



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERICHO**

**ELC CASE NO. 275 OF 2015**

**BENSITA CHANGAMU OSORO.....PLAINTIFF**

**VERSUS**

**SUSAN NYANGATE MAGETO.....1<sup>ST</sup> DEFENDANT**

**GABRIEL KIPKORIR LANGAT.....2<sup>ND</sup> DEFENDANT**

**RULING**

**Introduction**

1. This Ruling is in respect of the defendant's Notice of Motion dated 7<sup>th</sup> June, 2016, seeking to have the suit dismissed for want of prosecution. The application is supported by the grounds stated on the face of the Notice of Motion and the affidavit of Patrick Lumumba Nyaramba, learned counsel for the defendant sworn on the 7<sup>th</sup> June 2016.
2. The main ground upon which the application is based is that the plaintiff has failed to prosecute the suit for a period in excess of ten years.
3. The application is opposed by the plaintiff through his Replying Affidavit dated 7<sup>th</sup> October 2016. In the said affidavit the plaintiff avers that the application is incompetent and bad in law as the applicant has not complied with Order 11 of the Civil Procedure Rules. He further avers that the matter has come up for hearing on several occasions but the applicant was not ready. He takes issue with the affidavit sworn by Patrick Lumumba Nyaramba for failing to indicate the date when it was sworn. He finally avers that the said Patrick Lumumba had not taken out a practicing certificate at the time he filed the application on behalf of the 1<sup>st</sup> Defendant and therefore the application is incompetent and ought to be struck out.
4. The application was canvassed by way of written submissions and both advocates filed submissions on behalf of their clients.

**Issues for Determination**

5. I have considered the application and rival submissions and the following issues arise for determination:

- i. Whether there has been inordinate delay in prosecuting this suit
- ii. Whether the plaintiff has given a satisfactory explanation for the delay in prosecuting this suit
- iii. Whether the 1<sup>st</sup> defendant shall suffer any prejudice if the application is granted
- iv. Whether pleadings filed by an advocate who has not taken out a practicing certificate ought to be struck out.

**Analysis and Determination**

6. On the first issue, I have looked at the proceeding of the Court. The plaintiff's filed this suit on 12<sup>th</sup> August 2006. The defendants filed their defences by October 2006 and the plaintiff filed a reply to defence on 17<sup>th</sup> October 2006 thereby closing the pleadings. On 29<sup>th</sup> May 2007, the 1<sup>st</sup> defendant's file an Amended defence to which the plaintiff filed a Reply on 13<sup>th</sup> June 2007. Thereafter, the suit was set down for hearing on 16<sup>th</sup> March 2009 when the plaintiff and his advocate failed to attend court the same was dismissed for non- attendance. The

plaintiff swiftly filed an application to set aside the order of dismissal of the suit and Justice Ang'awa granted the application on 19<sup>th</sup> May 2009. The suit was then fixed for hearing on 12<sup>th</sup> November 2010 but it was taken out of the hearing list by consent as Mr. Juma, counsel for the plaintiff was in the Court of Appeal. The plaintiff then went into slumber. In the meantime, on 7<sup>th</sup> June 2016, the 1<sup>st</sup> defendant filed an application to dismiss the suit for want of prosecution which is the subject of this ruling.

7. Under Order 17 Rule 2 (1) of the Civil Procedure Rules, this court has jurisdiction to dismiss a suit for want of prosecution if no step has been taken by either party for one year. In the instant suit, the period of inaction between 2010 and 2016 has not been explained by the plaintiff and I find that it is inordinate.

