



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ENVIRONMENT AND LAND COURT CASE NO. 314 OF 2017

(FORMERLY KISII ELCC NO. 234 OF 2013)

ELISHA JABUYA.....PLAINTIFF/RESPONDENT

VERSUS

KENNEDY ODHIAMBO NYAORO.....DEFENDANT/APPLICANT

RULING

1. The Defendant/Applicant brought an application by a Notice of Motion dated 18th May, 2017 under Order 17 Rule 2 of the Civil Procedure Rules, 2010 and Section 3A of the Civil Procedure Act. He is seeking the following orders;

- a) *That this suit be dismissed for want of prosecution.*
- b) *That the costs of this application and the entire suit be awarded to the Defendant.*

2. In support of the application, is an affidavit sworn on 27th day of June, 2017 by Obach Humphrey, counsel for the Defendant/Applicant. The basis of the application is on the following grounds;

- a) **That the suit herein was filed on the 27th day of May, 2013.**
- b) **That the Defendant herein acting in person entered appearance on the 8th day of July 2013.**
- c) **That the Plaintiff has refused neglected and/or otherwise failed to set down the suit for hearing since the close of pleadings on 29th July 2013.**
- d) **That the suit is therefore on abuse of the process of this Honourable court.**
- e) **That the Defendant continues to suffer unnecessary anxiety due to the delay of this suit.**

3. By a Replying Affidavit of 12 paragraphs sworn on 7th July, 2017, the Plaintiff/Applicant is opposed the application and that he be given time to set down the suit for hearing. In support of the affidavit are copies of the following documents;

- a) **Notice of Motion application dated 13th December, 2016**
- b) **A payment receipt for Ksh 1,310/= for the Notice of Motion application issued herein**
- c) **A notice of change of advocates dated 13th Dec 2016.**

4. On 28/6/2017 and 12/7/2017 Mr Obach counsel for the Defendant/Applicant and Mr Kirui counsel for the Plaintiff/Respondent agreed to canvass the application by way of written submissions. The court granted the request pursuant to **Order 51 rule 16 of the Civil Procedure Rules, 2010.**

5. The Defendant's/Applicant's counsel filed submissions dated 2nd July, 2017. He submitted on the factual background of the suit and the following issues for determination:-

(a) whether there has been inordinate delay in the prosecution of the case by the Plaintiff.

(b) Whether there is any substantial risk to fair trial or serious prejudice to the defendant.

6. The counsel further submitted on an analysis of the issues and relied on authorities; **Utalii Transport company Ltd and 3 others-vs-NIC Bank Ltd and Another (2014) eKLR** , **ET Monks and Company Ltd-vs-Evans (1985) 584, Agip (K) Ltd-vs-Highlands Tyres Ltd (2001) KLR 630 and Ivita-VS-Kyumba (1984) KLR 441**. He concluded his submissions that the plaintiff neglected to set down the suit for hearing and called for its dismissal with costs.

7. In their submissions dated 19th July, 2017, the Plaintiff's/Respondent's counsel referred to the time they took time to locate the file for purposes of setting a hearing date, the court did not issue notice for dismissal, and that the defendant attempted to remove the caution against the suit land in Rongo misc application No. 184 of 2013, among others. The counsel submitted that failure to set a hearing date during that period was not deliberate and or intentional. He urged the court to note the nature of the case and that the plaintiff is ready and willing to prosecute the case to the fullest end.

8. I have considered the entire application, replying affidavit and submissions by both counsel in the instant application. The issues for determination are whether there was **inordinate delay and substantial risk to fair trial or serious prejudice to the defendant** in the suit.

9. The court record reveals that at this court's registry on 12th April, 2016, Mr Obach was represented by one Mr. Chacha who fixed Notice of Motion dated 8th April, 2016 for hearing on 28th June, 2016. Mr Obach counsel for the Defendant/Applicant appeared before Mutungi J on 28th June, 2016 in a Notice of Motion dated 8th April, 2016 for transfer of the matter but it was withdrawn with an order that costs be in the cause. On 19th October, 2016, a notice of intention to act in person dated 18th October, 2016 was filed by the defendant and the instant application was filed on 29th May, 2017.

10. I am guided by the principle under **Article 159 (2) (b) of the Constitution of Kenya, 2010** that justice shall not be delayed. In the **IVita case** (supra), the test applied was whether the delay is prolonged and inexcusable.

11. Similarly in the case of **Njuki Gachungu-vs-Githi (1976-80) KLR 538 at 540-41**, the court meant prolonged and inexcusable delay that can do grave injustice to the one side or the other or both. The court observed;

“It is thus inherent in an adversary system which relies exclusively upon the parties an action to take whatever procedural steps appear to them to be expedient to advance their own case, that the defendant, instead of spurring the plaintiff to proceed to trial, can with propriety wait until he can successfully apply to the court to dismiss the plaintiff's action for want of prosecution on the ground that so long a time has elapsed since the events alleged to constitute the cause of action that there is a substantial risk that a fair trial of the issues will not be possible.”

12. In a suit where for one year no application has been made and no step taken in it, the court has the discretion to issue notice for dismissal of the suit for want of prosecution. This is anchored under **Order 17 rule 2 of the Civil Procedure Rules, 2010** provides ;

“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.(Emphasis laid).

13. In the present application at least, some action and steps were taken in the suit on 28th June, 2016 and 19th October, 2016 within one year. The court did not issue notice for dismissal of the suit for want of prosecution as one year had not elapsed as envisaged under Order 17 (2) of the Civil Procedure Rules, 2010 and as noted in **Utalii Transport case** (supra). I therefore find that there was no inordinate delay in this matter. The period of time alleged by the Defendant/Applicant to be delay has not caused any substantial risk to a fair trial in this suit taking into consideration the right to fair trial under **Article 50 (1) Constitution of Kenya, 2010** and the inherent powers of the court to make orders for the ends of justice at **Section 3A of the Civil Procedure Act, 2010**.

14. In the result, I find the application dated 18th May, 2017 want of merit. Accordingly I dismiss the application.

15. Costs of the application shall be in the cause.

DATED, signed and DELIVERED at MIGORI this 31st day of January, 2018

G.M.A. ONGONDO

JUDGE

In the presence of:

Miss Mireri counsel holding brief for Mr Obach counsel for the Defendant/Applicant

Josephine Lori- Court assistant