



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT EMBU

JUDICIAL REVIEW APPLICATION NO. 53 OF 2014

IN THE MATTER OF AN APPLICATION BY NJIRU MIRURI FOR AN ORDER OF CERTIORARI

AND

IN THE MATTER OF LAND DISPUTES TRIBUNAL (ACT NO. 18 OF 1990)

AND

IN THE MATTER OF LAND PARCEL NO. NTHAWA/KIRIE/1517

REPUBLIC.....APPLICANT

VERSUS

SIAKAGO DISTRICT DISPUTES TRIBUNAL.....1ST RESPONDENT

PRINCIPAL MAGISTRATE COURT SIAKAGO.....2ND RESPONDENT

AND

NJERU MIRURI.....EX-PARTE APPLICANT

DIONISIUS NJUKI MUKAINDO.....INTERESTED PARTY

RULING

1. By a notice of motion dated 8th September 2016 brought under the provisions of **sections 1A, 1B and 3A of the Civil Procedure Act (Cap 21 Laws of Kenya), Order 2 Rule 15 (1), Order 40 Rule 10 (1) (a) and (b), Order 51 Rule 1 of the Civil Procedure Rules**, the **inherent jurisdiction of the court** and **all other enabling provisions**, the interested party sought the following orders;

a. Spent

b. That this honourable court be pleased to dismiss the judicial review application Miscellaneous Civil Application No. 25 of 2013 filed by the ex-parte Applicant, Njeru Miruri, for want of prosecution.

c. That this honourable court be pleased to uphold the findings of the Siakago Land Disputes Tribunal in Claim No. 416 of 2009 and the subsequent judgement and decree of the Senior Principal Magistrate's Court at Siakago, LDT No. 15 of 2012 which awarded the whole of land parcel No. Nthawa/Kirie/1517 to Dionisius Njuki Mukaindo, the interested party herein and directed the Land Registrar to transfer the said parcel from Njeru Miruri, the ex-parte Applicant to the interested party.

d. That an order to issue compelling the ex-parte Applicant, Njeru Miruri to immediately transfer the whole of the parcel of land, parcel No. Nthawa/Kirie/1517 to Dionisius Njuki Mukaindo, the interested party/Applicant herein.

e. That in the alternative, the court do issue an order compelling the District Land Registrar or other authorized officer of the court to execute the transfer documents relating to the whole of the land, parcel No. Nthawa/Kirie/1517 pursuant to the findings of the Siakago Land Disputes Tribunal and the subsequent judgement and Decree of the Senior Principal Magistrate's Court at Siakago,

LDT No. 15 of 2012 which awarded the whole of land parcel No. Nthawa/Kirie/1517 to Dionisius Njuki Mukaindo, the interested party herein and directed the Land Registrar to transfer the said parcel from Njeru Miruri, the ex-parte Applicant to Dionisius Njuki Mukaindo, the interested party/Applicant herein.

f. That an order do issue directing the District Land Registrar to expeditiously transfer and issue title to Dionisius Njuki Mukaindo, the interested party/Applicant herein for the whole of the land, parcel No. Nthawa/Kirie/1517 in accordance with the findings of the Siakago Land Disputes Tribunal and the judgement and decree of the Senior Principal Magistrate's Court at Siakago.

g. That this honourable court do issue a temporary injunction preventing any dealings with the whole of land parcel No. Nthawa/Kirie/1517 pending the transfer of the whole of the parcel of land from Njeru Miruri, the ex-parte Applicant to Dionisius Njuki Mukaindo, the interested party/Applicant herein.

h. That this honourable court do issue a permanent injunction restraining Njeru Miruri, the ex-parte Applicant herein, his servants, agents, assignees or any other person acting under his instruction from in any way interfering or dealing with the whole of the land parcel No. Nthawa/Kirie/1517 henceforth.

i. That costs of this application and the ex-parte Applicant's application dated 8th March 2013 be awarded to the interested party.

2. The said application was based upon the several grounds set out on the face of the motion. The grounds basically set out the history of the dispute between the ex-parte Applicant (hereinafter *the Applicant*) and the interested party dating way back to 1983. The dispute was taken before the Location Chief, the Land Disputes Tribunal (hereinafter *the Tribunal*) and the Senior Principal Magistrate's Court at Siakago in LDT Case No. 15 of 2012. The Applicant ultimately filed the instant application for judicial review to quash the award of the Tribunal in 2013 but has never prosecuted it since then.

3. The said application was supported by the affidavit sworn by the interested party on 8th September 2016 in which he reiterated and expounded upon the grounds set out in the notice of motion. It was contended that the Applicant had failed to prosecute his application for judicial review to his prejudice hence he wanted the same to be dismissed for want of prosecution and for the rest of the orders sought in the instant application to be granted.

4. The Applicant filed a replying affidavit sworn on 18th September 2017 in opposition to the said application. He stated that he was still interested in prosecuting his application for judicial review dated 8th March 2013. He contended that the delay could not be solely attributed to him since the interested party was partly to blame. It was further contended that he had encountered some financial constraints and that the court file had at some point been transferred to Kerugoya for hearing.

5. When the said application was mentioned before the Deputy Registrar on 11th June 2018, the parties consented to canvass the said application through written submissions. The record shows that the Applicant filed his submissions on 6th July 2018 but there is no indication of the other parties having filed their submissions.

