



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 91 OF 2013

**PIUS MULWA MASAI (SUING AS LEGAL REPRESENTATIVE OF THE
ESTATE OF MASAI KABOLELYA) PLAINTIFF/RESPONDENT**

VERSUS

NZEMBI MUSILI 1ST DEFENDANT/APPLICANT

GREGORY MAINGI 2ND DEFENDANT/APPLICANT

PATRICK KITAKA 3RD DEFENDANT/APPLICANT

VENDI A.K.A BAKARI 4TH DEFENDANT

JOSEPH MBUVA 5TH DEFENDANT/APPLICANT

DOMINIC MBULA MUTIE 6TH DEFENDANT/APPLICANT

RULING

This is in respect to the defendants/respondents' application seeking to have this suit dismissed for want of prosecution.

The application is supported by the affidavit of Mr. Mwaniki Gachuba advocate for the defendants/applicants and is based on the main ground that since the filing of the suit herein on 17th December, 2010, the plaintiff/respondent has taken no further action in this matter.

The application is opposed and there are replying affidavits by PIUS MULWA MASAI the plaintiff/respondent herein and his advocate BETH NDORONGO the contents of which are basically to state that by the time the suit was filed in December, 2010, the diary for 2011 was full and the one for 2012 was only availed in November, 2011 and by then, the Court was prioritizing old cases. It is also deposed by counsel for the plaintiff/respondent that she did a letter to the advocate for the defendants/applicants on 10th November, 2011 inviting them to fix a hearing date.

This application is brought under **Order 2 Rule 15, Order 17 Rule 2, Order 51 Rule 1 of the Civil Procedure Rules** as well as all the enabling Section 3A of the Civil Procedure Act. **Order 17 Rule 2 (i) of the Civil Procedure Rules** is the relevant provision herein as the remedies sought is dismissal for want of prosecution. It reads 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” – emphasis mine.

Sub-rule (2) of the same order reads as follows:-

“If cause is shown to the satisfaction of the Court, it may make such orders as it thinks fit to obtain expeditious hearing of the suit “.

I have considered the application, the rival affidavits and the submissions by both counsels.

It is clear from the above provisions that whereas the Court has the power to dismiss a suit in which no steps have been taken for one year, the use of the word “**MAY**” connotes that it is not mandatory that such suit can only be for dismissal. The law allows a party to show to its satisfaction that there are indeed good reasons why the suit ought not to be dismissed. Therefore, the dismissal does not automatically follow once the one year period is established in which no action was taken. A window is given to the party in default to show why the suit should not be dismissed. Where the delay is prolonged and no sufficient reasons are given for the same, then it will be considered that such delay is inexcusable and in such cases, the suit may be dismissed – **IVITA VS KYUMBU 1984 K.L.R 441.**

In the matter now before me, the suit was filed on 17th December, 2010 and defences were filed on 15th February, 2011. Nothing appears to have been done by the plaintiff/respondent and on 30th March, 2012, the defendants/applicants filed this application for dismissal of the suit. In her replying affidavit, MS BETH NDORONGO advocate for the plaintiff/respondent has annexed a copy of a letter of invitation addressed to the advocate for the defendants/respondents and dated 10th November, 2011 inviting them to attend the Registry at Embu Court on 18th November, 2011 at 10 o'clock to fix a suitable hearing date. The letter bears the stamp of the advocate for the defendants/respondents. It is therefore not entirely true that the plaintiff/respondent has not taken any action towards having this matter listed for hearing. There is also MS NDORONGO'S averment that the diary for 2011 was full and therefore it was not possible to get a date for hearing in 2011 and further, that the diary for 2012 was only availed in the Registry in October, or November, 2011. All this has not been disputed. Further, there is nothing to suggest that whatever delay has occurred has caused the defendant/respondents any prejudice as for instance making it impossible to secure the attendance of their witnesses. In short, there is nothing to demonstrate that justice cannot still be done in this matter. In my view, **Order 17 Rule 2 of the Civil Procedure Rules** grants the Court a discretion to dismiss a suit for want of prosecution but in so doing, the Court must consider all the circumstances obtaining in each case.

Having considered the circumstances of this case, I find that the delay has been explained satisfactorily and this is therefore not a proper case for dismissal. The defendants/respondents Notice of Motion dated 30th March, 2012 is accordingly dismissed with no order as to costs.

As the suit involves land situated within the jurisdiction of the Environment and Land Court at Embu, I hereby order that this suit be transferred to that Court where it will be mentioned on 10th December, 2014 for purposes of fixing a hearing date.

It is so ordered.

B.N. OLAO

JUDGE

2ND DECEMBER, 2014

2/12/2014

Before

B.N. Olao – Judge

Mwangi – CC

No appearance for Applicant

Mr. Mugo for Ndorongo for Respondent – present

COURT: Ruling delivered in open Court this 2nd day of December, 2014.

Mr. Mugo for Ms Ndorongo for Respondent present

No appearance for Applicant.

B.N. OLAO

JUDGE

2ND DECEMBER, 2014