



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CIVIL SUIT NO. 36 OF 2015

FRANCIS CHABARI NYAGA.....PLAINTIFF

-VERSUS-

PINA PANKAJ NIMAVAT.....1ST DEFENDANT

SHABIR MOHAMED HAJI.....2ND DEFENDANT

LAND REGISTRAR KWALE.....3RD DEFENDANT

HON. ATTORNEY GENERAL.....4TH DEFENDANT

RULING

1. For determination is the notice of motion dated 28th March 2017 brought by the 1st defendant seeking to dismiss the plaintiff's suit for want of prosecution. The 1st defendant avers that since 3rd March 2015 when the plaintiff filed the suit, he has not taken any steps to set down the suit for hearing and or mention for directions. That on 22nd July 2015, the Court directed the parties not to carry out any developments or dealings on the suit property until the case is heard and determined. He urged the Court to grant the orders sought.

2. The plaintiff opposed the application by filing grounds of opposition in which he stated thus:

i. The application is incompetent & fatally defective.

ii. That the application is also mischievous and made in bad faith.

iii. That dismissing the suit for want of prosecution is against the constitution of Kenya denying the plaintiff right of being heard.

iv. That there has not been inordinate delay in setting the matter for hearing and is ready to set it down for hearing.

v. That the Court has power to direct that the matter be heard expeditiously rather than dismiss the suit.

vi. That a mistake of an Advocate should never be visited on an innocent litigant.

3. The advocates parties on record filed submissions in arguing the application the 1st Defendant/Applicant quoted the provisions of Order 17 rule 2 of the Civil Procedure Rules adding that the Plaintiff/Respondent failed to set this matter in motion since 25th November 2015. In replying to provision on the right to be heard under article 50 of the Constitution, the applicant made a rejoinder in citing the provisions of article 159 (2) (b) of the Constitution which also provides that justice shall not be delayed. He also cited the case of **Ivita vs Kyumba (1984) KLR 441** where it was stated that ***“the last to be applied by the Court in dismissing a suit for want of prosecution is whether the delay is long and unexcusable and if it is whether justice can be done despite the delay.”***

4. The 1st defendant submitted that the delay has not been explained and that the delay is inordinate. He went ahead to list the principles the Court should consider when exercising discretion to dismiss a suit for want of prosecution and that this case fits in those principles hence the present application should be granted.

5. The Plaintiff/Respondent in his 1st paragraph of the submissions alluded to matters of facts on difficulty tracing the 2nd defendant for service which matters should have been presented to this Court by way of a replying affidavit. The respondent continued that land disputes are emotive hence the matter should not be summarily dismissed. Further that dismissing the suit for want of prosecution will result in condemning the plaintiff unheard contrary to article 50 of the Constitution. He also submits that the 1st defendant has not explained the prejudice he is occasioned by the delay. He put reliance in the case of **Patrick A. Ingoi vs Madhar Bhallal t/a Tanbjee & Bhalla Advocates & 2 Others (2014) eKLR**.

6. From the submissions of the plaintiff, he did not address the issues raised by his grounds of opposition except for item No 3 on the right to be heard. He also did not explain by way of affidavit why he has not been able to set down this matter for pre-trial directions and or hearing. The submissions that the delay is occasioned by the difficulty in serving the 2nd defendant was unsupported by evidence that would have annexed affidavit of service of a process server showing attempts to effect service. I have also perused the pleadings filed by the plaintiff (plaint & documents annexed to the affidavit in support of the application dated 3rd March 2015) and note that there was no privity of contract pleaded to have existed as between the plaintiff and the 1st defendant.

7. The plaintiff vide his application of 3rd March 2015 obtained orders restraining the defendants from developing and or dealing with the land pending determination of the suit. These orders definitely prejudice the 1st defendant and it is in bad faith to state the 1st defendant has not demonstrated any prejudice when the plaintiff has enjoyed the existence of the same for over two years without endeavouring to adopt alternative means of service upon the 2nd defendant if he is unable to physically trace him. Because the plaintiff/respondent has not explained the delay and also has not denied the delay is inordinate in accordance with the provisions of Order 17 rule 2 of the Civil Procedure Rules, I am satisfied that there is merit in the application. Consequently, I do order the suit struck out as against the 1st defendant for want of prosecution. The orders of this Court made on 22nd July 2015 are vacated as against the 1st defendant/applicant is awarded costs of this application and the suit.

Dated, signed & delivered at Mombasa this 26th January 2018.

A. OMOLLO

JUDGE