REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 253 of 2007

KENYA ANTI CORRUPTION COMMISSION.....…….....PLAINTIFF

- VERSUS -

MAJOR GENERAL (RTD) DEDAN NJUGUNA GICHURU…..1ST DEFENDANT

WILSON GACHANJA…….....2ND DEFENDANT

RULING

1. This is the 1st defendant's notice of motion dated 18th May 2012. The 1st defendant prays that the plaintiff's suit be dismissed for want of prosecution. The motion is expressed to be brought under order 17 rule 2 (3) of the Civil Procedure Rules 2010. It is predicated on a deposition sworn by the 1st defendant on even date. It is averred that no step has been taken to set the suit down for hearing since 8th April 2008. On that date, the matter had come up for hearing in open court. One of the orders made was that the parties do prepare the suit for hearing within 90 days. In a synopsis, the 1st defendant's case is that the plaintiff has lost interest in prosecuting its suit.

2. The motion is contested. There is filed a replying affidavit of Nzioki Wa Makau sworn on 11th July 2012. He was then an advocate and an investigator appointed under section 23 of the applicable Anti Corruption and Economic Crimes Act 2003. At paragraph 4, he lists 9 steps taken between 25th June 2008 and 19th August 2008 to prepare the suit for hearing. He avers that this suit is related to Judicial Review case ELC 19 of 2011 *R Vs Registrar of Titles ex-parte Major (Rtd) Dedan Njuguna Gichuru.* The suit related to L.R. No 14703 grant number I.R 74788. It is the same property pleaded at paragraph 6 in the plaint in this suit. The judicial review matter was concluded on 24th April 2012. The respondent's case is that the applicant has failed to disclose the existence of those proceedings. It was also alleged that there was a mutual understanding that the present suit be put on hold pending the outcome of the judicial review case. The 1st defendant denies there was such an understanding. Lastly, the respondent averred that there is an element of public interest in this suit that can only be met by a full hearing on the merits.

3. I have considered the grounds of the motion, the depositions, the written submissions and annexed authorities. I am of the following opinion. Under order 17 rule 2 (1), (2) and (3), if no step is taken in any suit by either party for 1 year, an aggrieved party may apply to the court for dismissal of the suit. In this suit, the record of the court shows that the parties last appeared before the Hon, Lady Justice Mary Ang'awa on 8th April 2008. By consent, an application dated 27th November 2007 to strike out the plaint was withdrawn. Another motion dated 8th November 2007 seeking to preserve the suit property was allowed by consent. Part of the latter consent required the parties to prepare the suit for trial within 90 days. On the face of it then, the matter has been in abeyance for over 4 years. As a period of more than

a year has lapsed, the applicant's motion for dismissal is properly before the court.

4. The test in a matter of this nature was laid out in *Ivita Vs Kyumbu* [1984] KLR 441. It is whether the delay is prolonged and inexcusable, and if it is, whether justice can still be done. In that event instead of dismissal, the court may exercise its discretion to set the suit down for hearing.

5. In *Fitzpatrick Vs Batger & Co. Ltd* [1967] 2 ALL ER 657 Lord Denning, citing his decision in *Reggentine Vs Beecholme Bakeries Ltd* [1967] 111 sol. Jo. 216, said;

"It is the duty of the plaintiff's advisers to get on with the case. Public policy demands that the business of the courts should be conducted with expedition ……. the delay is far beyond anything we can excuse. This action has gone to sleep for nearly two years. It should now be dismissed for want of prosecution".

6. With the overriding objective to do justice to the parties, it is also in the interests of a fair trial. The defendants here are prejudiced by the existence of a stagnant suit. In *Mugo Njogu Vs Mary Githinji* [2010] e KLR the court was of the view, and I agree, that the plaintiff's counsel must take full responsibility for such delay. The court went further to say that "counsel have a role and duty to assist the court in realizing the overriding objective and incompetency or lapses of counsel derogate from the objective".

7. So much so that the court must scratch below the surface of the record to determine whether there is want of prosecution. The reason is that the court must exercise its discretion in a judicious manner. For starters, the record of court shows the following other file notes: On 9th July 2008 a notice to admit facts was filed by the plaintiff; on 31st July 2008 admission of facts filed by the 1st defendant's counsel; 12th August 2008 a notice to admit facts was made by the 1st defendant's counsel together with a list of documents and a notice to produce certain documents; on 19th August 2008, a notice was filed requiring verification of the 1st defendants documents; and, on 29th August 2008, that affidavit was filed. On 23rd August 2010, the plaintiff filed a notice of change of advocates. On 5th June 2012, the 1st defendant then filed the present motion for dismissal of the suit for want of prosecution.

8. While the plaintiff took certain steps to prepare the suit for hearing up to 29th August 2008, I would agree that the plaintiff did not take steps to fix the suit for hearing. That was the critical step required to avoid the sanction of dismissal under order 17 of the Civil Procedure Rules 2010.

9. I would then return to the test in *Ivita Vs Kyumbu* [1984] KLR 441. Is the delay prolonged and inexcusable? Another guiding decision is *Allen Vs Mc Alpine & Sons* [1968] ALL E.R 56 and the three step test laid by Salmon L.J as follows:

"As a rule, when inordinate delay is established, until a credible excuse is made out, the natural inference would be that it is inexcusable. It is an all time saying which will never wear out however often said that, justice delayed is justice denied"

10. The primary excuse put forward by the plaintiff is the concurrent proceedings at the High Court in Judicial Review case ELC 19 of *2011 R Vs Registrar of Titles* (supra). That suit sought three key reliefs:

i) An order of certiorari be issued to remove into the High Court and quash the entire decision of the 1st Respondent contained at page 4349 of the Special Issue of the Kenya Gazette Vol. CXII-No. 124 published on 26th November 2010 revoking the title for property L.R. No. 14703 Nairobi Grant No. I.R 74788 dated 21st October 1997 registered in the name of the Applicant.

ii) An order of certiorari be issued to remove into the High Court and quash the entire decision of the 4th Respondent contained at Annex 25 of the report on the Commission on inquiry into the illegal/irregular allocation of Public Land published in June 2004.

iii) An order of prohibition be issued prohibiting the 1st, 2nd, 3rd and 4th Respondents from registering against the register of property L.R. No. 14703 Nairobi Grant No. I.R 74788 dated 21st October 1997 registered in the name of the applicant any documents adverse to the interest of the applicant and from further interfering with the applicant's title and possession of the property and/or taking possession thereof from the applicants.

11. From the replying affidavit of Nzioki Wa Makau, I am satisfied in the absence of any rebuttal, that those proceedings related to the title in the present suit and that those proceedings were pending in court from 18th March 2011 to 24th April 2012. The parties may have had a gentleman's agreement not proceed with the present suit: but it is denied by the 1st defendant. Fundamentally, it is not borne out by the record. Certainly, there was no order in that other suit staying these proceedings. So that is a lame excuse. What I find relevant is that there were concurrent proceedings in this suit and the other suit over the same title and largely between the same parties. But I have also noted a nexus: The court in the judicial review case ordered on 24th April 2012 as follows;

"This prayer is couched in such a way that if it is issued it may mean that this court has established that the Applicant legally acquired the title to the parcel of land in question. This court has not enquired into how the Applicant acquired the parcel of land in question. That issue will be dealt with by the court(s) hearing H.C. Misc. Application No. 587 of 2006 and HCCC No. 253 of 2007. I therefore do not find it appropriate to grant the 3rd prayer in the notice of motion".

12.The plaintiff did not disclose those matters. Yet they are relevant to the motion before the court. The court in the judicial review case ruled specifically that the question of the title be litigated in this suit and another suit. Section 1B of the Civil Procedure Act enjoins counsels and the parties to assist the court to realize the overriding objective. Such material non-disclosure negates that objective. I have also noted that the 1st defendant only moved the court for dismissal on 5th June 2012, less than two months after the above ruling. So much so that whereas the 1st defendant is, as I said, entitled to bring the motion, it is not merited. The reason is that the plaintiff has by reference to the judicial review proceedings, laid a plausible and reasonable explanation for non-prosecution of this suit. Put aptly, there has been inordinate delay in prosecuting the suit: but that delay is excusable in the circumstances.

13.That takes me to the interests of justice. This is a land matter. It is pleaded at paragraph 7 of the plaint that the defendants fraudulently or dishonestly registered the suit land in favour of the 1st defendant. It is also pleaded that this is public land reserved for the National Potato Research Centre-Tigoni and Lands Limited. The latter is impleaded as a public body owned by the Agricultural Development Corporation. Declarations are thus sought that the land belongs to the original allotee and for delivery up and cancellation of the 1st defendant's title. All those are weighty matters. And they should wake up the plaintiff from its slumber. On the face of it, there is a public interest aspect to the litigation. Granted those circumstances, the dictates of justice require that the matter be heard on its merits. There is obviously prejudice to the defendants who have been caught up by the inert grip of the plaintiff. See *Trust Bank (in Liquidation) Vs Kiprono Kittony and others* Nairobi, High Court case 223 of 2002 (unreported), *Mobile Kitale Service station Vs Mobil Oil Kenya Ltd and another* [2004] 1 KLR 1. But each case must be considered on its own unique history and circumstances.

14.The dictum of Justice C.B. Madan (as he then was) in *D.T. Dobie & Company Vs Muchina* [1982] KLR 1 at 5 rings true. The court there was dealing with a different matter of striking out of pleadings. But it held that a "court of justice should aim at sustaining a suit rather than terminating it by summary dismissal". The prejudice suffered by the defendants can be ameliorated by costs: and I am prepared to grant the 1st defendant costs of this motion.

15.For all the above reasons, the 1st defendant's notice of motion dated 18th May 2012 is dismissed. I grant costs of the motion however to the 1st defendant to be paid by the plaintiff. I do not grant any costs to the 2nd defendant.

It is so ordered.

G.K. KIMONDO

JUDGE

DATED and **DELIVERED** at **NAIROBI** this 4th day of November 2012.

G.V. ODUNGA
JUDGE

Ruling read in open court in the presence of

Mr. Machira for the Plaintiff.

Mr. Tuywa for Mr. Havi for the 1st Defendant.

No appearance for the 2nd Defendant.