



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 20 OF 2012

KATANA KAPOMBE

ALPHONCE KINAWA

MWALIMU KAPOMBE.....PLAINTIFFS/APPLICANTS

VERSUS

KITSAO KINEWA

DAVID KADENGE.....DEFENDANTS/RESPONDENTS

RULING

1. The three Plaintiffs filed this suit on 22nd February 2012 seeking a declaration that the Defendant is holding land parcel number Kilifi/Mbaraka Chembe/120 in trust for their Kirewa family and that they are all entitled to equal rights over the property. In addition, they sought a permanent injunction restraining the Defendant from evicting them and/or interfering with their occupation and utilization of the said parcel of land.

2. Subsequent to the institution of the suit, the matter remained active for about a year and not much happened after 20th August 2013 when the matter was stood over generally. On 1st April 2016, the Court acting *suo moto* required the parties to show cause why the suit should not be dismissed for want of prosecution pursuant to the provisions of Order 17 Rule 2 of the Civil Procedure Rules.

3. From the record, Counsel for the Plaintiffs appeared in Court and stated that there had been some confusion on the correct case number as a result of which they had been unable to trace the Court file. He pleaded for time to be allowed to fix the matter for hearing. Upon hearing the said Counsel on record the Honourable Justice Angote then seized of the matter directed that the matter be fixed for hearing within 120 days and if not, the suit would stand dismissed. Nothing was done within those 120 days.

4. Another notice was issued to the parties more than two years later on 30th July 2018 requiring them to show cause yet again why the matter should not be dismissed for want of prosecution. On 11th October 2018 when the matter came up for the hearing of the Show Cause, the Plaintiff's Counsel was not in Court and the matter was accordingly dismissed.

5. Subsequently and by an application dated 28th January 2019, the Plaintiffs pray that the order of dismissal be reviewed, varied and/or set aside and that accordingly this suit be reinstated for hearing and disposal. The said application is premised on the grounds that the parties had been negotiating with a view to bringing this matter to an end. It is the Plaintiffs case that the negotiations took time and hence the delay in fixing the matter for hearing.

6. The 1st Defendant is opposed to the grant of the orders sought. In Grounds of Opposition dated and filed herein on 28th February 2019 he asserts:-

i) That the Plaintiffs/Applicants application is made in bad faith and is an abuse of the Court process and deliberately so; and

ii) That the Plaintiffs/Applicants application has no merit and is a waste of valuable judicial time, it is mischievous and in bad taste.

7. I have considered the application and the objection thereto. I have equally considered the oral submissions made by the Learned Advocates for the parties before me. Order 17 Rule 2(1) of the Civil Procedure Rules grants the Court power to dismiss a suit in which no

step has been taken for one year. The order requires the Court to give notice to the party concerned to show cause why the suit should not be dismissed for want of prosecution, and if no cause is shown to the satisfaction of the Court, the Court may dismiss the suit.

8. The provisions of the said Order 17 of the Civil Procedure Rules are rather permissive and they give the Court a wide latitude within which to exercise its discretion to sustain the suit. This is quite in order given the requirements of Article 159 of the Constitution and the overriding objective which requires Courts to strive often to serve substantive justice.

9. That objective gels well with the reality that dismissal of a suit without hearing the substance thereof is so draconian and ought to be resorted to only as a last resort. But that reality has to be checked against yet another Constitutional demand that requires cases to be disposed of expeditiously and without any undue delay.

10. In the matter before me, the Plaintiffs filed their suit in February 2012 and have never prosecuted it to-date. On 1st April 2016 the matter came up for dismissal but the Court exercised its discretion in their favour and sustained the suit for hearing.

11. The Court granted them 120 days from the time to put their house in order. They however went back to sleep and did not do anything until more than two years later when the Court once again woke them up with yet another notice. They had no satisfactory explanation as to why the suit should not be dismissed. Even after that dismissal, it took them another five months before they filed the present application for reinstatement.

12. As it were, the sword of justice cuts on both sides and justice delayed is justice denied. The circumstances as borne from the record herein reveals that the Plaintiffs have never been vigilant to prosecute their case. It is unfair to keep this case hanging any longer on the Defendant's head and I find no sufficient reason why this Court should for the second time exercise its discretion in favour of the Plaintiffs.

13. The application dated 22nd February 2019 is accordingly dismissed with costs to the Defendant.

Dated, signed and delivered at Malindi this 30th day of July, 2019.

J.O. OLOLA

JUDGE