



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HCC NO. 16 OF 2007 (A)

N W WPETITIONER/RESPONDENT

VERSUS

S W GRESPONDENT/APPLICANT

RULING

1. Through a Notice of Motion dated 11th May, 2016 and filed in court on 26/5/2016 pursuant to Section 1A, 1B, 3, 3A of the Civil Procedure Act, Order 17 rule 2 and order 51 rule of the Civil Procedure Rules, the applicant/respondent sought for dismissal of the suit herein for want of prosecution with costs.
2. Application is supported by grounds on the face of it and an affidavit in support deponed by one S W the applicant/respondent.
3. Basically, the applicant had on 12/6/2014 filed similar application to which the court heard and made a ruling on 30/4/2015 directing the petitioner to fix the case for hearing within 45 days. That despite that directive, the petitioner only attempted to fix the suit for hearing on 19/11/2015.
4. The applicant avers that, it is now over six months since 19th November, 2015 and that the petitioner never attempted to have the case set down for hearing.
5. It is the applicant's contention that, continued pendency of this suit is prejudicial to and traumatizing against the applicant and that in the interest of justice the same should be dismissed.
6. In response to the application, the petitioner/respondent filed a replying affidavit deponed by herself on the 28th September, 2016 and filed in court on 3/10/2016.
7. The petitioner termed the averments contained in the application herein as false and a misrepresentation of facts. She averred that, the matter was fixed for hearing on 19/11/2015 but unfortunately the court was not sitting.
8. She further alleged that despite every effort to fix the case for hearing, the same could not be possible as the court diary for 2015 was full. She contended that, since 19/11/2015, one year has not lapsed as provided for under Order 17 rule 2 of the civil procedure rules.
9. Contending that determination of her contribution towards acquisition of the matrimonial property now the subject of this suit is paramount, the petitioner urged the court to dismiss the application herein as it is intended to frustrate her financially and therefore direct the case be heard and determined on merit.

10. In submission, the applicant's counsel Mr. Murafu submitted that pursuant to the court's orders of 30/4/2014 directing the petitioner to fix the case for hearing within 45 days, and the petitioner having failed to honour the order within the stipulated period, she cannot purport to do so outside time without leave of the court.

11. Counsel argued that the petitioner is guilty of disobedience and this being an old case which has been pending for the last 10 years, it is in the interest of expeditious delivery of justice in accordance with Article 159 (1) (a) (b) to have the same dismissed.

12. Counsel further relied on Section 1A of the Civil Procedure Act which provides that courts should facilitate a just and expedient litigation being the overriding objective in the Kenyan legal system. Counsel quoted the case of **Moses Mwangi Kamau vs Shamm Kanji vapp-arambil Thomas, Spectsa (K) Limited and Prime Bank Ltd Civil Case No. 38/10 Nairobi (2014) eKLR** in which the court allowed the plaintiff 30 days to have the case fixed for hearing but failed to do so until after six months hence the court dismissed the suit for want of prosecution on grounds that no plausible reason was given by not fixing the same as directed.

13. Miss Owiti for the respondent submitted that the failure by the respondent in fixing the case for hearing was beyond her control as the court diary was full the year 2015 and at some point court file went missing. She also submitted that one year had not lapsed since the matter was last mentioned before court on 19/11/2016.

14. In a nutshell counsel for the respondent submitted that there will be no prejudice suffered by the applicant if this suit was fixed for hearing to which the petitioner is keen.

15. She also submitted that, in the interest of justice and considering that the property in issue is land which is quite emotive in Kenya, parties should be given a chance to ventilate on their case.

16. I have considered the application herein, affidavit in support, replying affidavit and submissions by both counsels. Issues for determination are;

- (a) Has the suit been dormant for over a period of one year,
- (b) Is the delay inordinate,
- (c) Who is to blame for the delay?
- (d) What prejudice will the applicant/respondent suffer if the application is not allowed.
- (e) Is it in the interest of justice that the application be allowed or dismissed?

