



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

ELC CASE NO. 41 OF 2014

FRANCIS WAITHAKA NGARIUKO.....PLAINTIFF

VERSUS

MARGARET NYAWIRA KARIUKI.....DEFENDANT

RULING

1. By a notice of motion dated 18th October 2019 brought under the provisions of **Order 51 Rule 1, Order 21 Rule 12(1), Order 22 Rule 22(1) of the Civil Procedure Rules (hereafter the Rules), Section 3A of the Civil Procedure Act (Cap. 21) and all enabling provisions of the law**, the Plaintiff sought an order for reinstatement of his originating summons dated 20th July 2011 which was dismissed for want of prosecution on 15th November 2018.

2. The Application was based upon the several grounds set out in the notice of motion and supported by the Plaintiff's own affidavit sworn on 18th October 2019. It was contended that the Plaintiff was never served with a notice to show cause prior to dismissal of the suit; that he was in danger of being evicted from the suit property; that he had no alternative land hence if evicted he shall be rendered homeless; and that the Defendant shall suffer no prejudice should the application be allowed.

3. The Defendant filed a replying affidavit sworn on 13th October 2019 in opposition to the said application. The Defendant stated that she was the registered proprietor of the suit property and that the Defendant had unsuccessfully sought to obtain a share of the property through *Gachoka Land Disputes Tribunal Case No. 491 of 2011*. The award of the Tribunal in that claim was apparently quashed by the Hon. Justice B. Olao in *Kerugoya ELC J.R. Application No. 38 of 2013*.

4. The Defendant further contended that the Plaintiff was not diligent in the prosecution of the suit all along in consequence whereof it was dismissed for want of prosecution on 15th November 2018. The Defendant considered the instant application as a delaying tactic since the suit had been pending for more than 7 years prior to its dismissal. The Defendant further contended that the Plaintiff was aware of the notice to show cause since he had annexed a copy thereof to his application. Consequently, the Defendant urged the court to dismiss the Plaintiff's application for reinstatement of the suit.

5. When the said application was listed for hearing on 29th October 2019 the parties agreed to canvass it through submissions. The parties were consequently given timelines within which to file and exchange written submissions. The record shows that the Plaintiff filed his submissions on 18th November 2019 whereas the Defendant filed hers on 20th November 2019.

6. The court has considered the Plaintiff's said application, the Defendant's replying affidavit in opposition thereto and the respective written submissions of the parties. The court has also perused the record of proceedings in this matter. The court is of the view that the main question for determination is whether or not the Plaintiff has made out a case for reinstatement of his suit which was dismissed for want of prosecution on 15th November 2018.

7. There is no doubt that apart from the power of the court to dismiss a suit for want of prosecution under **Order 17 Rule 2 of the Rules** it has also residual power to dismiss a suit under the inherent powers of the court. The material on record indicates that when the suit was last fixed for hearing on 12th June 2017 the suit was adjourned at the instance of the Plaintiff's advocate. The record also indicates that the hearing date had been taken by the Defendant and not the Plaintiff.

8. The record further shows that the Plaintiff's advocates thereafter filed a chamber summons dated 19th July 2017 seeking leave to cease acting for the Plaintiff for *lack of instructions* and non-payment of professional fees. That application was allowed by the court on 13th November 2017.

9. The material on record indicates that on 16th October 2018, the court issued a notice to show cause why the suit should not be dismissed for want of prosecution under **Order 17 of the Rules** whilst the Defendant had a pending application dated 3rd September 2018 seeking dismissal of the Plaintiff's suit for want of prosecution. The court further directed that the notice to show cause be served upon the Plaintiff through registered post since he was acting in person by then. The postal address used by the court is P.O. Box 643 Embu. That is the same postal address which the Plaintiff has indicated in all his supporting and replying affidavits in the proceedings before this court.

