



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 39 OF 2015

ELLY ROBERT ONYURO (Suing as the Personal Representative of the estate of)

ALICE AKOTH OKONG'O.....PLAINTIFF

VERSUS

ROSEMARY ADHIAMBO ODINGA.....1ST DEFENDANT

SKYLARK CONSTRUCTION LIMITED.....2ND DEFENDANT

GIRO COMMERCIAL BANK LIMITED.....3RD DEFENDANT

THE COUNTY LAND REGISTRAR

(KISUMU COUNTY.....4TH DEFENDANT

RULING

1. Skylark Construction Ltd, the 2nd Defendant, moved the Court through the motion dated 3rd April 2017, seeking for the Plaintiff's suit to be dismissed with costs for want of prosecution. The application is premised on the five (5) grounds on its face and supported by the affidavit sworn by Jitendra Ramji Patel, the Managing Director of the 2nd defendant on the 3rd April 2017, summarized as follows;

- a) That the matter was last in court on 10th February 2016 when the ruling on the application dated the 12th February 2015 was delivered.**
- b) That the Plaintiff has not taken any other step since that last date of court appearance to prosecute this case.**
- c) That the Plaintiff has lost interest in the suit and it should be dismissed for want of prosecution.**

2. The application is opposed by Elly Robert Onyuro, the Plaintiff, suing as the personal Representative of the estate of Alice Akoth Okong'o, through the replying affidavit sworn by Ambrose Otieno Weda, Advocate on a date that is not indicated and filed on the 17th November 2017, in which he among others depones as follows;

- a) That this suit was ordered to be consolidated with ELC No. 209 of 2012 but the Plaintiff has had challenges in having the two files to be traced for consolidation.**
- b) That the Counsel lost contact with the Plaintiff but has since reconnected and the client has expressed his desire to proceed with both matters on merit.**
- c) That the Plaintiff is ready to set the matter down for pre-trial conference within the period the court deems fit.**

3. The other Defendants did not file any replying papers in respect of the application, but indicated through Counsel from the bar that they support the application. The court gave directions on the 20th September 2018 for filing and exchanging of written submissions. The learned Counsel for the 2nd Defendant filed their submissions dated 31st October 2018. The learned Counsel for the Plaintiff filed their unsigned submissions dated 3rd December 2018 on the 12th February 2019.

4. The following are the issues for the court's determinations;

a) Whether the 2nd Defendant has shown that the Plaintiff has delayed inexcusably long without taking steps to prosecute his case.

b) Who pays the costs.

5. The Court has considered the grounds on the motion, the affidavit evidence in support and opposition, the written submission by the two learned Counsel and come to the following findings;

a) That the Plaintiff and another commenced this suit through the plaint dated the 12th February 2015, that was filed contemporaneously with the notice of motion of even date seeking for injunctive orders in respect of Kisumu Municipality Block 7/148. The 2nd and 3rd Defendants filed notice of Preliminary Objection dated the 21st April 2015 through their Advocate, seeking to have the suit struck out for being time barred, lack of locus and subjudice. The court directed on the 8th October that the motion and Preliminary Objection be heard together through written submissions. The ruling on the notice of motion and Preliminary Objection was delivered on the 10th February 2016 rejecting the Preliminary Objection and directing that the 2nd and 3rd defendants maintains the land's legal status as it existed on the 2nd February 2015 and ordering an inhibition against the title under **Section 68 (1) of the Land Registration Act**.

b) That the court has perused the Court record and it confirms the 2nd Defendant deposition and submissions that no other action or step was taken by the Plaintiff, or any other party for that matter, towards prosecuting this case from 10th February 2016, when the ruling was read/delivered, to the 11th April 2017 when the 2nd Defendant motion dated 3rd April 2017 seeking to have the suit dismissed for lack of prosecution was filed. That the period lapsed from 10th February 2016 to the 11th April 2017 is about one (1) year two (2) months and one (1) day, which is far beyond the twelve (12) months required under **Order 17 Rule 2 of the Civil Procedure Rules**.

c) That the Plaintiff offers two explanations for the delay as discerned from the replying affidavit sworn by his Advocate. The first is that he had challenges in tracing ELC No. 209 of 2012 and this file, which were allegedly to be consolidated; and secondly that the Advocate had lost contact with Plaintiff. That the consolidation is mentioned in paragraphs (3) to (5) of the replying affidavit without giving details of the date the order of consolidation was made and in which file. That the nature of the "**challenge**" in tracing the two "**files for consolidation**" was not disclosed and there are no correspondence to the or by the Deputy Registrar that have been availed to confirm that the record had been misplaced or gone missing since 10th February 2016. That on the issue of Counsel losing contact with the Plaintiff, the same is raised at paragraph (6) of the replying affidavit without disclosing the period involved or availing documentary evidence in terms of written mails or electronic correspondence done by Counsel to the Plaintiff that probably never went through or was not responded. That the court finds the replying affidavit bare in details of the challenges, consolidation order and lack of contact allegations.

d) That in view of the finding in (c) above, the court finds that the Plaintiff has failed to offer a reasonable explanation on why no steps aimed at prosecuting the suit was not taken for a period of more than twelve (12) months from the 10th February 2016 to the 11th April 2017, when this application was filed. The delay is inordinate and prejudices the interests of the Defendants who are just like the Plaintiff, entitled to a fair and public hearing before a court without undue delay. That the court has a duty under **Section 1B of the Civil Procedure Act, Chapter 21 of Laws of Kenya** to ensure just and efficient determination of the proceedings before it and efficient use of the available judicial and administrative resources at a cost affordable by the parties before it. The parties and their counsel are equally under a duty under **Section 1A of the said Act** to assist the court further the overriding objective of the Act, which is to facilitate the just, expeditious proportionate and affordable resolution of the civil disputes before it. That for the costs to both the court and the parties to be affordable, the parties and or their advocates are enjoined to ensure matters filed in court are processed timeously as the court diary permits, and that there are no inordinate delays. That the Plaintiff herein appears to have been satisfied with the orders issued on the 10th February 2016, and did nothing more to prosecute their suit for more than twelve (12) months, which delay would obviously translate to more costs of litigation to all parties. The court finds merit in the application by the 2nd Defendant.

6. That flowing from the foregoing, the 2nd Defendant's notice of motion dated the 3rd April 2017, and filed on the 11th April 2017, is meritorious and therefore allowed with costs to the Defendants. That therefore the Plaintiff's suit commenced through the plaint dated and filed on the 12th February 2015 is hereby dismissed with costs for want of prosecution. That the status quo and inhibition orders issued on the 10th February 2016 are also hereby vacated.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 26TH DAY OF JUNE 2019

In the presence of:

Plaintiff

Absent

Defendants Absent

Counsel Mr. Mwesigwa for 1st Defendant

Mr. Ojuro for 2nd Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE