



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MILIMANI LAW COURTS**

**ELC CIVIL SUIT NO.479 OF 2015**

**PETER WEU T/A VIOZEN COMMERCIAL AGENCIES.....PLAINTIFF**

**VERSUS**

**RELiance OXYGEN LIMITED.....1ST DEFENDANT**

**PHILIP LEMARASIA.....2ND DEFENDANT**

**CHIEF LAND REGISTRAR.....3RD DEFENDANT**

**RULING**

1. The 1<sup>st</sup> Defendant /Applicant filed a Notice of Motion dated 2<sup>nd</sup> February 2018 seeking to have the Plaintiff's suit dismissed for want of prosecution. The Applicant contends that the Plaintiff/Respondent has not been keen on prosecuting his case and that the same should therefore be dismissed. The Applicant contends that the suit was last in Court on 6<sup>th</sup> October 2015 and that it has been two years without the Respondent taking any step towards prosecuting the suit.

2. The Respondent opposed the Applicant's application based on a replying affidavit sworn on 11<sup>th</sup> September 2019. The Respondent contends that he has been keen on prosecuting this suit and that it is the Applicant which is frustrating the prosecution of this suit through filing of the present application. The Respondent argues that he had filed an application for injunction seeking to stop the Applicant from trespassing on to the suit property and that after the Applicant ceased the attempts to trespass, the Respondent has been inviting the Applicant's lawyers to fix a date for the main hearing as parties maintain orders of status quo.

3. The Respondent further contends that the Applicant's application is malicious as the Applicant would have fixed its counter-claim for hearing if it were keen on having the matter determined.

4. I have considered the Applicant's application as well as the opposition to the same by the Respondent. I have also considered the submissions by the Applicant as well as the submissions by the Respondent. The only issue for determination is whether the Applicant has met the threshold for dismissal of the Respondent's suit. The principles to be considered in an application for dismissal of a suit for want of prosecution were well captured by Justice Chesoni (as he then was) in the case of: ***Ivita Vs Kyumbu ( 1975) e KLR*** . The judge stated as follows:-

***“ ...so the test is whether the delay is prolonged and inexcusable and if it is, can justice be done despite such delay. Justice is to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the Judge too, because it is no easy task for the documents, and or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced . He must show that justice will not be done in the case due to prolonged delay on the part of the Plaintiff before the court will exercise its discretion in his favour and dismiss the auction for want of prosecution. Thus, even if the delay is prolonged if the court is satisfied with the Plaintiff's excuse for the delay and that justice can still be done to the parties notwithstanding the delay ,the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time”.***

5. It is in light of the above principles in the **Ivita case** (supra) , that I will consider the application by the Applicant. The Respondent filed the present suit on 3<sup>rd</sup> June 2015. He contemporaneously filed an application seeking injunctive relief . The application for injunction was placed before a Judge on the same day it was filed. The Judge directed that service be effected for inter-partes hearing on 17<sup>th</sup> June 2015. On 17<sup>th</sup> June 2015, counsel for the Applicant who is the Respondent in the current application informed the court that he was only able to serve the 3<sup>rd</sup> Defendant with the application. The Court then directed the counsel to serve the other two Defendants and fixed the matter for mention on 6<sup>th</sup> October 2015. The Court record shows that on 6<sup>th</sup> October 2015, there was no attendance by either party. The court directed the file to be taken back to the registry.

6. The file lay in the registry until the time this application was filed on 2<sup>nd</sup> February 2018. Though the Applicant contends that the Respondent never took any step towards prosecuting the suit since 6<sup>th</sup> October 2015, the court record shows the contrary . The Respondent made efforts to have the matter fixed for hearing at least on two occasions that is on 6<sup>th</sup> October 2016 and 22<sup>nd</sup> November 2016. On these two occasions, the Applicant's counsel were invited to go to the registry and take a hearing date. The invitation letters were received as can be seen from the stamp on the letters of invitation . It is therefore not correct for the Applicant to state that the last time the Respondent made any step towards prosecution of his case was on 6<sup>th</sup> October 2015.

7. According to order 17 of the Civil procedure Rules , an application of this nature would have been ripe for filing after 30<sup>th</sup> November 2017. This is a period of one year after the Respondent took the last step towards prosecuting his case. The present application was filed two months after the lapse of one year required for an application for dismissal to be filed. I therefore find that there was no inordinate delay on the part of the Respondent to prosecute his case. As justice Chesoni ( as he then was ) stated in the Ivita case (supra) , justice cuts both ways. In the instant case the Applicant had filed a counter-claim which in law is a separate suit. The Applicant was equally under obligation to prosecute its counter-claim by fixing it for formal proof. It is no excuse that a defence to it had not been filed.

8. I do not see any prejudice which the Applicant has suffered or would suffer. The Applicant argues that it intends to sell the suit property once the suit is dismissed. The ownership of the property is disputed. This dispute has to be determined on merit before the Applicant can think of disposing it off. I therefore find that the Applicant's application lacks merit. The same is dismissed with costs to the Respondent. I notice that the subject matter of this suit falls within the jurisdiction of Machakos ELC Court . I direct that this suit be transferred to Machakos ELC Court for further directions as to the hearing of the same.

**Dated, Signed and delivered at Nairobi on this 1<sup>st</sup> day of October 2020.**

**E.O.OBAGA**

**JUDGE**

In the virtual absence of parties who had been informed of the date and delivery of Ruling.

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**