



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 87 OF 2018

ALICE CHELANGAT TOWETT.....1ST PLAINTIFF

JULIE CHEMUTAI TOWETT.....2ND PLAINTIFF

VICTORIA CHEPKEMOI.....3RD PLAINTIFF

VERSUS

RAEL CHELANGAT.....1ST DEFENDANT

DAVID NGASURA KONES.....2ND DEFENDANT

GEORGE OGENGO.....3RD DEFENDANT

LAND REGISTRAR.....4TH DEFENDANT

RULING

(Application for dismissal of suit for want of prosecution; record not reflecting negatively upon the plaintiff; there was inactivity for a year but the file appears to have been misplaced; applicant also having a counterclaim which he could as well have listed for hearing over the same duration that applicant is complaining that the plaintiff was inactive; application dismissed)

1. The application before me is that dated 20 February 2018 filed by the 1st defendant. The application is brought pursuant to the provisions of Order 17 Rule 2 (1) and seeks orders that the plaintiff's suit be dismissed with costs for want of prosecution. It is the view of the applicant that the plaintiff/respondent has lost interest in the case and has not taken steps to list the case for hearing despite the case having been instituted in the year 2003. The application is opposed.

2. To put matters into context, this case was filed on 26 September 2003 by one Julia Chemutai Towett who filed suit on her own behalf and as holder of a power of attorney on behalf of Victoria Chepkemoi Towett and Alice Chelangat Towett. The case was registered as Nakuru HCCC No. 155 of 2003. In the plaint, the said Julia, pleaded inter alia that she is the registered owner of the land parcel Nakuru/Sururu/83 while Victoria Chepkemoi Towett and Alice Chelangat Towett are the proprietors of the land parcel Nakuru/Sururu/82 and Nakuru/Sururu/84 respectively. It was contended that the defendants, Jacob Maritim Mosop, Rael Chelangat, David Ngasura Kones and George Ogenko, have trespassed into the said parcels of land. It was further pleaded that George Ogenko is a Land Registrar in Nakuru and has caused himself to be fraudulently registered as proprietor of the land parcel Nakuru/Sururu/83. In the suit the plaintiff asked for a cancellation of the title of Mr. Ogenko and for eviction orders against all the other defendants.

3. There is a related file, registered as Nakuru HCCC No. 205 of 2003) instituted by David Ngasura Kones (3rd defendant in the suit Nakuru HCCC No. 155 of 2003) where he sued one Edwin Langat Kirui. He claimed to be the owner of the land parcel Nakuru/Sururu/82 (one of the land parcels in issue in the suit Nakuru HCCC No. 155) and complained that the defendant went to illegally occupy the land. He asked for a permanent injunction to restrain the said Edwin Langat from the land.

4. On 15 April 2011, George Ogenko (4th defendant in the suit Nakuru HCCC No. 155 of 2003), filed his own suit which was registered as Nakuru HCCC No. 89 of 2011. He contended to be the owner of the land parcel Nakuru/Sururu/83 (a subject in Nakuru HCCC No. 155 of 2003) and in the case he sued one Francis Odiaga and David Langat for trespass and orders of permanent injunction against them.

5. The matters were in court separately until they were consolidated on 31 May 2013. On 19 October 2015, the file to the case Nakuru HCCC NO. 89 of 2011 was placed before me but the files to HCCC No. 155 of 2003 and HCCC No. 205 of 2003 could not be traced and I gave an

order authorizing a reconstruction of the file. On 16 March 2016, Mr. Nyaribo, appearing for the respondent informed the court that the two files have been reconstructed. On that day, I gave directions for amendment of the plaint so that the plaint in that case takes into account all the other suits. This was aimed at having only one case instead of three. An amended plaint was duly filed on 13 July 2016 and the applicant herein filed his amended defence and counterclaim on 16 July 2016. The other parties also filed their defences and the respondent replied to the same. On 19 July 2016 the case was to be mentioned for directions but no counsel appeared in court. I have seen from the record that M/s Onyinkwa & Company Advocates, counsel for the 2nd and 3rd defendants took a date on 23 March 2018 for a mention due on 28 May 2018 but the file appears to not have been brought to court on that day. Nothing transpired until this application was filed.

6. In replying to the motion, the respondent/plaintiff has inter alia through his counsel, pointed out that the court directed that the pleadings be amended which was duly done. They were however unable to progress with the suit as the file got misplaced and some letters written to the Deputy Registrar informing about the missing court file are annexed. It was thus stated that it cannot be true that the respondent has lost interest in the matter.

7. The 2nd and 3rd defendants did not support the application. Through grounds of opposition they have resisted the claim that this matter has been dormant.

8. I have considered the case. This is an application for dismissal for want of prosecution. Order 17 Rule 2 upon which the application is premised provides as follows :-

2. 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 a party may apply for the dismissal of the suit for want of prosecution if no step is made or action taken for one year. In this case, I can see that the case was last in court on 19 July 2016 when no party attended and the case was stood over generally. This application was filed on 21 February 2018. Whilst it is true to state that more than one year had lapsed from the time the matter was last in court, I am not convinced that this was due to a lack of interest on the part of the plaintiff. I have seen that the plaintiff through his advocates on record did write the letter dated 25 May 2017 to the Deputy Registrar, which letter was received in court on 26 May 2017, that the court file is not available to enable them file some documents. Counsel asked the Deputy Registrar to mobilize the court staff in order to trace the file. I note that this letter was actually copied to counsel for the applicant. Apart from that, the past conduct of the plaintiff demonstrates a keen litigant. The plaintiff did comply with the court order on amendment of pleadings and her counsel has been attending court regularly save for the court attendance of 19 July 2016 where indeed no counsel, including counsel for the applicant attended.

10. I am therefore not persuaded that this case is fit for dismissal for want of prosecution. I think the applicant could as well have listed the case for hearing for he himself has a counterclaim. It can as well be inquired why he has not set down his counterclaim for hearing for the same duration of time that he is complaining that the plaintiff has not set down her case for hearing.

11. I do not see why the applicant thought of filing this application rather than listing his counterclaim for hearing. The record of the case does not reflect negatively upon the plaintiff.

12. For the reasons above, I see no merit in this application and it is hereby dismissed. Indeed, to me, this application was completely unnecessary and thus the plaintiff and 2nd and 3rd defendants shall have the costs of the same as against the applicant.

13. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 12th day of March 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In Presence of :-

Mr. R.K Langat holding brief for Mr. Andama for the applicant.

Mr. Geke for the plaintiff/respondent.

No appearance on the part of M/s Onyinkwa & Co. for the 2nd & 3rd defendants.

Court Assistant : Nelima Janepher

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU