



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 47 OF 2015

ENOS BUKO AYUB.....1ST PLAINTIFF

KENANI KOMORA BUKO..... 2ND PLAINTIFF

VERSUS

AMANA PETROLEUM (K) LIMITED.....1ST DEFENDANT

MOHAMED AMADA ISAAC.....2ND DEFENDANT

OMAR ISAACK NIZAMDIN.....3RD DEFENDANT

RULING

(Application for dismissal of suit for want of prosecution; application filed during a time when one of the plaintiffs had died and one year for substitution had not lapsed; application therefore filed at a time when the suit was technically in abeyance; application dismissed)

1. Before me is an application dated 10 December 2019 filed by the 1st defendant. It is an application brought pursuant to the provisions of Order 17 Rule 2 (3) of the Civil Procedure Rules, 2010. The order sought is for this suit to be dismissed with costs for want of prosecution. The application is opposed.

2. To put matters into context, the plaintiffs/respondents commenced this suit through a plaint filed on 17 March 2015 which plaint was later amended after leave was granted on 9 July 2015. The 1st plaintiff is father to the 2nd plaintiff. They pleaded that the 1st plaintiff owned the land parcel Mugumo Patsa/Mazeras/455 which he subdivided and sold a portion to Gazi Limited. It was averred that the 1st plaintiff is yet to acquire title to his portion after the subdivision and they have their structures therein. They averred that the 2nd and 3rd defendants own the land parcel Mugumo Patsa/Mazeras/456 which is separated by a road. They pleaded that the defendants have on various occasions crossed the road and entered the plaintiffs' land claiming ownership of it. In the suit they sought orders of a permanent injunction against the defendants and costs. The 1st defendant filed an amended defence wherein they denied that the plaintiffs ever owned the land parcel Mugumo Patsa/Mazeras/455. They pleaded that the land parcel Mugumo Patsa/Mazeras/455 was consolidated with the plots No. 439, 457, 1044 and 1043 to form the plot No. Mgumo Patsa/Mazeras/1129 owned by Kilimanjaro Proventures Investment Limited. They thus pleaded that the plaintiffs are litigating over land that does not exist. The 1st defendant otherwise pleaded ownership of the land parcel Mgumo Patsa/Mazeras/456.

3. The matter went before the Deputy Registrar for parties to comply with pre-trial procedures. I observe that on 6 February 2018, only counsel for the 1st defendant was present and counsel stated that the 1st defendant is ready for hearing. The Deputy Registrar observed that there was no proof of service of summons upon the 2nd and 3rd defendants and gave a further mention date of 17 May 2018. The case did not go to court on that day and on 31 May 2018 counsel for the plaintiff took 2 August 2018 for mention. On that day, counsel for the plaintiff was present but he stated that he served counsel for the 1st defendant late. The issue of service of the 2nd & 3rd defendants arose, with the plaintiff's counsel stating that they were served, but the Deputy Registrar directed fresh service and gave a further pre-trial date of 4 October 2018. I have no record of the case going to court on this day, and nothing seems to have happened since the matter was in court on 2 August 2018, which is probably what prompted the 1st defendant to file this application on 16 December 2019. Before the application could be heard, the court, on its own motion, issued a notice to the plaintiffs to show cause (NTSC) why their suit should not be dismissed for want of prosecution. The NTSC came before court (Njoroge J, visiting Judge) on 11 September 2020. Only Ms. Hashi for the 1st defendant was present and the case was dismissed for want of prosecution. Later on the day, Ms. Athman appeared and submitted that she was not aware of the matter and pleaded for the setting aside off the order of dismissal. This was allowed and the court directed this application be heard before me. That is how I am seized of the matter.

4. The supporting affidavit principally states that the plaintiffs have not demonstrated interest in pursuing this case. This is supported by the 2nd and 3rd defendants.

5. To oppose the motion, a replying affidavit sworn by Daniel Orege, counsel on record for the plaintiffs was filed. He deposed that after the last time the matter was in court, he was informed that the Deputy Registrar had gone on maternity leave till early 2019. Come the year 2019, he avers that he made attempts to have the matter fixed for hearing but it was not possible because there were power blackouts at the archives and they could not obtain the files. He avers that he had to wait for further information from the registry. He tried to reach the plaintiffs in vain and he contemplated ceasing to act but the 2nd plaintiff called at his office with information that the 1st plaintiff is deceased. A death certificate is annexed which shows that the 1st plaintiff died on 7 April 2019. He prepared an application for a grant but it escaped his attention until he got notice that this matter had been listed for dismissal. He has deposed that court sittings were suspended from 16 March 2020 owing to COVID-19 pandemic and he closed his office until sometimes in July 2020. He has deposed that he had to close his office again as some staff in various registries got affected by the pandemic. He has deposed that the 2nd plaintiff is desirous of prosecuting this case to its conclusion. He deposed that the matter landed in court because the parties were unable to negotiate it.

6. A supplementary affidavit was filed by the applicant asserting that a rational explanation for the delay has not been given. It is further deposed that there is no evidence of filing of any application for a grant.

7. I have considered the matter alongside the submissions of Ms. Hashi, learned counsel for the applicant, and Ms. Athman, learned counsel for the plaintiff.

8. This is an application for dismissal of suit for want of prosecution and the law is set out under Order 17 Rule 2 which provides as follows :-

Notice to show cause why suit should not be dismissed [Order 17, rule 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.

9. It will be seen from the above that if a suit remains idle for one year, then the court, or any of the parties to the suit, may apply for its dismissal. The last time the matter was in court before this application was filed was on 2 August 2018. This application was filed on 16 December 2019 which is one year after the matter had been in court.

10. I however think that there is a complication here because the 1st plaintiff died on 7 April 2019, meaning that the case had to remain in abeyance for one year, pending substitution or abatement, in accordance with the provisions of Order 24 of the Civil Procedure Rules. Thus, strictly speaking, it was improper for this application to be filed before the lapse of that one year, as during that time, the case was in abeyance. An application for dismissal of the suit could only be filed after 7 April 2020. The period of inactivity, after 7 April 2019 to the time this application was filed, which is about 8 months, cannot be counted for the one year (12 months) period required to sustain an application for dismissal for want of prosecution. It is because of this technicality that I have little option but to dismiss this application. There will be no orders as to costs.

11. There were other issues raised such as the fact that the replying affidavit is sworn by counsel and not the party, which are pertinent, but given the circumstances above, I do not find it necessary to address them. It is due to the legal technicality on abeyance of suits for one year, pending substitution or abatement of a deceased party, that makes this application fail.

12. Orders accordingly.

DATED AND DELIVERED THIS 19TH DAY OF NOVEMBER 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA