



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI LAW COURTS)
CIVIL CASE 365 OF 2004

JULIUS KIIO MUKEKU

DANIEL MWOLOLO MAKAU

EDWARD MUTINDA NDETEI PLAINTIFFS

VS.

ALOICE MWAIWA MUIA 1ST DEFENDANT

MAKUENI COUNTY COUNCIL 2ND DEFENDANT

RULING

The plaintiffs herein brought this suit against the two defendants claiming that the defendants had encroached and trespassed on their parcels of land, which acts were wrongful and unlawful. As a result, they asked for a permanent injunction to issue against both defendants to restrain them from trespassing or otherwise interfering with property known as Emali Plot Nos.400-600.

At the instance of the plaintiffs a restraining order was given by Ransley J, some time in the year 2004. Thereafter, the plaintiffs did not move the court to facilitate the disposal of this case. It is this inaction on the part of the plaintiffs that, by a Notice of Motion filed on 8th April 2009, the 2nd defendant has moved the court for orders that the plaintiffs' suit be dismissed for want of prosecution.

The record shows that the plaintiffs' advocates were served with this application, but on the date it was called out for hearing, there was no appearance on their part and the court being satisfied that the notice was properly served proceeded to hear the application.

The application is under Order XVI Rule 5 of the Civil Procedure Rules and section 3A of the Civil Procedure Act. The grounds upon which the 2nd defendant relies to obtain the said orders are that, since the matter was filed before the court on 14th April 2004, the plaintiffs have not taken any step to fix the same for hearing. It is well over three months since the hearing was last adjourned and the plaintiffs are guilty of inordinate and inexcusable delay in prosecuting the matter. Above all, litigation must come to an end.

The application is supported by an affidavit sworn by one Danson N. Ngugi who is said to be the County Clerk of the said 2nd defendant. I have also heard the learned counsel for the 2nd defendant and read the authorities he has cited before me.

It is true that, after obtaining restraining orders which must be sometime in June 2004, the plaintiffs have not moved the court to prosecute this suit. I believe they must have been satisfied with the restraining orders and their failure to prosecute the same in my view is, inordinate delay, considering that it is now 5 years since the restraining orders were granted by Ransley J.

Litigation, it is true, must come to an end and, a party is bound to prosecute any pleadings he files in court, otherwise any delay associated with inaction on his or her part may be prejudicial to the other party.

This suit involves parcels of land and chances are that land may change hands severally to the detriment of the defendants. In that case, any trial after a lengthy period of time is likely to be prejudicial to the defendant and a fair trial cannot be guaranteed.

The 2nd defendant is perfectly in order to bring the application now on record in view of the provisions therein because, the pleadings have been closed and no steps have been taken by the plaintiffs to prosecute the case. In the absence of any reply to the said application on the part of the plaintiffs, I find that the evidence of the 2nd defendant by way of affidavit and the submissions by the learned counsel remain uncontroverted.

In that regard therefore, I find that there is every justification to grant the orders sought by the 2nd defendant. Accordingly, the plaintiffs' suit herein is hereby dismissed for want of prosecution with costs to the defendant.

Orders accordingly.

Dated, signed and delivered at Nairobi this 5th day of **October, 2009.**

A. MBOGHOLI MSAGHA

JUDGE