



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 35 OF 2014

**MUCHIRA WARUI (Suing as the legal representative of the Estate of
MITARU BABU).....PLAINTIFF/APPLICANT**

VERSUS

THE LAND REGISTRAR KIRINYAGA COUNTY.....1ST DEFENDANT/RESPONDENT

EDITH MUTHONI MUCHIRA.....2ND DEFENDANT/RESPONDENT

RULING

The application pending before me is by the 2nd Defendant dated 15th May 2018 seeking dismissal of the suit for want of prosecution. The grounds in support of that application are that the matter was last in Court on 20th December 2016 and since then, the respondent has never taken steps to prosecute the matter. The Applicant further states that the delay and/or inaction is inordinate and inexcusable as one year has lapsed since the matter was in Court. The respondent in his reply stated that there was a wrong notion that a hearing date had been taken in this matter. The respondent also stated that it is in the interest of justice that he be granted an opportunity to be heard on merit and that all parties have since complied including the Attorney General who had not complied by 20th December 2016.

ANALYSIS AND DECISION

I have considered the application, the supporting affidavit and replying affidavit. The plaintiff/respondent in paragraph 3 of the replying affidavit stated that there was a wrong notion that a hearing date had been taken in this matter which turned out not to be the position after they were served with the present application. The respondent has not explained where the notion came from. Upon perusal of the Court record, it is clear that this suit was instituted on 20th February 2014 simultaneously with an application under certificate of urgency. The Court in its ruling issued the same day ordered that there be a prohibitory order placed on L.R. No. BARAGWE/RAIMU/871 pending inter-parties hearing. The inter-parties hearing was then fixed for 12th May 2014. Thereafter, the applicant herein filed an application dated 11th November 2014 seeking to be added as a 2nd defendant and the suit land revert in the name of Robert Muchina Karaba pending hearing and determination of the suit which was granted on 24th November 2014. The matter was fixed for hearing on 1st September 2016 where the trial Judge was said to be indisposed and the matter fixed by consent on 20th December 2016. On the said date, the advocates for the plaintiff sought adjournment for reason that they had discovered that they have not authenticated their documents. The application for dismissal was subsequently filed on 15th May 2018 and fixed for 5th July 2018. From the time the plaintiff sought adjournment on 20th December 2016 until when the present application was filed is about one year four months. The reasons by the plaintiff/respondent that there was a wrong notion that a hearing date had been taken is not an explanation for the delay at all. To my mind, the plaintiff/respondent has not offered any reasonable explanation that is satisfactory to this Court for the delay to prosecute this suit for one year, four months. In the case of **RAJESH RUGHANI VS FIFTLY INVESTMENTS LIMITED & ANOTHER (2016) e K.L.R.**, the Court of Appeal held as follows:

“The test for dismissal of a suit for want of prosecution is stated in the case of IVITA VS KYUMBU (1984) K.L.R 441. The test was expressed as follows:

“The test is whether the delay is prolonged and inexcusable and if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and the defendant so both parties to the suit must be considered and the position of the Judge too, because it is no easy task for the documents and or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time; the defendant must 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”.

Again in the case of *MWANGI MEDANGI S. KIMENYI VS ATTORNEY GENERAL & ANOTHER*, the Court restated the test for dismissal of a suit for want of prosecution as follows:

“1. When the delay is prolonged and inexcusable such that it would cause grave injustice to the one side or the other or to both, the Court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the Court from doing justice to all the parties – the plaintiff, the defendant and any other third or interested party in the suit, test justice should be placed too far away from the parties.

2. Invariably, what should matter to the Court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues:-

1. Whether the delay has been intentional and contumelious;

2. Whether the delay and conduct of the plaintiff amounts to an abuse of the Court;

3. Whether the delay is inordinate and inexcusable;

4. Whether the delay is one that gives rise to substantive risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the defendant; and

5. What prejudice will the dismissal cause to the plaintiff. By this test, the Court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties”.

Applying the principles as set out in the above decisions, I find that the 2nd defendant has not given any prejudice that she stands to suffer which cannot be compensated by way of damages. I say so because the act of dismissing a suit is draconian measure which should be exercised cautiously as it drives a party away from the seat of judgment.

In the end result, I disallow the application on the following terms:

1. The Notice of Motion dated 15th May 2018 is disallowed.

2. The plaintiff to pay the 2nd defendant thrown away costs of Ksh. 10,000/= within 14 days failing which the suit stands dismissed.

3. The plaintiff to take steps to fix this suit for hearing within six (6) months from today failing which the same shall stand dismissed.

READ, DELIVERED and SIGNED in open Court at Kerugoya THIS 8TH DAY OF MAY. 2020.

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. Duudu for 1st Defendant

2. Ms Wambui holding brief for Mr. Maina Kagio

3. Mr. Igati Mwai holding brief for Mr. Nganga

4. Mbogo – Court clerk