17. There is no dispute that there was an application dated 12/6/2014filed by the respondent seeking for similar orders. Fortunately the same was not allowed as the petitioner/respondent was on 30/4/2015 granted 45 days within which to fix the suit for hearing. That however did not happen until 19/11/2015 when the fixed hearing date collapsed due to the failure of the court as the same was not sitting. From the court record, it is true that on 13/8/2015 a date was taken fixing the suit for hearing on 19/11/2015. There is no evidence of any court proceedings on that day.

18. Although the hearing date was taken after 45 days had expired, the applicant contended that the court diary was full hence she could not get a nearer date. There is no proof to support that allegation. However I take judicial notice that sometime in the past, Family Division used to have a problem with dates hence the diary would be closed earlier in the year. I will therefore give her a benefit of doubt.

19. As to loss or disappearance of court file, there was no documentary proof or otherwise to ascertain that any effort was made to look for the file. There were no correspondences exchanged in an effort to get the file.

20. Was there delay?

Order 17 rule 2 provides that

“.....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”.

The one year period commences from the time action was last taken in respect of this file.

21. When did time start running in this case? After the expiry of 45 days given by the court for the petitioner to fix case for hearing, no action was taken until 19/11/2015. None of the parties moved the court after expiry of 45 days for any necessary orders. The order of 30/4/2014 had no default clause. By taking action on 13/8/2015 fixing the suit for hearing on 19/11/2015 and the respondent/applicant having not raised any objection, he is deemed to have acquiesced to the delay hence he cannot complain for time lapse between 30/4/2015 and 13/8/2015

22. That being the case, time started running from 13/8/2015 when action was last taken. From that day up to 11/5/2016 when this application was filed is not over one year hence order 17 rule 2 cannot apply.

23. Was there inordinate delay? Having stated time started running from 13/8/2015, I would say that the delay was not inordinate. What prejudice will the petitioner suffer if this matter proceeded for hearing? Indeed this file has been pending in court since 2007 which is close to 10 years.

24. Ultimately this is a long time for any reasonable litigation to subsist. Both parties kept quiet till 2014 a period of 7 years down the line. Although an outside court settlement attempt was being pursued, nothing useful came out of it and everybody went to sleep. Again, although each party is under obligation to move the court and fix the case for hearing under Order 17 rule (2) and (3), the onus is higher on the petitioner or plaintiff as the case may be as his or her stake is higher in the suit as compared with the defending litigant who has nothing to lose.

25. Borrowing from the wisdom of Mativo J in the case of **Juliet Wangui Ndegwa vs Francis James Ndegwa (2016) eKLR Civil Appeal No. 63/2010 Nairobi (O.S.)**, the court held that:

.....with regard to the last test, I am persuaded that the nature of this case which deals with a protracted dispute relating to matrimonial property requires lenient exercise of discretion so that the parties can ventilate their respective positions in court and have the dispute conclusively determined.

Judge went further to say this:

“..... the interest of justice in my view weigh in favour of having this dispute heard so that the respective rights of the parties in the matrimonial property can be determined by the court”.

26. Despite the constitution under Article 159 providing for expeditious disposal of cases, the same is safeguarding the right to access to justice (Article 48) and fair hearing (Article 50).

27. Considering the nature of the subject property in this case which is land, and considering that land in Kenya is an emotive issue which touches on the livelihood of individuals and society and considering that this is matrimonial property to which each party is claiming a stake in it, it will be imprudent to dismiss the suit hurriedly without weighing the repercussions and the net effect of exposing one party to poverty hence digging an earlier grave for such a party.

28. In the interest of justice, this suit should be heard to conclusion and on merit so as to give each party an opportunity to ventilate their own cause. The respondent/applicant will not suffer any prejudice if this

matter proceeded for hearing.

29. Accordingly, I am satisfied that the application herein has not fully met the criteria set under order 17 rule 2, hence the same is dismissed with no order as to costs. The case shall be set down for hearing forthwith in any event not later than seven days from today and hearing to proceed on priority basis.

Order accordingly.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF APRIL, 2017.

J.N. ONYIEGO (JUDGE)

In the presence of Mungai holding brief for Namada for respondent

No appearance for applicant