling on 27th February 2018.

7. On that date, the Plaintiff/Respondent was present in Court represented by the Learned Counsel Ms. Sagini holding brief for Mr. Okeyo. The Court was informed that, the Applicant and 2nd Defendant/Respondent had filed their submissions but the Plaintiff/Respondent had not responded to the Application, nor filed their submissions. They sought for one hour for the same. It was granted. The Parties then agreed to dispense with highlighting of submissions and the matter was set for Ruling on 12th April 2018. However at the time of writing this ruling, there is no response to the Application or submissions on record filed by the Plaintiff/Respondent. In the circumstances, the Application is unopposed.

8. However, I have considered the Application; the Affidavits in support and the submissions by the Defendants and I find that from the Court record, indeed the last active step in prosecution of this matter before the current Application was on 4th December 2013. On that date, the Plaintiff/Respondent was allowed sixty (60) days to substitute the deceased Plaintiff with the Personal representative. Thereafter, there has been no further action in the matter for three (3) years and seven (7) months.

9. The Procedural Provisions of Order 17 Rule 2 of the Civil Procedure Rules, 2010, provides that;

(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 was 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 for in sub-rule (1)

10. It is clear that there has been a delay herein of over 3 years. This is definitely inordinate and calls for a reasonable and satisfactory explanation, and obviously in the absence of such an explanation as the delay is unjustified. Indeed the delay of this prolonged period will definitely prejudice the Defendants. In fact, if the detailed facts, being that the cause of action herein arose in the year 2004 are true, then this matter has been on-going for the last thirteen (13) years and that will definitely cause prejudice to any party.

11. In that regard, I fully associate myself with the observation in the case of; Nilani vs Patel & Others (1969) EA, 341, where the Court expressed itself as follows:-

“Delay in these cases is much to be deplored. It is the duty of the Plaintiff’s advisor to get on with the case. Every year that passes prejudices the fair trial. Witnesses may have died...documents may have been mislaid, lost or destroyed and the memory tends to fade”.

12. In conclusion, I find that, the Application has merit, and the Application has met the threshold of

dismissal of the suit for want of prosecution as laid down in the case of; *Ivita vs Kyumbu (1984) KRL 441*. That there has been prolonged and unexplained delay which is inexcusable and therefore justice cannot be served in the given circumstances.

13. The upshot is that, the Application is allowed as prayed.

14. It is so ordered.

Dated, delivered and signed in an open Court this 3rd day of May 2018.

G.L. NZIOKA

JUDGE

In the presence of:-

Ms. Muchui for Mr. Okeyo for the Plaintiff/Respondent

Mr. Ojiambo for the 1st Defendant/Applicant

Mr. Ngugi for Mr. Ombati for the 2nd Defendant/Respondent

Mr. Lang'atCourt Assistance