6. The court has considered the interested party's said application, the Applicant's replying affidavit in opposition thereto as well as the submissions on record. The court has also considered the record of proceedings and the history of the long running dispute between the parties. Although the interested party has sought a raft of other reliefs and orders in his notice of motion, the court is of the opinion that the only legitimate question for determination herein is whether or not the application for judicial review should be dismissed for want of prosecution. The rest of the prayers belong to a different forum and not the court sitting as a judicial review court.

7. It is relatively well settled in law that it is the duty of a litigant who initiates legal proceedings to ensure that he prosecutes the suit or application to its logical conclusion. Such party cannot shift blame to the adverse party by accusing him of acquiescence or contribution to the delay in the prosecution of the suit. In the case of **Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd [1969] EA 696** it was held, *inter alia*, that;

“The second matter relates to the undoubted delay in the hearing by the High Court of this case. It is the duty of a Plaintiff to bring his suit to early trial, and he cannot absolve himself of his primary duty by saying that the Defendant consented to the position...”

8. The court does not accept as lawful justification the suggestion by the Applicant that a litigant who is financially constrained should keep legal his opponent in court for more than 5 years without prosecuting his suit. A litigant should only move the court when he is prepared to prosecute the suit to its logical conclusion. A party who files a suit and leaves it dormant for several years as he seeks to replenish his financial resources risks having the suit dismissed for want of prosecution or struck out for being an abuse of the process of court. As was held by Lord Denning MR in **Allen V Sir Alfred McAlpine & Sons Ltd [1968] 1 ALL ER 543**;

“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 (Bleake House, C1). To put right with 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.”

9. The Applicant has also attributed the delay to the fact that the jurisdiction of the High Court to try environment and land matters was challenged before the Court of Appeal and that there was a period of time during which the suit could not be prosecuted. The court is aware that when the Court of Appeal declared that mixed benches were unconstitutional in May 2015, the Environment and Land Court Judge at

Kerugoya took up the hearing of Environment and Land Court matters filed at Embu. The only period when Embu did not have a resident Environment and Land Court Judge was a period of about one and a half years i.e. between May 2015 and December 2016.

10. The court is aware that the Environment and Land Court Judge at Kerugoya would make periodic visits to Embu to hear environment and land matters whereas he would also deal with some from Kerugoya. The record of proceedings shows that the court file was first transferred to the Environment and Land Court at Kerugoya on 23rd December 2013 and then transferred back to Embu the following year on 16th December 2014. Thereafter, the Applicant did not take steps to prosecute his application for judicial review for nearly two years till the interested party filed the instant application on 8th September 2016. The record also reveals that even after the interested party filed the said application, the Applicant did not take any steps such as taking directions on the hearing of his application.

11. Even after a new Judge of the Environment and Land Court was posted to Embu in 2017, the Applicant did not take any positive steps towards prosecution of the matter. He was merely content in filing written submissions to the application for dismissal of the application for judicial review.

12. In the Kenyan case of **Ivita Vs Kyumbu [1984] KLR 441** the test to be applied in applications for dismissal of suits for want of prosecution was summarized as follows by Chesoni J (as he then was);

“So the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the Plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the Plaintiff’s excuse for the delay and that justice can still be done to the parties notwithstanding the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time. Where the Defendant satisfies the court that there has been prolonged delay and the Plaintiff does not give sufficient reason for the delay the court will presume that the delay is not only prolonged but it is also inexcusable and in such case the suit may be dismissed. To put it in the words of Salmon LJ in Allen Vs McAlpine, at p 561 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.” (Emphasis added).

13. There is no doubt in the circumstances of an application for judicial review that there has been considerable delay in its prosecution. The Applicant obtained leave on 21st February 2013. It was ordered that the said leave do operate as stay. The Applicant upon filing the notice of motion dated 8th March 2013 was no longer keen on prosecuting the matter despite having moved the court under certificate of urgency. He was content to enjoy the order of stay obtained *ex-parte* and to look for additional resources to prosecute his application some years later. As it has turned out, it is now the 6th year since the institution of the proceedings and he has never taken any concrete steps towards its prosecution. And as indicated in the earlier part of the judgement, the court is not satisfied that any legitimate reasons have been tendered by the Applicant to justify the lengthy delay in the prosecution of the matter.

14. The next aspect for consideration is whether justice can still be done in spite of the lengthy delay. This aspect goes hand in hand with the risk of prejudice to the interested party. The court has noted from the material on record that the dispute between the warring parties has been around for decades. They have been before the Chief, the Tribunal and the Magistrate’s Court in the past. They are now before this court. The Applicant does not appear to be in a hurry to have the matter concluded. The interested party has to contend with the litigation hanging over his head and the attendant costs. The court is of the opinion that the interested party shall suffer prejudice if the instant suit is sustained. The interests of justice may well be served by dismissing the matter for want of prosecution.

15. The upshot of the foregoing is that the court is satisfied that the interested party has made out a case for dismissal of the application for judicial review for want of prosecution. The interested party’s notice of motion dated 8th September 2016 is hereby allowed in terms of order No. 2 only. Accordingly, the notice of motion dated 8th March 2013 is hereby dismissed for want of prosecution. The rest of the orders in the said application are hereby declined. Each party shall bear his own costs.

16. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 28TH day of MARCH, 2019.

In the presence of Ms Kiai holding brief for Ms Ndorongo for the Applicant and in the absence of the Respondents and the interested party.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

28.03.19