



REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 2210 OF 2007

IRENE NYAKINYUA KANYOTU.....PLAINTIFF

VERSUS

LUCY WATHIRA WACHU.....1ST DEFENDANT

JOHN KAMAU KIBUGI.....2ND DEFENDANT

RULING

The court served the Plaintiff with a Notice to Show Cause why the suit herein should not be dismissed dated 16th December 2011, and issued under Order 17 rule 2 of the Civil Procedure Rules. The said Notice was issued on the ground that no action had been taken to prosecute this case for more than a year. The Plaintiff's counsel in a replying affidavit sworn on 7th February 2011 denied that he had delayed in prosecuting the suit, and stated that despite taking out hearing dates on 26th January 2011 and 18th July 2011, the suit was not listed for hearing, and that the court diary was thereafter filled up and he could not get hearing dates in 2011.

The 1st Defendant in an affidavit sworn on 14th February 2011 admitted that hearing dates have been taken out in this matter, but stated that it is the Defendant who has been taking out the dates, and the Plaintiff has done nothing to prosecute this matter other than file a list of agreed issues on 30th April 2008. Further, that he has not complied with the steps required to be taken by law.

The Plaintiff's Advocate sought a ruling date during the hearing of the Notice to Show Cause on 24th September 2013, and relied on the parties' respective affidavits. I have read and carefully considered the arguments made by the parties. The main issues are whether the suit filed herein should be dismissed for want of prosecution, and if so, which party should bear the burden of costs in the present suit. The law on dismissal for suit for want of prosecution is set out in Order 17 Rule 2 of the Civil Procedure Rules which provides 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.”

There are two tests to be satisfied under Order 17 rule 2 of the Civil Procedure Rules for the dismissal of a suit for want of prosecution. The first one is whether there has been delay. A perusal of the court record shows that this matter was last in court for hearing on 3rd March 2010, and the delay in prosecuting the suit at the time of the date of the Notice to Show Cause was one year and nine months, . The threshold of one year’s delay in prosecuting a suit has therefore been met, and this suit is subject to dismissal. My finding is therefore that there has been culpable delay in the prosecution of the suit filed herein by the Plaintiff.

The second test to be satisfied under Order 17 rule 2 is that the delay must be inexcusable. I am also persuaded in this respect by the ruling of this Court in **Ivita vs Kyumbu (1984) KLR 441** that even if there are good reasons for the delay, the court must also be satisfied that justice will still be done to the parties despite the delay. I find that the reasons given by the Plaintiff for not prosecuting this suit are valid, as there are entries on the court record for hearings on the dates he stated. It is also the case that the said dates were taken out by the Defendants, and it is in this respect noteworthy that the requirement in Order 17 rule 2 that steps be taken to prosecute a suit within one year do not specify that that the steps need to be taken by the Plaintiff, but can be taken by any of the parties in a suit.

The Defendants have alleged that the Plaintiff has no cause of action as she is no longer living on the suit premises. It is my view that for this same reason the Defendants have not suffered any prejudice as a result of the delay. I therefore find that the delay in prosecuting this suit is excusable and will not cause injustice to the parties herein.

I accordingly find that reasonable cause has been shown as to why the suit filed herein should not be dismissed for want of prosecution, and order as follows pursuant to the provisions of Order 11 of the Civil Procedure Rules and sections 1A, 1B and 3A of the Civil Procedure Act :

1. That the Plaintiff shall file and serve the witness statements and list and bundle of documents to be relied upon at the trial of this suit within 30 days of the date of this ruling.
2. That the Plaintiff shall take the necessary steps to set this suit for pre-trial conference within 6 months of the date of this ruling.
3. In default of any of the orders hereinabove, the Defendant shall be at liberty to apply for the dismissal of this suit.
4. The costs of the Notice to Show Cause shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____8th____ day of____November____, 2013.

P. NYAMWEYA

JUDGE