



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
MILIMANI LAW COURTS
ELC NO.872 OF 2015

WILLIAM MWANGI KIRUBI.....PLAINTIFF

=VERSUS=

CECILIA MWAI.....1ST DEFENDANT

SALIM JUMA.....2ND DEFENDANT

RULING

1. The Defendants/Applicants filed a Notice of Motion dated 2nd February 2017, in which they seek orders that the Plaintiff/ Respondent's suit be dismissed with costs for want of prosecution. The applicants contend that it has been one year since the matter was last in Court and that since then the Respondent has not taken any step towards prosecution of the suit; that the Respondent has therefore lost interest and the suit should therefore be dismissed. They further contend that the Respondent has not even served summons to enter appearance.

2. The Respondent has opposed the applicants' application based on a replying affidavit sworn on 4th April 2017. The deponent who claims to have been given power of attorney by the Respondent states that the Respondent has been out of the country in South Africa; that due to the absence of the respondent, he was unable to instruct his lawyers; that the respondent has now given a power of attorney to the deponent who is now in a position to carry on with the case.

3. The Respondent explains that the other reason for delay in prosecuting this case is that the Court diary for 2016 was closed due to shortage of Judges. The Respondent is now ready to have the suit set down for hearing as there is an order for maintenance of Status Quo.

4. I have considered the applicant's application as well as the opposition thereto by the Respondent. I have also considered the submissions filed on behalf of the parties. The only issue for determination is whether there are grounds disclosed to warrant dismissal of the suit for want of prosecution. The suit herein was filed on 15th September 2015. The Plaintiff contemporaneously filed an application in which he sought among other orders injunctive reliefs. This application was placed before the Judge on 16th September 2015, who certified the same as urgent and fixed it for hearing inter-partes on 30th September 2015. On this date, the trial Judge gave leave to the Respondents in that application to file a replying affidavit. The Judge further directed that the status quo be maintained and ordered parties to take a date for the application at the registry.

5. Neither party sought to have the application fixed for hearing at the registry as directed. The

Respondent explains that he could not take a date as there were no dates available in the diary for 2016. The other reason is that the Respondent was away in South Africa. In deciding whether to dismiss a suit for want of prosecution, the Court has to exercise its discretion depending on the reasons given for the delay. This discretion is exercised based on the length of delay; the reasons for delay; whether the will be prejudice to the applicant among other grounds. In the case of **Ivita Vs Kyumbu 1984 KLR 441 Justice Chesoni** as he then was stated as follows:-

“The test applied by the Courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable , and if, it is whether justice can be done despite the delay. Thus even if the delay is prolonged if the court is satisfied with the Plaintiff’s excuse for the delay and that justice can still be done to the parties , the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time. It is a matter in the discretion of the Court”.

6. In the instant case the delay was not prolonged. The explanation for the delay has been given. There were no available dates in the diary for 2016, due to shortage of Judges. I take judicial notice that in 2015-2016, there were only three ELC Judges serving Machakos, Kiambu, Kajiado, Makueni ,Nairobi City counties and the three Judges were overwhelmed . There were no dates available due to the heavy workload. The workload eased with the opening up of ELC Courts in Thika, Machakos, Makueni and Kajiado. One cannot therefore be blamed for not prosecuting his/her case during that period.

7. The reason given that the Respondent was out of the country and could not give instructions to his counsel cannot be believed. The Respondent’s lawyer did not require the Respondent in order to fix a date for the application. There is also no evidence that the respondent was away out of the country. However owing to the explanation on the basis of heavy workload, I will not allow the application for dismissal of this suit. I can see an application filed by the Respondent seeking extension of summons. If that application has not been prosecuted. I direct that the same should be heard by the Deputy Registrar of this court so that this case can move on and be disposed of with expedition. Costs of this application shall be in the cause.

It is so ordered.

Dated, Signed and delivered at **Nairobi** on this **7th** day of **March ,2018**.

E.O.OBAGA

JUDGE

In the absence of parties who were aware of the date and time of delivery of Ruling .

Court Assistant: Kevin

E.O.OBAGA

JUDGE