



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Civil Case 60 of 2006

MARTIN MUGAMBI 1ST PLAINTIFF

AGNES MWIMBI 2ND PLAINTIFF

VERSUS

NJERU NYAGA alias NDURURU NYAGA. DEFENDANT

RULING

The defendant has filed a Notice of Motion dated 11th June 2008 brought under Order XVI Rule 5 of the Civil Procedure Rules. The defendant seeks for the dismissal of the plaintiff's suit for want of prosecution. The application is premised on the grounds that more than three months have elapsed since the matter was last in court and no action had been taken, that the plaintiffs had not set down the suit for hearing and, that there is inordinate delay in the prosecution of the suit. In the affidavit in support, the advocate for the defendant deponed that the suit was last in court on 13th December 2007. That it appeared that the plaintiffs are not interested in pursuing their case. The 1st defendant responded to the application by a replying affidavit. He began by saying that he was swearing that affidavit on his own behalf and on behalf of the 2nd plaintiff. On this point, the defendant argued that the 1st plaintiff was not qualified to swear an affidavit on behalf of the 2nd plaintiff without the specific authority from the said 2nd plaintiff. I find that that objection by defendant was well taken. As correctly stated by learned defence counsel Joe Kathungu, Order 1 Rule 12(1) of the Civil Procedure Rules provides that for one party to act for the other written authority of such authorization ought to be filed in the case file. That Rule provides:-

“Where there are more plaintiff than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceedings, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceedings.”

As matters stand therefore, there is no response to the defendant's application on behalf of 2nd plaintiff. The 1st plaintiff further deponed in part thus:-

“That the matter came for hearing on 23.5.2007, 08.08.2007, 13.12.2007 and we have been willing and eager to get the matter sorted out.

That all the previous dates were fixed by consent and we have never shied (sic) away from the hearing

of the matter herein.

That we were waiting for the advocate to inform us of the hearing date just to be told that the application herein has been filed.

That there were issues we were informed on 3.8.07 which were to be sorted out in the 127/1996 (sic) before the hearing herein and the same is still to be sorted out.”

The plaintiffs relied on the case of HCCC No. 206/1995 Meru where Hon. Justice Onyancha had this to say:-

“I have considered these facts and in my view, unless either party’s conduct can execute the plaintiff, this suit is liable for dismissal without much ado. As stated by Kneller. J. (as he then was) in the case of ET MONKS & CO. LTD VRS. EVANS (1985) KLR 584, whether an application for dismissal of a suit for want of prosecution should be allowed or not is a matter of the discretion of the judge who must exercise it judicially.”

The same judge in HCCC No. 43 of 1988 Kenya Industrial Estates Ltd – Vrs – Guilford Riungu Ndubi & 3 others Meru stated:-

“The court has to consider the length of the delay, the parties to the suit, availability of evidential documents, the availability of the witnesses and/or the expenses likely to be used to avail the witnesses or the documents. The court will also consider whether a trial, taking into account the length of delay, will render a fair trial impossible.”

The relevant Rule under which the present application is considered is OXVI Rule 5. That rule provides:-

“If, within three months after-

(a) the close of pleadings; or

(b) (deleted)

(c) The removal of the suit from the hearing list; or

(d) The adjournment of the suit generally, the plaintiff, or the court of its own motion on notice to the parties, does not set down the suit for hearing, the defendant may either set the suit down for hearing or apply for its dismissal.”

In this case, the suit was fixed for hearing on 23rd May 2007. On that date the defence raised a query about another suit, namely HCCC No. 127 of 1996 where the 2nd plaintiff in this suit was the 3rd plaintiff. Plaintiff’s counsel sought for time to acquaint himself with that suit which was being handled, according to him, by another counsel. The matter was adjourned to 3rd August 2007. On that date, it seems as though the court was not sitting. It does, in any case, seem to have been during the summer high court vacation. The case was next fixed for hearing on 13th December 2007. The proceedings of this case do not show what happened on 13th December 2007. Needless to say that the plaintiffs did not again fix this case for hearing; no attempt was even made after the present application was filed, to try to fix the suit for hearing. The plaintiff either cared less or was caught in a stupor once the application for dismissal was filed. As can be seen from the replying affidavit of 1st plaintiff, no explanation was given why the suit was not fixed for hearing after December 2007. In this regard, the holding in case of Fitz Patrick Vrs. Batger and Co. Ltd (1967) 2 ALLER 657 is very apt. It was held:-

“.....I said that 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 plaintiffs did not fulfill that duty and much more they failed to give explanation why they were unable to fulfill it. The lame excuse given about the existence of HCCC No. 127 of 1996 cannot assist them because that issue was raised on 23rd May 2007. What, might I ask, did they do from that date up to the date the defendant filed his application. The court will never know because the plaintiff failed to disclose. If the plaintiff had wished the court to exercise its discretion in their favour, they were duty bound to place before court material to assist the court exercise that discretion. I got the clear impression that the plaintiffs were half hearted in their response to the defendant's application. It also did not assist them in stating that if the suit was dismissed, they would be evicted by defendant. When they laid back and failed to fix the case for hearing, did they not know that if the suit was dismissed there was the danger of their eviction? In case the plaintiffs are wondering why the court is taking the view that failure to fix the case for hearing would lead to the dismissal of the suit, I will borrow from the following decision for an answer. In the case of HCCC No. 593 of 2001 (Milimani) **National Industrial Credit Bank Ltd Vrs. Fresco International Ltd & Others (Unreported)** where the court stated:-

“I agree with 2nd defendant that the continued silence and inactivity on the part of the plaintiff was prejudicial to the interest of the 2nd defendant. Perpetual apprehension of the 2nd defendant to my mind is sufficient demonstration of the prejudice that the 2nd defendant will suffer if this application is not allowed.”

Also the holding in **HCCC No. 117 of 2003 Milimani Fidelity Commercial Bank Ltd – Vrs. Muthoga Gaturu & Co. Advocates**, was in following terms:-

“In that regard, I find that there will be much prejudice suffered by the defendants in having such an action hanging over them, and not knowing when it was going to be brought to trial, that indeed is tantalizing torment.”

The plaintiffs had a duty to prosecute their suit with diligence. The fact that the subject matter of this suit was land was more the reason they should have embraced that duty with seriousness. The defendant should not be tormented by an outstanding suit.

In the end, I find the Notice of Motion dated 11th June 2008 is merited. The orders of this court are:-

- (i) That the plaintiffs' suit is dismissed for want of prosecution with costs to the defendant.**
- (ii) The costs of the Notice of Motion dated 11th June 2008 are also awarded to the defendant.**

MARY KASANGO

JUDGE

Dated and delivered at Meru this 2nd day of July 2009.

M.J.A. EMUKULE

JUDGE