



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 264 OF 2014

DAVID KIRPONO KOECH.....PLAINTIFF

VERSUS

RAYMOND KIBET LANGAT.....DEFENDANT

RULING

(Application for dismissal of suit for want of prosecution; apparent that respondent failed to move the case but court in its own discretion allowing the respondent a chance to prosecute the suit subject to payment of costs)

1. The application before me is that dated 19 November 2018 filed by the defendant. It seeks the dismissal of this suit for want of prosecution. The respondent has opposed it by way of a replying affidavit.
2. To put matters into context, this suit was commenced through a plaint which was filed on 23 September 2014. In his plaint, the respondent pleaded that he is the legal and absolute owner of the land parcel Olenguruone/Chepakundi/895 measuring approximately 2.4 Ha. He averred that in the month of March 2014, the applicant trespassed into the suit land and started putting up structures and ploughed it. In his suit, he asked for orders of eviction and permanent injunction against the applicant.
3. The applicant filed defence wherein he pleaded inter alia that he had a right to enter into possession of the suit land, having purchased it from one Wambura Itundu Mukanda, the registered proprietor of the land. He also alluded to another suit filed in the Chief Magistrate's Court Molo, being Case No. 309 of 2014.
4. Alongside the plaint, the respondent filed an application for injunction. He did not appear to prosecute it ex-parte on 29 September 2014 when the same came up, but he had counsel on 6 October 2014 when the application was not certified urgent and he was advised to take a date in the registry. He did not take any date for his application, and indeed he did not take any step to prosecute either the application or the main suit until 11 May 2016, when he filed a second application for injunction dated 10 May 2016. I noted that he had an earlier a similar application for injunction which was still pending and I declined to certify the application dated 10 May 2016 as urgent. On 8 December 2016, counsel for the respondent took a mention date of 10 May 2017, but he did not appear on the said date and was directed to take a new date in the registry. On 12 March 2018, counsel for the defendant/applicant took a date of 21 September 2018 for mention. The court did not sit on that date and the matter was adjourned to 31 October 2018. On that day, Mrs. Gathecha, learned counsel for the applicant, informed the court that there was a notice filed on 8 January 2015 by counsel for the respondent, that the suit is withdrawn, but the court did not accept this position noting that the same party had come to court later in May 2016 with the application dated 10 May 2016. Nothing happened thereafter until this application was filed.
5. In his replying affidavit, the respondent has averred inter alia that the delay in prosecuting the matter was occasioned by factors beyond him, and that they were occasioned by both himself and the applicant. He has deposed that his displacement from the suit land destabilized him resulting in him not giving his counsel instructions. He has also stated that he attempted to settle the matter through ADR, but the applicant ignored the various summons issued by the village elders. He has faulted the applicant for taking advantage of the long time taken to resolve the matter out of court.
6. I have considered the application. It is apparent that the respondent has not moved his case so that it can be heard. He has however explained that he was attempting an out of court settlement in order to try and resolve the matter. I do not have concrete evidence that there were actual negotiations undertaken by the respondent to resolve the dispute out of court. Nevertheless, after perusing the documents availed by the plaintiff and the defendant, I do see a dispute that needs to be resolved, for I can see that the plaintiff has a title deed which was issued on 2 October 1995 whereas the defendant claims to have purchased the suit land from one Wambura Itundu Mukanda, who appears to have a title deed issued to him on 8 June 1978. It is therefore necessary to resolve who between the two holds the better title and I think that it is only fair that I allow the plaintiff an opportunity to ventilate his case subject to him paying throw away costs of Kshs. 7,500/= to the defendant for I cannot fault the defendant for filing this application. The costs be paid in 30 days or else the suit will stand dismissed.

7. Orders accordingly.

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

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : - _____

Mr.Towett holding brief for Mr. Chirchir for the plaintiff/respondent.

No appearance on the part of M/s Muchiri Gathecha & Co. for the defendant/applicant.

Court Assistant: Nancy Bor/Alfred Cheronno

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU