



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 61 OF 2016

CHELESTE NJIRU GICHECHE.....PLAINTIFF

VERSUS

EPHANTUS NJUE KIATHI & 8 OTHERS.....DEFENDANTS

RULING

1. By a plaint dated and filed on 29th May 2009, the Plaintiff, who described himself as the administrator of the estate of David Njue Gicheche M'turi (hereinafter "the deceased") sued the 1st and 2nd Defendants claiming the following reliefs;

a. Eviction orders against the Defendants together with their family members from land parcel No. Evurori/Nguthi/1628.

b. Costs of the suit.

c. Any other relief this honorable court may deem fit to grant.

2. The basis of the suit was that the Defendants had unlawfully settled and erected structures on *Title No. Evurori/Nguthi/1628* (hereinafter known as the "suit property") which was said to belong to the estate of the deceased and had refused to vacate and remove their structures despite notice to do so.

3. The Defendants do not appear to have entered appearance or filed any defences. The Plaintiff, therefore, requested for interlocutory judgement against them on 19th June 2009 but the Deputy Registrar directed that the suit should be set down for hearing. I think the Deputy Registrar was right in so directing in view of the reliefs which the Plaintiff was seeking. There was no provision in law for entry of interlocutory judgement as sought by the Plaintiff.

4. The Plaintiff does not appear to have taken any steps to prosecute the suit for about 4 years in consequence whereof the court issued a notice to show cause why the suit should not be dismissed for want of prosecution under Order 17 of the Civil Procedure Rules.

5. When the matter was listed for the notice to show cause on 28th May 2013, none of the parties attended court in consequence of which the Hon Justice H.I. Ong'udi dismissed the suit for want of prosecution under **Order 17 Rule (2) (1) of the Civil Procedure Rule.**

6. The Plaintiff did not take any action in the matter until 30th August 2016 when he filed a notice of motion dated 10th August 2016 seeking a review of the order made on 28th May 2013 dismissing his suit for want of prosecution. In the same application, he also sought an eviction order against the Defendants and an order for the sub-county A.P Commander for Mbeere North to provide security during the eviction.

7. The said application was based upon the following grounds;

a. That the Plaintiff was the registered owner of the suit property.

b. That he was unable to take possession and develop the suit property due to the Defendants' illegal occupation.

c. That he was apprehensive that the Defendants might claim adverse possession to his prejudice.

8. The said application was supported by the Plaintiff's own supporting affidavit sworn on 10th August 2016 together with the annexures thereto. It was stated in the said affidavit that he was busy prosecuting succession cause No. 456 of 2008 in respect of the estate of the deceased. He stated that the grant was confirmed on 29th May 2014 and that he was issued with a title deed for the suit property on 5th March 2015. He further stated that he became aware of the dismissal order in 2016 when he sought to file his application for an eviction order.

9. The 1st Defendant filed a replying affidavit sworn on 14th September 2016 in opposition to the Plaintiff's said application. The relevant parts of the replying affidavit stated that the Plaintiff had failed to demonstrate any error apparent on the face of the record, discovery of any new or important evidence or any other sufficient reason for review as required by law.

10. The 1st Defendant also opposed the said application on the basis of inordinate delay in filing the application for review. It was stated that the Plaintiff had not explained why it took him more than 3 years to file the said application. He therefore asked the court to dismiss the said application as being frivolous, vexatious and an abuse of the court process.

11. According to the record, the Plaintiff's said application was by consent of the parties fixed for mention for directions on 12th April 2017 before the Deputy Registrar. On the said date, the Registrar was informed that the parties had agreed to dispose of the said application through written submissions. A mention date was to be taken at the registry upon the filing of submissions.

12. The record further shows that on 6th June 2017, the matter was by consent of the parties, fixed for mention for submissions on 12th July 2017. When the matter was listed before me on 12th July 2017, the parties had not filed any submissions. Mr Guantai holding brief for Mr Eddie Njiru requested for 14 days to file written submissions. The Plaintiff was granted more time and the matter fixed for further mention on 26th September 2017 to confirm compliance and fix a ruling date.

13. On 26th September 2017, the Plaintiff's counsel again requested for 14 more days to file and serve his submissions. The court extended the time for filing and fixed the matter for further mention on 16th October 2017 to confirm compliance and fix a ruling date.

