



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 232 OF 2014 (OS)

IN THE MATTER OF: LAND PARCEL NOS. 337/III/MN (CR. 8964) 464/III/MN, 1881/III/MN AND 1883/III/MN

IN THE MATTER OF: AN APPLICATION FOR DECLARATION THAT THE PLAINTIFFS HAVE OBTAINED OWNERSHIP OF 20 HECTARES OF THE ABOVE PARCEL OF LAND BY WAY OF ADVERSE POSSESSION

BETWEEN

- 1. MTSONGA KABILA CHIRO**
- 2. KHAMIS MOHAMED**
- 3. EMMANUEL FADHILI JEFWA**
- 4. ESTHER TSORAMBA TSULU(all suing on behalf of themselves**

and the other member of **Barani**

Pole Pole Self Help Group.....PLAINTIFFS

VERSUS

- 1. KAMIMI COMPANY (1976) LIMITED**
- 2. MTWAPA HOLDINGS LIMITED**
- 3. KABIBI HOLDINGS LIMITED**
- 4. AYEM INVESTMENT LIMITED**
- 5. BAJABER LIMITED.....DEFENDANTS**

RULING

1. By this Notice of Motion dated 18th March 2019 Bajaber Ltd (the 5th Defendant/Applicant) prays that this suit be dismissed for want of prosecution.

2. The application which is supported by an affidavit sworn by a director of the 5th Defendant Swaleh Bajaber is premised on the grounds:-

a) That the Plaintiffs have refused, neglected and/or otherwise failed to take other steps to prosecute this matter for a period of over 17 months since the last Court attendance;

b) That the delay is inordinate and inexcusable;

c) That the 5th Defendant continues to suffer irreparable damages as the Plaintiffs are enjoying the consensual orders that is to

have the status quo maintained. That the said orders are being misused/violated by the Plaintiffs as they are wantorily wasting and developing the suit property;

d) That the delay in the prosecution of this suit is clear that (sic) the Plaintiffs have no interest in the suit and the pendency of the suit is thus prejudicial to the 5th Defendant who is the registered proprietor of the suit property.

3. The application is however opposed. In a Replying Affidavit sworn by the 2nd Plaintiff Khamis Mohamed on behalf of his colleagues and filed herein on 8th May 2019, the Plaintiffs assert that the orders sought are not helpful in resolving the dispute herein and hence the same should be dismissed.

4. The Plaintiffs aver that the 5th Defendant joined the instance case on their own volition but have never filed any formal response to the Originating Summons and hence cannot be said to oppose the same. The Plaintiffs further aver that the properties which are the subject of this suit have been developed by themselves and it would be unfair to summarily terminate the case.

5. While agreeing that the matter has not been heard for a period exceeding one year, the Plaintiffs assert that no prejudice has been visited upon the 5th Defendant and urge the Court to allow them time to fix the matter for hearing. They further deny that they are wasting and/or carrying out any further developments on the suit property and urge the Court to let the matter be determined on merit.

6. I have perused and considered the application and the response thereto. I have equally considered the submissions placed before me by the Learned Advocate for the parties and examined the record herein and the law.

7. Order 17 Rule 2(1) which governs dismissal of suits for want of prosecution provides as follows:-

“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.”

8. Further Order 17 Rule 2(3) under which this application is brought provides thus:-

“Any party to the suit may apply for its dismissal as provided in sub-rule 1.”

9. As was stated in *Argan Wekesa Okumu –vs- Dima College Ltd & 2 Others (2015) eKLR:-*

“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.”

10. From a perusal of the record, this suit was instituted way back on 11th December 2014. As the 5th Defendant concedes however at paragraph 6 of the Supporting Affidavit, both the Plaintiffs and the 5th Defendants have made a series of applications herein whose hearing and disposal have consumed some considerable time.

11. Indeed immediately before the present application before me, the 5th Defendant made another application dated 6th February 2017 seeking an order of injunction to restrain the Plaintiffs from dealing with the suit property. As at that time there were already in place orders of status quo issued in regard to the suit property and the 5th Defendant’s application therefore had no basis and was dismissed on 19th September 2017.

12. While it is true that between that Ruling and the filing of the present application the Plaintiffs had not taken action to prosecute the matter, I did not think that prolonged delay alone is ground for dismissal. As was stated in *Ivita –vs- Kyumbu (1984) KLR 441:-*

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

... (the Defendant) 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.”

13. Considering the record in the matter before me, I am of the view that justice can still be done to the parties despite the delay which as I have stated is not solely attributed to the Plaintiffs.

14. Accordingly I decline to allow the 5th Defendant’s application. As at the time this application was filed parties had complied with pre-trial directions. Directions were however yet to be made on how to proceed with the Originating Summons.

15. The Plaintiffs are in the circumstances granted 60 days within which to fix the matter for directions and to schedule the suit for hearing.

16. The costs of the application shall be in the cause.

Dated, signed and delivered at Malindi this 27th day of May 2020.

J.O. OLOLA

JUDGE