



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. CASE NO. 48 OF 2017

JULIUS KINYUA NYAGA.....PLAINTIFF

VERSUS

NJUKI MBURURI

NYAGA NDAGARARI

SILAS K. NYAGA

[AS OFFICIALS OF MBANDI GROUP RANCH].....DEFENDANTS

RULING

1. By a notice of motion dated 6th May 2019 brought under **Order 17 Rules 2 and 3 of the Civil Procedure Rules** the Defendant sought an order for dismissal of the Plaintiff's suit for want of prosecution.
2. The said application was based on the ground that the Plaintiff had never taken steps to prosecute the suit since 2nd November 2017 when a ruling on an interlocutory application was delivered. The said application was supported by the 2nd Defendant's affidavit sworn on 6th May 2019 which simply reiterated the grounds set out in the notice of motion.
3. The Plaintiff did not file a response to the said application despite service upon his advocate.
4. When the said application was listed for hearing on 29th May 2019 the Defendants' advocate prosecuted it orally in open court. It was submitted that the Plaintiff had failed to prosecute the suit for about 1½ years and that he enjoyed some interim orders in his favour. The court was urged to allow the application since the Plaintiff had not filed a response thereto.
5. The court has considered the Defendants' said application for dismissal of the suit for want of prosecution. The court has perused the material on record since the filing of the suit on 8th March 2017. The record shows that the Plaintiff's application for interim orders was determined on 2nd November 2017. Thereafter, no action was taken by the Plaintiff to prosecute the suit.
6. The court has also considered the fact that there exists a backlog in the hearing and disposal of Environment and Land Cases at Embu Law courts. This is a matter of public knowledge. The court is aware that priority is always accorded to older cases which have been pending for a long period. The court is currently handling suits which are at least 4 years old. So, even if the Plaintiff had tried to fix his 2 year old suit for hearing, he would not have succeeded in obtaining a hearing date.
7. The principles to be considered in an application for dismissal of a suit for want of prosecution under **Order 17 Rule 2 of the Civil Procedure Rules** were summarized in the case of **Ivita Vs Kyumbu [1984] KLR 441** 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. 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.

Where the Defendant satisfies the court that there has been prolonged delay and the Plaintiff does not give sufficient reason for the delay the court will presume that the delay is not only prolonged but it is also inexcusable and in such case the suit may be dismissed. To put it in the words of Salmon LJ in Allen Vs McAlpine, at p 561 as a rule, when inordinate delay is established until a credible excuse is made out, the natural inference would be that it is inexcusable. It is an all-time saying, which will never wear out however often said that, justice delayed is justice denied.”

8. The court is of the opinion that there has not been undue delay on the part of the Plaintiff in the prosecution of the suit. The court is further of the opinion that the explanation for the Plaintiff's inability to prosecute the suit is in the public domain. It is a matter of public notoriety of which the court can take judicial notice. It would be bizarre for a court to dismiss a two year old suit for want of prosecution whilst it is struggling to hear suits which are 4 years and older.

9. The upshot of the foregoing is that the court finds no merit in the Defendants' notice of motion dated 6th May 2019. The same is accordingly dismissed with no order as to costs.

10. It is so decided.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 31ST DAY OF OCTOBER 2019.

In the presence of Mr. Nzioki holding brief for Mr. Eddie Njiru for the Defendants and in the absence of the Plaintiff.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

31.10.19