



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 62 OF 2018

NTHENYA MUIA MUTIO.....PLAINTIFF/RESPONDENT

VERSUS

JOHN NDETO KYALODEFENDANT/APPLICANT

R U L I N G

1. What is before Court for ruling is the Defendant's/Applicant's Notice of Motion Application expressed to be brought under Order 8 Rule 7 of the Civil Procedure Rules 2010 for orders:-

1) That the instant suit herein be dismissed for want of prosecution.

2) That costs do abide the application.

2. The application is predicated on the grounds on its face and is supported by the affidavit of John Kyalo Ndeto, the Defendant/Applicant herein sworn at Machakos on 30th October, 2018.

3. The Defendant/Applicant has raised the following grounds;

(1) That Plaintiff has lost interest in the case.

(2) That matter has been inactive for more than six (6) years.

(3) That suit was filed in 2012, six (6) years ago.

(4) It is fair that the suit be dismissed with costs.

4. Nthenya Muia Mutiso, the Plaintiff/Respondent herein, has opposed the application vide her replying affidavit sworn at Machakos on 13th November, 2018 and filed in Court on even date.

5. In his affidavit, the Defendant/Applicant repeated the very same grounds that the application is predicated on. On the other hand, the Plaintiff/Respondent has deposed in paragraphs 2 and 3 of her affidavit there is no suit pending since Machakos ELC No.73 of 2009 was heard and determined. The Plaintiff/Respondent has annexed a copy of the said judgment as NMM1. The Plaintiff/Respondent has further deposed in paragraph 4 of her affidavit that she is aware that there should not be two suits in any Court touching on the same issue.

6. Both parties filed their respective submissions pursuant to the Court's direction that the application be disposed by way of written submissions.

7. The Defendant/Applicant's Counsel's submissions were that the legal basis for dismissal of suits for want of prosecution is the requirement of expediency in the prosecution of civil suits as dictated by Article 159(2)(b) of the Constitution as well as Section 3A of the Civil Procedure Act. The Counsel further cited Sections 1A, 1B of the Civil Procedure Act that provide for the overriding objective in the administration of justice.

8. The Counsel cited the case of **ET Monks & Company Ltd. Vs. Evans [1985] 584** where the Court stated thus;

"It is clear that the process of the judicial system requires that all parties before the Court should be given an opportunity to present their cases before a decision is given. It is, therefore, not possible that the rules committee intended to leave the plaintiff without remedy and take away the authority of the court when it made Order IVI Rule 5 of Civil Procedure Rules.

The Counsel went on to cite the case of **Naftali Onyango vs. National Bank of Kenya [2005] eKLR** where F. Azangalala J (as he then was) stated;

“The defendant must show:-

i) That there had been inordinate delay. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case but it should not be too difficult to recognize inordinate delay when it occurs.

ii) That this inordinate delay is inexcusable. As a rule until a credible excuse is made out the natural inference would be that is inexcusable.

iii) That the defendants are likely to be seriously prejudices by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff or between themselves and the plaintiff or between each of other or between themselves and third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule the longer the delay the greater the likelihood of prejudice at trial.”

9. Flowing from the above, the Counsel urged the Court to find that the Defendant’s/Applicant’s application to dismiss the Plaintiff/Respondent’s suit is merited and accordingly allow it.

10. The Plaintiff/Respondent submitted that Machakos Environment and Land Court could not have heard and determined ELC No.73 of 2009 if the suit herein was still pending. The Plaintiff/Respondent was of the view that the Court abandoned this suit and as such, there is no suit pending before this Court. She urged the Court to dismiss the application for lack of merit.

11. Having read the submissions filed herein, it is clear that there was indeed another matter at Machakos Environment Land Court being ELC No.73 of 2009. The Plaintiff/Respondent has averred as to the existence of the said suit in paragraph 8 of her plaint. Parties herein are agreed that the aforementioned suit was heard and determined.

12. The above being the case, it is pretty obvious that to proceed with the hearing of this matter would amount to an academic exercise since the issues in dispute are the same issues that were determined in aforementioned case.

13. I have perused this file and I see no evidence of abandonment of the suit or withdrawal. In my view, the Plaintiff/Respondent ought to have taken steps to withdraw this matter. She however did not do so. What are the steps to be taken in this matter? For the reasons that I have given, the suit cannot be dismissed for want of prosecution. It can only be struck out. In the circumstances, I hereby proceed to strike out the suit. I further direct that each party will bear their own costs. It is so ordered.

Signed, dated and delivered at Makuani this 25th day of April, 2019.

MBOGO C. G.,

JUDGE.

In the presence of:-

Mr. Hassan holding brief for Mr. Tamata for the Defendant

Plaintiff/Defendant present

Ms. Nzioka – Court – Assistant

MBOGO C.G, JUDGE,

25/04/2019.