



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CASE NO. 1928 OF 2007

HUDSON MAINA KAMAU.....PLAINTIFF

VERSUS

J. K. HORERIA T/A HORERIA & COMPANY.....1ST DEFENDANT

OAKRIDGE INVESTMENTS LIMITED.....2ND DEFENDANT

RULING

This Court served the parties herein with a Notice to Show Cause why the suit herein should not be dismissed for want of prosecution dated 9th December 2011. The said notice was issued under Order 17 Rule 2(1) and (4) of the Civil Procedure Rules.

In response, the Plaintiff filed a replying affidavit sworn on 14th May 2012 wherein he stated that he was not aware that a notice to dismiss the suit had been issued until 8th May, 2012 when the court informed his advocate of the existence of the notice. The Plaintiff blamed his former advocate for not taking adequate steps to prosecute the suit, and attached evidence of letters dated 13.08.12, 10.04.12, 28.02.12, 28.10.10, 22.07.10, 15.07.10 in which he sought to enquire on the progress of the suit from the firm of Mariaria & Co. Advocates as well as a letter dated 11.08.10 from the said firm of advocates admitting a mistake on their part for failure to confirm the matter for hearing.

It is the Plaintiff's case that he hoped that the suit was being prosecuted satisfactorily, and further, that due to financial constraints resulting from the manner in which he suddenly lost his business he not in a capacity to change his advocates quickly. In addition, the Plaintiff stated that having lost his business, he went through a traumatic time which caused physical illness and mental torture from which he is still in recovering, and that he had to relocate from Nairobi to his rural home. The Plaintiff urged the Court not to dismiss the suit and sought a last chance to complete the suit.

The Plaintiff's counsel filed submissions dated 22nd April 2013, wherein he reiterated the facts hereinabove and submitted that the letters annexed to the Replying Affidavit demonstrated a diligent litigant who was keen to proceed but was let down by indolent advocates. Counsel submitted that the Plaintiff had shown cause why the suit should not be dismissed, and further stated that the Plaintiff was ready, willing and desirous of prosecuting his case to the end. Counsel blamed the Defendant for the delay in hearing this application by seeking various adjournments.

The 1st Defendant in response swore a Replying Affidavit on 1st March 2013 where he stated that he was the director of the 2nd Defendant who was the registered proprietor of the suit property, plot LR No. 209/4917/1. The 1st Defendant termed the allegations contained in Plaintiff's Replying Affidavit as false and misleading. It is the Defendants' case that the Plaintiff had been a troublesome tenant who constantly fell into rent arrears. The Defendants attached as evidence letters dated 13.01.05 and 26.10.05 asking the Plaintiff to settle the said arrears, as well as a letter dated 13.10.06 instructing Bell and Hammer General Merchants to levy distress and recover rent arrears from the Plaintiff.

According to the Defendants, the Plaintiff made several promises to clear the arrears and evidence of letters dated 02.06.05, 18.08.05, 31.10.05 and 23.03.05 from the Plaintiff seeking indulgence have been attached. The Defendants maintained that the Plaintiff was not in a financially fit state of operations and had actually closed the premises and affixed a notice to this effect. The Defendants have attached evidence of proclamation from Cash Crop Auctioneers as well as Bell and Hammer General Merchants and stated that they had obtained a lawful break in order from the Milimani Magistrate's Court. Evidence of the court order as well as an application for police assistance dated 18.12.06 was been provided.

The Defendants contended that there was no real desire to prosecute the matter on the part of the Plaintiff, who kept on changing advocates without making any progress and who never took appropriate action against his previous advocates nor filed any complaint to the Advocates disciplinary committee. The Defendants accuse the Plaintiff of not coming to court with clean hands having failed to comply with a court order issued on 8th May 2012 requiring him to file a reply to the notice to show cause and serve it within ten days.

Counsel for the Defendants filed submissions dated 10th May 2013 wherein he stated that the Plaintiff is seeking reliefs which cannot be granted by the court, since the Plaintiff is no longer a tenant and the suit premises have been demised to another tenant for over 5 years now. The Defendants through their advocate submitted that eviction was conducted in a legal way and the Plaintiff never obtained any restraining orders when the eviction was carried out.

It was submitted for the Defendants that since the suit was instituted in 2006, it came up for hearing on 24th May 2007 when the hearing did not take off, and a date was later fixed on 17th November 2011 after 4 years had lapsed. Further, counsel argued that no complaint was filed by the Plaintiff against his advocates for professional misconduct during the whole period of the unnecessary delay of 4 years.

Counsel contended that the Plaintiff had not shown the court satisfactorily why the suit should not be dismissed for want of prosecution, and further argued that the Plaintiff had lost interest in the case. In support of this submission, the Defendants relied on the case of **Kenya Commercial Bank -vs- Harun Komen Tuitoek(2005)eKLR** where the court held that the Plaintiff made no effort to list the matter for hearing for over two and a half years and proceeded to dismiss the suit for want of prosecution.

I have carefully read and considered the pleadings and submissions filed by the parties. The issue for determination is whether there has been inordinate delay in prosecuting the suit herein for which no reasonable explanation has been offered, to render the suit liable for dismissal. The Notice to Show Cause that is the subject of this ruling was issued under Order 17 Rule 2 of the Civil Procedure Rules which provides for dismissal of suit for want of prosecution as follows:

“2. (1) 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.

(2) 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.

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.

(4) The court may dismiss the suit for non-compliance with any direction given under this Order.”

The decision in the case of **Ivita vs. Kyumbu [1984] KLR 441** set the test to be applied by the courts in an application for the dismissal of a suit for want of prosecution. This is firstly, whether the delay is prolonged and inexcusable, and, secondly if the delay is excusable, whether justice can still be done to the parties despite the delay. A perusal of the court record in this suit shows that prior to the issuance of the notice to show cause, this suit was last in court on 26th June, 2009 when the Plaintiff's chamber summons to re-amend the Plaint dated 4th December 2007 was allowed by the Deputy Registrar. There was thus a delay of prosecuting this suit for over one year, which renders the suit herein liable for dismissal under Order 17 Rule 2 of the Civil Procedure Rules.

The court record also shows that subsequently, the Plaintiff's advocates fixed the suit for hearing on 15.01.10, 22.04.10 and 11.08.10 when hearing did not proceed. In a letter dated 11th August, 2010 annexed to the replying affidavit, the Plaintiff's advocate admitted to a mistake on their part for having fixed the matter for hearing severally and failing to confirm it for hearing. The Plaintiff has also furnished the court with copies of several letters addressed to his former advocates, enquiring on the progress of the matter. It is thus my finding that the Plaintiff has offered a reasonable explanation for the delay in prosecuting the suit, since there seems to have been indolence on the part of their former advocates in prosecuting this matter for which he should not be penalized.

The Defendants have in addition not shown how they have been prejudiced by the delay. Their opposition is based on the argument that the entire suit is not meritorious and that the Plaintiff has no real desire to prosecute the matter. A decision as to whether the Plaintiff's suit has merit can however only be made after hearing the parties, and any prejudice the Defendant may suffer by the suit not being found not to have merit and having been delayed by the Plaintiff can be adequately addressed by way of costs.

The Plaintiff has accordingly shown reasonable cause why the suit herein should not be dismissed for want of prosecution. The Plaintiff shall however within 90 days of the date of this ruling take the necessary steps to have the suit herein set for hearing, and in default the suit herein shall stand dismissed.

The Plaintiff shall meet the costs of prosecuting the Notice to Show Cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 8th day of July, 2013.

P. NYAMWEYA

JUDGE