



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND ACT AT MURANGA**

**ELC NO. 29 OF 2018**

**WILSON NJOROGE KAMAU.....PLAINTIFF**

**VS**

**WILSON MWANGI NGONI.....1<sup>ST</sup> DEFENDANT**

**JAMES NGONI NDIRANGU.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. On the 25/8/2005 the Plaintiff moved this Court by way of Originating Summons taken out against the Defendants for the following questions;

a. That the Plaintiff/Applicant be declared the proprietor of Land reference No. LOC.2/KANGARI/34 (certified copy of extract of the Land Register attached to affidavit) by virtue of his adverse possession for the period prescribed in the Limitation of Actions Act Cap 22 Laws of Kenya.

b. That the replacement of ownership of the Plaintiff instead of WILSON MWANGI NGONI and JAMES NGONI NDIRANGU by virtue of the right of the Plaintiff of L.R. Number LOC.2/KANGARI/34 directed to the Land Registrar Murang'a and transfer of the said land be effected in the name of the Plaintiff.

c. That the Land Registrar Murang'a be directed that the order herein shall be an instrument of transfer of ownership of LOC.2/KANGARI/34 from the Defendants to the Plaintiff.

d. That the Defendants/Respondents be restrained from entering, wasting, damaging, or in any way alienating or disposing the Land reference Number LOC.2/KANGARI/34 until the final decision of this matter.

2. Subsequently the Plaintiff by a Chamber Summons dated the 5/9/2005 sought an order for injunction against the Defendants from evicting and or interfering with the suit land. On the 18/11/2005 the Court dismissed the said application with costs.

3. As was expected the Defendants resisted the Plaintiff's claim and filed a Replying Affidavit dated the 4/10/2005.

4. For 3 years nothing significant towards setting the matter for hearing seems to have taken place until on the 28/11/08 the Hon Justice Osiemo directed the parties to fix the matter for hearing on priority basis.

5. It would appear that this directive of the Court was not complied with fully forcing the Defendants to file a motion dated the 21/9/17 seeking the following orders;

a. The suit against the Defendants which is over agricultural land parcel No LOC 2/KANGARI/34 registered in the names of the Defendants since 1986 be dismissed for want of prosecution on the part of the Plaintiff .

b. Costs of the application.

6. The application is based on the grounds adduced and on the supporting affidavit deposed by Wilson Mwangi Ngoni on the 21/9/17. In it he deposed that the suit was filed in 2005 and the Plaintiff has not set it down for hearing to date. That the last time the case was in Court was on the 19/2/14 when the Plaintiff partially testified. That the delay in prosecuting the case is prejudicing him. That the Plaintiff has lost interest in the suit and his claim ought to be dismissed.

7. The application is opposed by the Plaintiff who has set out the activities that have taken place in the file from 2014 when the matter was

heard partly in Nyeri. A number of reasons have been adduced such as the Court was not sitting, the file was transferred to the Environment and Land Court division from the High Court, Court diary had closed inter alia until the current application was filed in 2017. In conclusion the Plaintiff urged the Court that he has been keen in prosecuting the case and the application is brought in bad faith and aimed at preventing justice for the Plaintiff. He urged the Court to dismiss the application.

8. On the 22/1/19 parties with the concurrence of the Court elected to prosecute the application by way of written submissions. I have read and considered the submissions on record. The key issue for determination is whether the application is merited.

9. Order 17 rule 3 Civil Procedure Rules provides as follows ;

“Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the modes directed in that behalf by Order 12, or make such other order as it thinks fit”.

10. In the case of **Ivita Vs Kyumbu Justice Chesoni (1994) KLR 441** had this to say; see page 250 of commentary.

“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 by the delay or even that the plaintiff 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 words of Salmon LJ in *Allen V McAlphine*, 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”.

11. The long and short of the above is that the test in evaluating an application for dismissal for want of prosecution are; whether there has been delay; whether the delay is inordinate; whether there is prejudice to be suffered by the opposite party as a result of delay; whether justice can still be rendered in spite of delay.

12. I have carefully perused the proceedings in this case and a summary is important; on the 28/11/08 the Hon Justice Osiemo directed that the matter be fixed for hearing on a priority basis. On the 21/10/10 the Defendants’ Advocate sought an adjournment for the reason that his client was hospitalized. The Plaintiff did not have any objection. On the 21/3/11 the Plaintiff sought an adjournment because his lawyer was ill. It being unopposed by the defense, the Court granted the same. On the 30/4/13 the hearing was again adjourned because the English version of the kikuyu translation of an agreement of sale had not been served on the defense forcing the matter to be adjourned. On the 18/9/13 the adjournment was because the witness was unwell. The matter was particularly heard on the 3/12/13 before Hon Justice Ombwayo but on the 19/12/14 it was adjourned because the Counsel for the Plaintiff was absent in Court. The Plaintiff however was present but could not proceed with his case in the absence of his Counsel.

13. For a period of 4 years there was no activity until the file was transferred to Murang’a Environment and Land Court.

14. Fortified by Article 159 of the Constitution I am persuaded that despite the delay which I find inordinate, justice can still be done to the case if it is heard on its merits. The Defendant did not state to the Court what prejudice he stands to suffer which cannot be met with costs if the application is disallowed.

15. I dismiss the application. I order the Plaintiff to pay all the costs of the Defendants from the 3/12/13 to date. The costs to be agreed and in default the same be taxed by the taxing master of the Court.

16. I direct the Plaintiff to fix the matter for hearing on priority basis but in any event within the next 21 days from the date of this ruling. In default the suit shall stand dismissed with without the necessity of any further orders.

**DELIVERED, DATED AND SIGNED AT MURANG’A THIS 28TH DAY OF MARCH, 2019.**

**J G KEMEI**

**JUDGE**

**Delivered in open Court in the presence of;**

Ms Muthui HB for Kinyanjui for the Plaintiff

Mr Opiyo HB for Kamiro for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

Irene and Kuyiki, Court Assistants