



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 198 OF 2013**

**MICHAEL NJUGUNA MBUGUA.....PLAINTIFF**

**VERSUS**

**DORCAS NOKABI WAIHENYA.....1<sup>ST</sup> DEFENDANT**

**JOSPHAT MWAURA.....2<sup>ND</sup> DEFENDANT**

**RULING**

*(Application for dismissal of suit for want of prosecution; suit filed in 2013; plaintiff suing defendants for possession of land on the basis that he has a lease for 2 years from the registered proprietor; no step taken in the matter since May 2014 when the plaintiff's application for injunction was dismissed; clear that plaintiff has lost interest in the case but also apparent that the subject matter has been overtaken by time; suit dismissed but no orders as to costs on the main suit as it has been overtaken by time, save that applicant will have costs of the application)*

1. The application before me is that dated 9 November 2016 filed by the 1<sup>st</sup> defendant. The application is brought pursuant inter alia to the provisions of Order 17 Rule 2(1) and (3) of the Civil Procedure Rules, and seeks orders that this suit be dismissed for want of prosecution. The applicant avers that it has been close to 3 years since the plaintiff/respondent took any action in the suit and the case should therefore be dismissed. The application is opposed.
2. To put matters into context, this suit was commenced by way of a plaint which was filed on 20 February 2013. In the suit, the plaintiff averred that in the month of January 2013, he leased for a period of 2 years, the land parcels Nakuru/Bahati Settlement Scheme/212 and 329 from one Loise Wambui Kahenya, the registered proprietor. He sued the defendants, because they restrained him from taking possession of the leased land, claiming that they are owners, while the land is actually owned by the said Loise Wambui Kahenya. In the suit, the plaintiff asked for orders to have the applicants be evicted from the land and be permanently restrained.
3. The applicant filed a statement of defence on 20 March 2013. She averred that the 2<sup>nd</sup> defendant is her father but that he died on 24 January 2013. She contended that the title of Loise Wambui Kahenya, was procured by way of fraud and that the same is subject to challenge in the case Nakuru ELC No. 160 of 2012. She pleaded that the rightful proprietor of the suit lands is the late 2<sup>nd</sup> defendant and that he bequeathed the land parcel Nakuru/Bahati/329 to her (applicant) and the land parcel Nakuru/Bahati/217 to one Sybella Wanjiku Gitiha. She averred that if the respondent was to suffer any loss, he is the author of his own misfortune for failing to inquire into the nature of the applicant's occupation of the suit lands.
4. Together with the plaint, the respondent filed an application for injunction, seeking to restrain the defendants from the suit properties pending hearing and determination of the case. The application was heard and was dismissed vide a ruling delivered on 9 May 2014. From the date of delivery of that ruling, the respondent never took any step in the matter until this application was filed.
5. The application is opposed through the replying affidavit of Kahiga Waitindi, who is counsel on record for the respondent. He has deposed inter alia that the respondent has not lost interest in the suit. He has averred that they have tried to fix the matter for hearing but informed by the court registry that no dates are available. He has further deposed that this being a land matter, the respondent should be given a chance to ventilate the case. He has averred that the delay has been caused by factors beyond the control of the respondent.
6. When the matter came up for inter partes hearing, both Mr. Kisilah, learned counsel for the applicant, and Mr. Kahiga, learned counsel for the respondent, relied on the affidavits on record.
7. I have considered the application. Order 17 Rule 2 provides as follows :-

**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.*

8. It will be seen from the above that where one party (the plaintiff) does not take steps to move the matter within one year, the other party (defendant) is at liberty to apply for the dismissal of the suit. That is precisely what the applicant has proceeded to do in this instance.

9. From the facts that I outlined above, it is apparent that since his application for injunction was dismissed on 9 May 2014, the respondent appears to have lost interest in the case. In as much as Mr. Kahiga stated in his affidavit that there was effort to pick a date, I am not persuaded, for I have not seen any letter inviting the other party to fix a date. I however appreciate, that it may have been difficult to have had a hearing date and complete the matter by January 2015, which is the time that the lease of the respondent was bound to expire, after which he would not have any cause of action for eviction of the applicant from the suit lands. It is now the year 2019 and the respondent cannot now claim to have any further interest in the parcels of land since his lease has expired. Even if this case was to be allowed to proceed, there is no subject matter, for the same has already been overtaken by time.

10. There is no need to keep this matter lying in the court shelves. It is hereby dismissed. I would have made an order for costs in favour of the applicant, but since the position is that the suit is overtaken by time, and it was probably not possible to have completed the matter while the respondent's lease was still alive, I will in my discretion make no orders as to the costs of the suit, save that the applicant will have costs of this application, as he was entitled to file it, the respondent having not taken any step in the matter.

11. Orders accordingly.

**Dated, signed and delivered in open court at Nakuru this 26<sup>th</sup> day of June 2019.**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of : -**

Mr. Kimani holding brief for Mr. Kisilah for the defendant /applicant.

No appearance on the part of M/s Mirugi Kariuki & Company Advocates for the plaintiff/respondent.

Court Assistants: Nelima Janepher/Patrick Kemboi .

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**