



REPUBLIC OF KENYA.

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA.

ELC CASE NO. 138 OF 2017.

(FORMERLY KAKAMEGA HCC. 296 OF 1987).

ANTHONY K. SABUNI.....1ST PLAINTIFF

JUSTUS LUMARA WAKWENJE.....2ND PLAINTIFF

GABRIEL WAKHUNGU SABUNI.....3RD PLAINTIFF

REMI WAFULA SABUNI.....4TH PLAINTIFF

FRED KHAEMBA SABUNI.....5TH PLAINTIFF

VERSUS.

JOSEPH WANJALA FULAFU.....1ST DEFENDANT

JOSEPH WANYONYI WANJALA.....2ND DEFENDANT

RULING.

[1] This notice of motion is made pursuant to order 17 rule 2(3) and order 51 rule 1 of the Civil Procedure Rules 2010 Section 3A 3 1A 1B of the Civil Procedure Act. The application prays that this suit be dismissed for want of prosecution.

[2] This application is grounded on the fact that the suit has been pending in court since 1987 and that it is now 30 years since the suit was filed in Court and finally that the suit was last in court on 19/2/1992. It is argued that the defendants are greatly prejudiced by the pendency of this suit because the 2nd plaintiff continues to unlawfully utilize the plaintiffs land.

[3] The second plaintiff swearing on behalf of third plaintiff and 5th plaintiff swore an affidavit on 30/8/2017 and said that the suit land is situated in Bungoma County and that after opening of the High Court in Bungoma the cases arising from Bungoma which were pending in Kakamega High Court were transferred to Bungoma High Court. That he was told so by his advocate on record and that the transfer was done orally. He alleged that there was no communication from either Kakamega High Court and Bungoma High Courts to his advocates who advised him to take time and follow up the file in Kakamega. He alleged that he visited the Kakamega Court Registry Countless number of times and was told that the file is not there, the same having been transferred to Bungoma High Court. He alleged that his advocate wrote a letter to Bungoma High Court and Kakamega High Court on 16/3/2013 to no avail. He said that he wrote a reminder to the Executive Officer Bungoma High Court on 27/3/2017 and

received a reply on 28/3/2017. The Executive officer wrote and said that they had perused their registers from 2013 and no such a file was in Bungoma High Court Registries. He attributed the delays to the aforesaid lack of communication from the said registries.

[4] Those being the allegations of the parties, what is the real and true facts in regard to the delay in prosecution of this suit?

[5] The Originating Summons was filed on 27/11/87. A replying affidavit was filed on 27/1/1988 by the second respondent who alleged that he was a bona fide purchaser for value from the 1st respondent. On the 30th June 1989 the advocate for the respondent filed a chamber summons praying that the Originating Summons be dismissed for want of prosecution. The affidavit supporting the chamber summons stated that the applicants filed the Originating Summons for adverse possession through their advocates M/s Kiarie and Company Advocates sometime in 1987 and that they had not moved the Court to fix the same for hearing and that the applicant and their Counsel were delaying the case. That the Chamber Summons were served on the applicants, who replied through the first respondent who explained the delay. He alleged that the 2nd respondent instituted a Criminal Case against the 3rd 4th and 5th applicants vide Kimilili DM's Criminal Case No. 208 of 1987 for forcible detainer and that they waited for the completion of that case and that the case was finalized on 18/9/1987 and that in the subsequent years 1988 and 1989, they lost close members of the family. The application was withdrawn on 31/7/1991 by consent. The respondent filed another Notice of Motion on 11/11/1991 to yet again dismiss the suit for want of prosecution. He argued in his application that the case came up for directions on 31st July 1991 and directions were dispensed with and that the applicants had not done anything since then. The same was served upon Kiarie & Co. Advocates by Jason Kundu a Process Server of this Court. This matter came to Court on 19/2/1992 and the application dated 11/11/1991 was withdrawn by Consent. Thereafter the matter came up in Kakamega Court on 23/10/1992 before Osiemo Judge, it was marked S.O.G. on 29/10/1992 before Osiemo Judge it was marked S.O.G., 28/4/1993 before Osiemo Judge when it was stood over to 19/5/1993 when Anzangalala Judge marked it S.O.G. On 28/7/1993 Kiarie advocate appeared before Tanui Judge and his application for substitution was heard and allowed. This case was later on dealt in the registry and in court on 16/8/1995, 28/5/1998, 23/6/98. On 30/9/1998 the same came before Tanui Judge, There was no appearance for the applicants/plaintiffs. The Counsel for the respondent appeared and said that the application which was on record was withdrawn. The Judge marked the case S.O.G. There it lay until 30/8/2017 when the advocate for the defendant/respondent in the current application for dismissal went to Kakamega Court Registry and in the absence of the counsel for the applicant in the Originating Summons fixed his application dated 13/7/2017 for hearing on 27/9/2017. Then on 12/10/2017 Sitati Judge realized that this was an ELC matter and that the land is situated in Bungoma County and she transferred it to ELC Bungoma Court final disposal.

[6] There is no doubt, from the history I have enumerated from this court file, that this file was firstly, never missing in the Kakamega Court registry. Secondly, that the defendants have twice filed a chamber summons and a notice of Motion to have this suit dismissed for want of prosecution in 1987 and that those applications were compromised by the parties to pave the way for hearing of this case. Thirdly, this file was transferred by Justice Sitati to Bungoma ELC Court when Makali & Co. Advocates the current advocates for the defendant, filed the current application for the dismissal of the suit for want of prosecution. Fourthly, the applicants in the Originating Summons has from the inception of the suit on 25th November 1987, more than 30 years ago, has had the same advocates Kiarie & Company for the conduct of this case. Therefore, the contents of the replying affidavit by the applicant respondent that the file was missing and/or was transferred to Bungoma orally by Kakamega Court is pure falsehood and I dismiss them as such.

[7] I agree with the applicant that the delay herein is inordinately too long and inexcusable. There cannot be any justifiable reason to keep this case in court. The same has been pending for over 30 years. The defendant has tried twice before to have it dismissed for want of prosecution. This is the third time she has asked the court to dismiss this suit. Those two earlier applications for dismissal should have been a wakeup call to the applicants in the Originating Summons. The applicant/plaintiff in the Originating Summons instead of offering any plausible reason for the long delay then fabricated falsehoods that the

file was sent to Bungoma Court and that it was last in Court in 1982.

[8] This application has merit the same is allowed as prayed. This suit is therefore dismissed for want of prosecution with costs and interests to the defendant respondents in the Originating Summons. It is so ordered.

Ruling read in open Court In the presence of Counsels.

Dated at Bungoma this 22nd day of February, 2018.

S. MUKUNYA

JUDGE.

In the presence of:

Joy: Court Assistant

Mr. Nyamu: Holding brief for Mr. Kiarie

Mr. Murunga: For the defendant