REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO . 171 OF 2012

COUNTY COUNCIL OF BARINGO.....PLAINTIFF

VERSUS

DAVID ROBERTS WILDLIFE LIMITED.....DEFENDANT

RULING

(Notice to show cause why suit should not be dismissed for want of prosecution, suit not dismissed owing to a public element)

1. On 10 August 2018, this court issued a notice for the plaintiff to show cause why its suit should not be dismissed for want of prosecution. That notice was issued pursuant to the provisions of Order 17 Rule 2 which provides as follows :-

> *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.*

2. By way of background, this suit was commenced through a plaint which was filed on 25 February 2011. The plaintiff, now defunct, was then a local government established under the Local Government Act, Cap 265, Laws of Kenya (repealed). The local government system was abolished with the coming into force of the Constitution of Kenya 2010, and we now have the County Government system. In the plaint, it is pleaded that the plaintiff was/is the proprietor of the land parcel comprised in the title IRN 3433, LR No. 13010 measuring 4.574 hectares or thereabouts and situated in Baringo District adjoining Lake Baringo (hereinafter referred to as "the suit property") . It is averred that on 23 March 1976, the plaintiff granted the defendant a lease in respect of the suit land, which lease was to run for a term of 33 years, with effect from 1 January 1966. It is pleaded that the lease expired on or about 2 January 2000, but this notwithstanding, the defendant refused to yield possession and continued to unlawfully occupy the suit property. The plaintiff has complained that the action of the defendant has denied it use and enjoyment of the suit property. In the suit, the plaintiff sought orders of a declaration that it is the lawful owner of the suit property, orders of eviction of the defendant, mesne profits, costs and interest.

3. The defendant entered appearance and filed defence on 10 March 2011. The defendant denied all the claims in the plaint including denying that it is in possession of the suit property. It further pleaded that the area where the suit property is located became an adjudication section and was thereafter subject to the laws pertaining to ascertainment, recording, and registration of individual rights and interests in and titles to land. A reply to defence was filed on 1 April 2011 where the claim that the land is in an adjudication section was denied. On 4 July 2011, the defendant filed an application dated 1 July 2011, seeking orders to have the plaint struck out for not disclosing a cause of action. That application came up before my predecessor, Waithaka J, on 22 July 2013, but counsel for the defendant/applicant, sought an adjournment on the same which was granted. The court then directed parties to take a date in the registry. The plaintiff's counsel then caused the matter to be mentioned on 27 November 2013, but nobody showed up in court on that date and the court took out the matter. The plaintiff's counsel took another mention date of 14 April 2015, a date that the court did not sit, but directed the matter be rescheduled to 23 April 2015. It was a no show on this date and I directed that parties take fresh dates in the registry. Nothing happened until this notice for dismissal was issued on 10 August 2018, with the notice scheduled to be heard on 30 October 2018. The court did not sit on this day but the matter was mentioned before the Deputy Registrar with neither the plaintiff nor the defendant being represented. The notice was adjourned for hearing on 23 January 2019, a date that the court did not sit. On the same date, parties took 14 March 2019 for hearing of the notice which date again the court did not sit but the matter was rescheduled to 24 June 2019.

4. In the intervening period, the defendant, through its counsel, Mr. Mwenesi, did file an affidavit on 23 November 2018, giving reasons why the suit should be dismissed. A response was also filed on behalf of the plaintiff by Mr. Mutai K. Owen, counsel practicing in the law firm of M/s Kiplenge & Kurgat Advocates, who are on record for the plaintiff. On 10 June 2019, an application was filed by counsel for the plaintiff seeking orders for leave to amend the plaint so as to indicate the correct status of the plaintiff to read the County Government of Baringo.

5. I took submissions of Mr. Koome, learned counsel for the plaintiff, and Mr. Mwenesi learned counsel for the defendant, on 24 June 2019, on whether or not the suit should be dismissed for want of prosecution. Mr. Koome referred me to the affidavit of Mr. Mutai and added that the suit should not be dismissed as there are two pending applications that are yet to be determined, that of the defendant dated 1 July 2011, and the plaintiff's application for amendment of the plaint. I do observe that in his affidavit, Mr. Mutai did not dispute that the matter has been inactive but attributed the delay in prosecuting the suit to the transition from the County Council to the County Government regime. He deposed further that his law firm is now furnished with instructions that would enable them proceed to prosecute the suit to its logical conclusion. He also pointed to the fact that the defendant was yet to prosecute its application dated 1 July 2011.

