



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 157 OF 2018

(Formerly Nairobi ELC Case No. 1038 of 2014)

MASANGO OLE MONCHO.....PLAINTIFF

VERSUS

THE REGISTRAR OF LANDS.....1ST DEFENDANT

SAJILONI GROUP RANCH.....2ND DEFENDANT

LAANDI NAISHWA.....3RD DEFENDANT

KAPILA OLE KAKA NIKONI.....4TH DEFENDANT

KAIYIAKONI OLE KOROGI CHAPALA.....5TH DEFENDANT

RULING

What is before Court for determination is the 2nd to 5th Defendants application dated the 5th October, 2015 brought pursuant to Order 17 Rule 2 (3) of the Civil Procedure Rules; In the said application, they seek orders to dismiss the Plaintiff's suit for want of prosecution.

The application is premised on the grounds on the face of it and the supporting affidavit of KELVIN MOGENI who is the advocate in conduct of the matter on behalf of the 2nd to 5th Defendants. He deposes that the 2nd to 5th Defendants filed their Defence on 17th September, 2014 and since the Plaintiff failed to file a reply to Defence, the pleadings were assumed to be closed on 1st October, 2014. He claims the Plaintiff has not fixed the case for hearing. He contends that by virtue of Order 17 Rule 2(3) of the Civil Procedure Rules, the Defendant may inter alia apply for the dismissal of the Plaintiff's suit for want of prosecution if the Plaintiff does not set the said suit for hearing.

The Plaintiff opposed the application and filed a replying affidavit sworn by MERCY MORAGWA MOGUSU who is the Advocate acting on his behalf, where she explains that upon instructions from the Plaintiff, she filed this suit and served summons to enter appearance upon all the Defendants. She confirms that the firm of Messrs Kelvin Mogeni & Co Advocates entered appearance for the 2nd to 5th Defendants but took some time to file a Replying Affidavit as well as a Defence and Bundle of Documents which were served upon them. She states that the 1st Defendant has not filed their Defence. She explains that the Plaintiff has been ill and hospitalized at various times with no space to follow up on this matter. Further, that this matter had initially been filed in Machakos and since July, 2015 there was no Judge appointed to hear land cases hence their wait also contributed to the delay in prosecution of this case. She insists she has been trying to get hold of the Plaintiff to attend court but in vain as his health is deteriorating. She reiterates that failure to set down the suit for hearing has been occasioned by the Plaintiff's ill health and was not intentional. Further, that they have been unable to substitute the Plaintiff with any other member of his family. She states that the Plaintiff has no intention of delaying the disposal of this matter and prays that the Plaintiff be granted a chance to be heard. Further, that dismissing the suit without hearing and determining it on merit will be detrimental and unconstitutional. She seeks for a the Plaintiff to be granted a chance to prosecute this matter.

The Application was canvassed by way of written submissions but it is only the Applicants that filed their submissions.

Analysis and Determination

Upon consideration of the instant application, rivaling affidavits and applicants' submissions, the only issue for determination is whether this suit should be dismissed for want of prosecution.

The Applicants in their submissions have reiterated their claim and contended that justice delayed is justice denied. Further, that there has been inordinate delay, which is inexcusable and the Defendants are likely to be prejudiced with the said delay. They relied on the decisions

of **Venture Capital and Credit Ltd V Consolidated Bank of Kenya Ltd (2006) eKLR**; **Caltex Oil (Kenya) Ltd V Evanson N. Wanjihia; Allan V Sir Alfred Mc Alpine and Sons Limited (1968) 1 ALL ER 543**; **Dagane V Cheron (2015) eKLR**; **Ivita V Mutua CIV, Case No. 340 of 1971 and Pravichandra Jamnadas Kakad V Kenya Bus Services Limited and Another (2014) eKLR**.

Order 17, rule 2 of the Civil Procedure Rules provide that:’ **(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.**’

From the court records, it is evident that the Plaintiff has never set down the suit for hearing ever since it was filed on 1st July, 2014, in Machakos High Court. The matter was then transferred to Nairobi ELC and later to Kajiado ELC on 27th September, 2018 when both parties were present before Justice Bor. However, from the said date the Plaintiff has still never set the suit down for hearing. The Plaintiff’s claim is that he has been unwell over a period of time and that is the reason why he has never set the suit down for hearing. As cited in the case of **Skyview Properties Limited & Another V Kennedy Amos Njoroge & 3 Others (2017) eKLR**, the jurisprudential criteria applied in determining whether or not a suit should be dismissed for want of prosecution was articulated in the case of **Ivita V Kyumbu (1984) KLR 441** as Chesoni J (as he then was) stated as follows:’ **The test is whether the delay is prolonged and inexcusable and, if it is, can justice be done despite such delay.**’

Further, in the case of **Venture Capital and Credit Ltd v Consolidated Bank of Kenya Ltd [2006] eKLR**, Justice Fred Ochieng while favourably citing the case of **ALLEN –VS- SIR ALFRED MC ALPINE [1968] 1 ALL E.R. 543 at 546**, where Lord Denning MR captured, in the following words, the fundamental reason why courts do dismiss suits for want of prosecution;

"The delay of justice is a denial of justice.

To no one will we deny or delay right or justice. All through the years’ men have protested at the law’s delay and counted it as a grievous wrong, hard to bear. Shakespeare ranks it among the whips and scorns of time (Hamlet, Act 3.Sc. 1). Dickens tells how it exhausts finances, patience, courage, hope (Bleak House, C.1). To put right this wrong, we will in this court do all in our power to enforce expedition; and if need be, we will strike out actions when there has been excessive delay. This is a stern measure; but it is within the inherent jurisdiction of the court, and the rules of court expressly permit it. It is the only effective sanction that they contain."

In the current scenario and from the court record, it is evident that the Plaintiff has actually failed to prosecute his claim which is now 6 years old. To my mind, I find the delay inordinate, inexcusable and prejudicial to the Defendants. In associating myself with the decisions cited above as well as the legal provisions which I have quoted, I have no recourse but to proceed to dismiss the Plaintiff’s case with costs to the 2nd to 5th Defendants.

It is against the foregoing that I find the 2nd to 5th Defendants application dated the 5th October, 2015 merited and will allow it.

Dated Signed and Delivered at Kajiado this 26th Day of November 2020.

CHRISTINE OCHIENG

JUDGE