14. Come 16th October 2017, the Plaintiff's counsel did not attend court and neither did he send an advocate to hold his brief. The 1st Defendant's counsel informed the court that the Plaintiff's counsel had not filed or served him with any submissions. The 1st Defendant had therefore decided to file his. The court thereupon fixed the Plaintiff's said application for ruling on 1st February 2018 and granted the Plaintiff liberty to file written submissions within 30 days.

15. By the time of preparing this ruling, the Plaintiff's submissions were not on record. The court, nevertheless, decided to consider and determine the said application on the basis of the material on record.

16. Although the Plaintiff's notice of motion dated 10th August 2016 is expressed to be brought under sections 3 and 3A of the Civil Procedure Act and "all other enabling provisions of the law", it is really an application for review under the provisions of Order 45 of the Civil Procedure Rules and it shall be considered as such.

17. The material provisions of Order 45 Rule 1(1) of the Civil Procedure Rules provide as follows;

(1) Any person considering himself aggrieved –

a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b) by a decree or order from which no appeal is hereby allowed,

and from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgement to the court which passed the decree or made the order without unreasonable delay.

18. The court has considered the grounds listed in the Plaintiff's said notice of motion and none of them really bring the Plaintiff's case within the ambit of Order 45 Civil Procedure Rules. The mere fact that he is the current registered owner of the suit property does not warrant a review of the dismissal order made on 28th May 2009. The fact that he is unable to take possession of and develop the suit property is not of any help either. Neither would his fears and worries that the Defendants might apply for adverse possession of the suit property or part thereof.

19. The court has considered the explanation given in the Plaintiff's supporting affidavit for his failure to prosecute the suit prior to its dismissal and his failure to apply for review without undue delay. The fact that the Plaintiff was prosecuting the succession case, pursuing confirmation of grant and obtaining a title deed for the suit property are not good reasons at all.

20. Prosecuting a succession cause and prosecuting a civil suit are not mutually exclusive. He could have prosecuted both. The court notes from the record that the Plaintiff's suit was dismissed for want of prosecution under Order 17 Civil Procedure Rules after a delay of 4 years. There is no reasonable and acceptable explanation for such delay. It was the Plaintiff's duty to prosecute the suit upon filing it.

21. As was stated in the case of Ivita Vs Kyumbu [1984] KLR 441, the test to be applied is whether the delay is prolonged and inexcusable and, if it is, whether justice could be done despite the delay. In the said case Chesoni J (as he then was) cited with approval the case of Fitzpatrick Vs Batger & Co Ltd [1972] ALL ER 657 in dismissing the Plaintiff's suit for want of prosecution. He stated thus;

"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.

22. In the said case, Chesoni J 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.”

23. The court is aware that the court has discretion to reinstate a suit which has been dismissed for want of prosecution. However, such discretion must be exercised judicially and not upon whim or sympathy. As was held in the case of **CMC Holdings Ltd Vs Nzioki [2004] 1 KLR 173**;

“That discretion must be exercised upon reasons and must be exercised judiciously...”

24. The court is far from satisfied, on the basis of the material on record, that the Plaintiff deserves the exercise of judicial discretion in his favour. The suit was filed about 9 years ago. He failed to prosecute it for 4 years in consequence of which it was dismissed under **Order 17 Civil Procedure Rules**. He, again, failed to file an application for review or setting aside of dismissal order for another 3 years. In my view, the Plaintiff is not a vigilant litigant.

25. The other consideration on an application for review relates to expedition in the filing of such application. There is no doubt that the Plaintiff filed the instant application more than 3 years after the dismissal of his suit. No good explanation for such delay has been given. It has not been explained why the Plaintiff failed to check on the progress of his suit on a regular basis. If he had done so, he could have discovered the existence of the dismissal order much earlier. The upshot of this is that the court finds that the application for review was not filed without unreasonable delay.

26. In the result, the court finds that the Plaintiff has failed to demonstrate any of the grounds for review of the dismissal order made on 28th May 2013. The court also finds that the Plaintiff is not entitled to the order of eviction or provision of security since he has no decree in his favour. Consequently, the court finds no merit in the Plaintiff’s notice of motion dated 10th August 2016 and the same is hereby dismissed in its entirety with costs to the 1st Defendant.

27. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 1ST day of FEBRUARY, 2018.

In the presence of the Plaintiff and the 1st Defendant and in the absence of the other Defendants.

Court clerk Njue/Leadys.

Y.M. ANGIMA

JUDGE

01.02.18