6. Mr. Mwenesi in his affidavit filed on 23 November 2018 and a supplementary one filed on 19 June 2019, urged that this suit ought to be dismissed. He deposed inter alia that the plaintiff, for more than 3 years, has not taken steps to prosecute the suit. He also thought that the plaintiff does not have any probable cause of action against the defendant. He did not believe that the delay in prosecuting the suit was well explained, and he pointed out that the transition to the county government regime took off after the general election of 2013. He further deposed that since the County Government of Baringo ceased to exist, there was no client to instruct counsel appearing for the plaintiff, and in essence there is no plaintiff. He buttressed his deposition by referring me to the decision of ***Ivita vs Kyumbu (1984) KLR 441***. In his oral address, he submitted inter alia that his client was not obliged to prosecute the application dated 1 July 2011. He also submitted that the cause of action is time barred and was of the view that the plaintiff deserves no mercy from the court.

7. I have taken note of these submissions, the depositions in the affidavits, and the record, in arriving at my decision.

8. It is common ground, and it is indeed not denied, that the plaintiff has been inactive in prosecuting this suit. Before the court issued this notice, the suit had laid dormant from 23 April 2015, a period in excess of three years to the time that this notice was issued. The plaintiff's counsel main excuse for not prosecuting the matter is that there was a transition from the local government to the county government regime. Whereas there may seem to be substance in this argument, I observe that the transition to county government took place in 2013, and this country has in fact gone through a second election cycle within the county government regime in the year 2017. I am not persuaded that from 2013, when the first elections under the 2010 constitution were held, to the year 2018, when this notice was issued, counsel for the plaintiff could not be able to seek instructions from the County Government of Baringo, which is the predecessor of the Baringo County Council. There is in my view an extremely prolonged delay of inactivity which has not been explained. Neither can the plaintiff seek refuge in the fact that the defendant has not prosecuted its application to dismiss the suit for lack of a cause of action. The mere fact that such an application was filed, did not bar the plaintiff from taking a date for the hearing of the main suit.

9. The test as laid down in the case of ***Ivita vs Kyumbu*** (supra) is whether on the facts, the delay is prolonged and inexcusable, and if it is, whether justice can still be done despite the delay. In his dictum, Chesoni J, stated as follows :-

> *"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…"*

10. At the end of the day, it falls upon the discretion of the court, whether to allow the dismissal of the suit, or to direct that the same be heard, after taking into account all relevant factors. In our situation, I am not quite satisfied with the explanation for the delay as I have expounded above. However, I do note that the dispute herein revolves around land which may very well be argued to be held in trust for the public, and I do not think that in the circumstances of this case, any party will be prejudiced in the form of being unable to present evidence or witnesses because of the delay, as my view of the dispute, is that much of it will fall on documentary evidence. There is certainly a public element to this suit and it is that public element which moves me to exercise my discretion in not dismissing the suit. If it were not for that, I probably would not have been persuaded not to dismiss this suit for failure to prosecute.

12. I am aware of the arguments of Mr. Mwenesi that there is no plaintiff, but it is common knowledge that County Governments are the successors of the now defunct local authorities, and suits that were previously in names of local authorities can be continued by County Governments. This is provided for in Section 59 of the Urban Areas and Cities Act, Act No. 13 of 2011, which is drawn as follows :-

> *Pending actions and proceedings*
>
> *Any legal right accrued, cause of action commenced in any court of law or tribunal established under any written law in force, or any defence, appeal, or reference howsoever filed by or against any local authority shall continue to be sustained in the same manner in which they were prior to the commencement of this Act against a body established by law.*

13. From the above, it will be noted that suits for, or against, defunct local authorities, can be continued, and it is for that reason that I do not buy the argument that there is no plaintiff in this case.

14. On the argument that this suit is statute barred, that is an argument that can be raised at the hearing of the matter.

15. Taking all these factors into consideration, I will allow the plaintiff a chance to ventilate its case. I will give directions after delivery of this ruling aimed at expediting the conclusion of this matter as I am obliged to do under Order 17 Rule 2 (2) which I set out at the early stages of this ruling. I cannot however fault the defendant for urging that this suit be dismissed and the defendant will thus have attendance costs for this notice, which will be assessed at the time that this ruling will be delivered, and which will need to be paid by the plaintiff within such period as I will pronounce, and failure to pay such costs may lead to the dismissal of this costs following the provisions of Order 17 Rule 2 (4).

16. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 30th day of July 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mr. Wairegi holding brief for Mr. Kiplenge for the plaintiff.

No appearance on the part of Mr. Mwenesi for the defendant.

Court Assistants: Nelima Janepher/Patrick Kemboi.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU