



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 1161 OF 2013

ZULFIQAR A. MUGHAL

t/a ELEMEC ENGINEERINGPLAINTIFF

VERSUS

ALCON HOLDINGS LIMITEDDEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 2nd August 2013 in which the Defendant/Applicant seeks for this suit to be dismissed for want of prosecution.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of Davinder Singh Hanspal, the Managing Director of the Defendant, sworn on 2nd August 2013 in which he averred that the Plaintiff filed this suit on 8th November 2004 for, amongst other orders, that the Plaintiff is entitled to the suit property by way of adverse possession and further for specific performance against the Defendant to transfer the suit property to the Plaintiff. He further averred that the Defendant filed their Memorandum of Appearance and Replying Affidavit on 15th March 2005. He further stated that their advocates filed an application for dismissal of this suit for want of prosecution but unfortunately it was dismissed for non-attendance on 15th March 2012. He further averred that their advocates thereafter filed an Application dated 27th March 2012 for reinstatement of their dismissed Application dated 14th October 2008 but the court declined to allow the reinstatement and in dismissing the said Application ordered that the hearing of the main suit proceed immediately. He added that it has been over one year since then and this suit has never been fixed for hearing as was ordered by this court. He averred further that it is clear from the Plaintiff's conduct that it has lost completely interest in prosecuting this suit for all intents and purposes and continues to abuse the Defendant's generosity of being allowed to remain in occupation of the suit property. He averred that the Plaintiff has completely failed in its duty to bring this suit to an early trial as ordered by this court on 26th June 2012. He added that the Plaintiff's delay means maintaining an unhealthy status quo in its favour since the year 2004 to the total prejudice of the Defendant which cannot deal with its own property as the rightful registered owner thereof. He sought for this Application be allowed with costs and this suit be dismissed with costs.

The Application is not opposed.

The Defendant/Applicant filed their written submissions.

The applicable law is **Order 17 Rule 2(1) of the Civil Procedure Rules, 2010** which 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.”

Order 17 Rule 2(3) provides as follows:

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

I have carefully studied the proceedings of this suit. I have noticed that the Defendant had made a similar application for dismissal of this suit for want of prosecution which was dismissed for non-attendance. The Defendant’s application seeking the reinstatement of their dismissed application was also dismissed with a direction by the court (Khaminwa J. now deceased) that the matter be transferred to the Environment and Land Court. Justice Waweru ordered for this matter to be transferred to the Environment and Land Court on 25th September 2013. Subsequent to that, the plaintiff’s advocates and the Defendant’s advocates jointly tried to fix this matter for hearing of pending applications twice, that was on 22nd November 2013 and on 28th March 2014. There was a court appearance on 16th July 2014 and thereafter when directions on the hearing and disposal of this Application were given by this court. There were subsequent court appearances on 29th September 2014, 11th November 2014 and 17th November 2011 in which the Plaintiff and the Defendant were represented. As far as I can tell, this is not a suit ***“in which no application has been made or step taken by either party for one year”***. To the contrary, this suit has remained active through the years. The hearing of this main suit has been prevented by the fact that the Defendant has been busy filing and prosecuting its earlier application to dismiss this suit for want of prosecution and subsequently its application for reinstatement of its dismissed application. The parties have also been pre-occupied with the hearing and determination of this later Application. My finding therefore is that this Application has not been substantiated to warrant allowing it. It is therefore dismissed. Costs in the cause.

The Plaintiff is however directed to fix this suit for hearing within the next 60 days from today’s date failing which the suit shall stand dismissed from the 61st day from today’s date.

It is so ordered.

DELIVERED AND SIGNED AT NAIROBI THIS 12TH DAY OF FEBRUARY 2016.

MARY M. GITUMBI

JUDGE