



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 60 OF 2016

MUMWANJESYI DEVELOPMENT LTD.....PLAINTIFF

VERSUS

MBARAK MOHAMED ALI.....DEFENDANT

RULING

(Application for dismissal of a suit for want of prosecution; no action taken for more than 2 years in the matter; respondent explaining that there was delay in obtaining a survey report; explanation plausible but no notice given to the other party of this delay; applicant cannot therefore be faulted for filing the application; court orders respondent to pay thrown away costs for the application or else suit will stand dismissed)

1. The application before me is that dated 31 January 2019. It is an application seeking orders that the suit herein be dismissed for want of prosecution. The application is opposed.

2. To put matters into context, this suit was commenced through a plaint which was filed on 7 April 2016. In the suit, the plaintiff/respondent, averred to be the registered owner of the land parcel Sub-Division No. 8011/I/MN and Subdivision No. 8012/I/MN (the suit properties). It was pleaded that the defendant/applicant has illegally entered the suit properties and started construction. The plaintiff sought orders to have the applicant permanently restrained from the suit properties and a mandatory injunction to have him demolish the house that he erected on the properties. Together with the suit, the respondent filed an application for injunction to have the applicant restrained from the suit properties pending hearing of the case. A ruling on the application was delivered on 13 December 2016 where an order of injunction was issued against the applicant restraining him from making any new structures. From the time the ruling was delivered, the respondent did not move the case until this application was filed on 1 February 2019. It will thus be noted that the file remained inactive for more than two years before this application was filed.

3. The application states that it is brought pursuant to the provisions of Order 42 Rule 35 but this clearly cannot be the applicable provision, for dismissals for want of prosecution are provided for under Order 17. Order 17 Rule 2 is directly applicable for it provides as follows :-

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.

4. To oppose the motion, the respondent has filed a Replying Affidavit sworn by one Joseph Wainaina Muraya, a director of the plaintiff. He does not deny that the case was last in court on 13 December 2016 when ruling on the application for injunction was delivered. He has however asserted that the respondent is still interested in the suit and has deposed that the respondent appointed a surveyor to map out the extent of encroachment but this has taken time because he was not able to trace the parcel files in the land registry.

5. Though the explanation may be plausible, I must rebuke the respondent for not letting the applicant, and the court, know that she is facing some difficulty which may lead to delay in prosecution of the matter so that it may not be thought that she has lost interest in the suit. I will allow the respondent an opportunity for her to ventilate her case, but the respondent must be vigilant to move her case and must pay the costs of this application, for one cannot fault the applicant for filing this application. I assess the costs at Kshs. 10,000/= and these must be paid within the next 14 days. If they are not paid, then this suit will stand dismissed for want of prosecution with costs to the applicant.

6. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 31ST DAY OF OCTOBER 2019.

MUNYAO SILA

JUDGE.

IN THE PRESENCE OF:

Ms. Buxton for the applicant.

Mr Koech holding brief for Mrs. Kabole for the respondent.

Court assisntat; Koitamet.