10. The court is of the opinion that a notice to show cause under **Order 17 Rule 2 of the Rules** need not be served personally upon the concerned parties in the same manner as a summons to enter appearance under **Order 5 of the Rules**. The court concurs with the decision of the High Court in **Fran Investments Ltd Vs G4S Security Services Ltd [2015] eKLR** that a notice to show cause only needs to be brought to the "notice" of the parties concerned as opposed to being "served" upon them. The court is thus satisfied that the notice to show cause was brought to the notice of the Plaintiff in the manner prescribed by the court, that is, through registered post which was adequate notice for purposes of **Order 17 Rule 2 of the Rules**.

11. The court is aware of the principles to be considered in dismissing a suit for want of prosecution. As was stated in the case of **Ivita V Kyumbu [1984] KLR 441**, the test to be applied is whether the delay is prolonged and inexcusable and, if it is, whether justice can still be done despite the delay. The Plaintiff's explanation for his failure to prosecute the suit should be an important factor to be considered. In the said case, Chesoni J (as he then was) cited with approval the following passage from the case **Fitzpatrick V Batger & Co. Ltd [1972] ALL ER 657**:

"In the Fitzpatrick case Lord Denning M R said at page 658:

...It is the duty of the Plaintiff's adviser to get on with the case. Public policy demands that the business of the courts should be conducted with expedition. Just consider the times here. The accident was on December 13, 1916... It is impossible to have a fair trial after so long a time. The delay is far beyond anything, which we can excuse. This action has gone to sleep for nearly two years. It should now be dismissed for want of prosecution."

12. Chesoni J also cited with approval the following passage from the judgement of Sir Charles Newbold P in the case of **Mukisa Biscuit Manufacturing Co Ltd Vs West End Distributors Ltd [1969] EA 696 at P. 701**:

"The second matter relates to the undoubted delay in the hearing by the High Court of this case. It is the duty of the Plaintiff to bring his suit to early trial and he cannot absolve himself of his primary duty by saying that the Defendant consented to that position."

13. The court in the said case of **Ivita V Kyumbu** considered what is meant by inexcusable delay as follows:

"... 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."

14. So, what is the Plaintiff's explanation for the delay of about 7 years in the prosecution of the suit? The court has perused the Plaintiff's supporting affidavit sworn on 18th October 2019 in support of his application. The Plaintiff has not rendered any explanation whatsoever for the lengthy and inordinate delay in the prosecution of the suit. He only contended that he was not personally served with the notice to show cause and that he had been condemned unheard. The Plaintiff's contention that he has been in occupation of the suit property for over 45 years and that he may be rendered homeless if evicted cannot constitute a valid reason for his failure to prosecute the suit for several years. In the absence of a reasonable explanation for the prolonged delay in the prosecution of the suit the court is unable to exercise its discretion in favour of the Plaintiff.

15. The material on record indicates that the Plaintiff has not been a diligent litigant. He was never keen on fixing hearing dates. Instead, it was the Defendant who appeared keen of taking hearing dates. Indeed, the last hearing date of 12th June 2017 was taken by the Defendant and the Plaintiff scuttled the hearing by seeking an adjournment. An indolent litigant should not be allowed visit injustice upon his opponent by keeping a suit pending infinitely. It is often said that justice delayed is justice denied. In the case of **Allen V Sir Alfred McAlpine & Sons Ltd [1968] 1 All E.R. 453** Lord Denning M.R. stated of delays as follows:

"The delay of justice is a denial of justice...To no one will we deny or delay right or justice. All through the years men have protested at the law's delay and counted it as a grievous wrong, hard to bear. Shakespeare ranks it among the whips and scorns of time (Hamlet, Act 3, Sc 1). Dickens tells how it exhausts finances, patience, courage, hope (Bleake House, C1). To put right with wrong, we will in this court do all in our power to enforce expedition: and, if need be, we will strike out actions when there has been excessive delay. This is a stern measure; but it is within the inherent jurisdiction of the court, and the rules of court expressly permit it. It is the only effective sanction that they contain."

16. The upshot of the foregoing is that the court finds no merit in the Plaintiff's notice of motion dated 18th October 2019. Accordingly, the same is hereby dismissed with costs to the Defendant.

17. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **28TH DAY** of **NOVEMBER, 2019**.

The Plaintiff present in person and Ms. Muriuki for the Defendant.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

28.11.19