



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 449 OF 2010

GIDEON K. NDICHU PLAINTIFF

VERSUS

KENYA INDUSTRIAL ESTATE LTD.1ST DEFENDANT

EXPEDITIOUS GENERAL MERCHANTS.....2ND DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 11th June 2013 filed by the Defendants seeking for this suit to be dismissed for want of prosecution and for costs of the application to be provided for.

The Application is supported by the grounds appearing on the face of it together with the Supporting Affidavit of Edna Adala, the Legal Manager of the 1st Defendant, sworn on 11th June 2013 in which she averred that the Plaintiff filed this suit on 23rd September 2010 and the pleadings closed on 19th May 2011 with the Plaintiff filing a reply to Defence. She further averred that thereafter, the Plaintiff filed an application to enjoin George Njoroge Kamuri as a necessary party to these proceedings which application was heard on 2nd May 2012 and the application was allowed. She averred further that since then, the Plaintiff has not taken any step to prosecute this matter any further. She further stated that her advocates wrote to the Plaintiff's advocates on 8th June 2012 and on 7th August 2012 requesting for draft issues, list of documents and witness statements in vain. She then stated that since 2nd May 2012, the Plaintiff has not taken any steps to have the matter prosecuted.

The Application is contested. The Plaintiff, Gideon Kahwai Ndichu, filed his Replying Affidavit sworn on 6th January 2014 in which he stated that it is true that he filed suit against the Defendants on 23rd September 2010 with a chamber summons application dated the same day seeking, inter alia, a temporary injunction pending the hearing and determination of the chamber summons application and the suit. He then contended that he is the bona fide legal owner of the suit property being Ruiru/Mugutha Block I/ T.1536 having purchased the same for the sum of Kshs. 900,000/- from George Njoroge Kamuri. He also stated that for proper determination of the issues, he filed an application to enjoin the said George Njoroge Kamuri as a necessary party, which application was heard on 2nd May 2012 and was allowed. He further conceded that the last time this matter was in court was on the said 2nd May 2012 from which date owing to circumstances beyond his control, he was unable to proceed with this matter. He further stated

that he has for some time now been in poor health limiting his movements and for that reason he was unable to move around including travelling to Nairobi to consult and instruct his advocates. He further stated that this being a land matter should be allowed to be heard and conclusively determined.

In their submissions dated 11th February 2014, the Defendants opposed the Plaintiff's assertion of being unwell by stating that the Plaintiff attached no medical report or documents to support his contention that he was unwell and that in the absence of such evidence, the claim should be dismissed. They argued further that the Plaintiff did not indicate which time period in which he was unwell which amounts to material non-disclosure. They further stated that there is no explanation why the Plaintiff's lawyer did not respond to the Defendant advocates lawyer's letters.

In his submissions dated 25th February 2014, the Plaintiff asserted that this suit should not be determined on a technicality as the Defendants are intending but should be allowed to proceed and be determined on its merits. He then stated that he was unwell since June 2012 until early in January 2014.

The applicable law is Order 17 Rule 2(1) 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”

It is clearly in exercise of the power conferred by Order 17 Rule 2(3) that the Defendants have brought this application to have this suit dismissed for want of prosecution. This is a relatively straightforward case. It is evident that the Plaintiff appears to have lost interest in this matter and has not made any application or set the suit down for hearing since the ruling on his application was delivered on 2nd May 2012, which is now over 1 year ago. It is also clear that he even ceased to give instructions to his advocates who failed to reply to letters written to them by the Defendant's advocates. Clearly, the time period required in the law cited above has been achieved, thereby giving this court the right to make this ruling. The excuse given by the Plaintiff leaves much to be desired. He claims to have been unwell during the material period of time but failed to annex any medical documents to support his claim. The claim of being unwell therefore remains incredible and unsupported. I note from Justice Muchelule's ruling on the Plaintiff's chamber summons seeking injunctive orders was dismissed on 16th February 2011. After that, the only step taken by the Plaintiff was to apply to enjoin George Njoroge Kamuri to this case on 2nd May 2012, which application was allowed on the same date. Since then, the Plaintiff never took any step to prosecute this suit any further. I find that the Plaintiff has lost interest in this suit and it is highly unfair on the Defendants to let this suit continue to tax them. Accordingly, I hereby allow this application and hereby dismiss this suit with costs to the Defendants.

SIGNED AND DELIVERED AT NAIROBI THIS 2ND

DAY OF MAY 2014

MARY M. GITUMBI

JUDGE