8. I am guided by the case of **Netplan East Africa Limited V Investment and Mortgages Bank Limited (2013) eKLR** where the Court held as follows:

***“I find that the delay in this matter has been established. When such delay is established, unless it is well explained, it becomes inexcusable... From what I have stated earlier, the plaintiff has failed to offer any plausible reason for its failure to prosecute the suit since 23<sup>rd</sup> November 2009. The plaintiff even after dismissal of the suit on 9<sup>th</sup> January 2009 did not file the present motion until ten months later on 17<sup>th</sup> January 2013. This is undue laches. A portrait emerges of a lethargic litigant completely disinterested in the prosecution of its suit. Under such circumstances the Court was well entitled to dismiss the suit under Order 17 Rule 2(1) of the Civil Procedure Rules 2010 and the inherent powers of the Court. See Mukisa Biscuits Manufacturing Company V West End Distributors Ltd (1969) E.A 696.”***

9. In the instant suit even after the suit was reinstated on 19<sup>th</sup> May 2009, the plaintiff only fixed it for hearing once on 12<sup>th</sup> November 2010 when it failed to proceed then went back to sleep. Clearly this is a plaintiff who is not keen on prosecuting his case.

10. Regarding the second issue, the plaintiff has in an attempt to explain the delay shifted the blame to the 1<sup>st</sup> defendant by stating that the suit was not yet ripe for hearing since the 1<sup>st</sup> defendant had not complied with pre-trials. He then raises technicalities touching on the supporting affidavit and the status of counsel for the 1st defendant at the time the application was filed.

11. While considering a similar situation in the case of **Argan Wekesa Okumu V Dima College Limited & 2 Others (2015) eKLR** the Court held as follows:

***“..The Plaintiff further faults the defendants by stating that he could not fix the matter for hearing since the parties were yet to comply with Order 11 of the Civil Procedure Rules, 2010.***

***Be that as it may, under Order 17 Rule 2(1) the burden of expeditious prosecution of a suit lies with the plaintiff and not the defendant. The pendency of the application did not prevent the plaintiff from taking steps to prosecute his suit. Neither did it prevent him from undertaking pre-trials ... He cannot pass the blame to the defendant. The case of Mobil Kitale Services V Mobile Oil Kenya Limited and Another is instructive. Warsame J citing the case of Nilani V Patel (1969) E A 341 observed as follows:***

***I am in agreement with these observations. The Plaintiff by all means had a duty to prosecute the suit that had been filed in court. Although the plaintiff in this case accuses the defendants of contributing to the delay by filing multiple applications and not complying with order 11 of the Civil Procedure Rules, the burden is always on the plaintiff to ensure the expeditious conclusion of his case. It was therefore the duty of the plaintiff to move the court for directions on any pending application. The same holds true with regards to the defendant's non-compliance with Order 11 of the Civil Procedure Rules 2010. The Plaintiff should have sought the court's direction on any pre-trial procedures and whether the same were necessary. In my view the plaintiff should not have sat back and waited for the lapse of 2 years and 10 months to be jolted into action. I note that although the plaintiff has complied with the pre-trial procedures, and is purportedly ready to prosecute his case, the same was only filed after and in reaction to the application for dismissal that was filed by the defendant. The filing of witness statements, list of witnesses and the bundle of documents all dated 18<sup>th</sup> June 2013 was probably intended to give the illusion that the plaintiff was still interested in prosecuting the suit. The question then becomes why the plaintiff had to wait for nearly three years to demonstrate such willingness. I therefore find that there has been undue laches on the part of the plaintiff and a portrait emerges of a lethargic litigant disinterested in the prosecution of the instant suit.”***

12. The court further observed as follows:

***“Cases cannot remain in courts forever. They are for determination. There has been no action since 13<sup>th</sup> May 2010 until the present application was filed, and this suit is for dismissal for want of prosecution. Accordingly, I find the defendant's application to be meritorious. I will therefore allow the application dated 12<sup>th</sup> March 2013 and order that the suit be dismissed with costs to the defendants”***

13. Article 159 2 (b) of the Constitution of Kenya 2010 enjoins the courts to administer justice without delay while the objective of oxygen rule under sections 1A and 1B of the Civil Procedure Act is to ensure the just, expeditious, proportionate and affordable disposal of cases. I find no good reason why this case should continue pending in this court.

14. No doubt the defendant continues to be prejudiced by having a suit hanging over his head. The 2<sup>nd</sup> defendant has already passed away and the 1<sup>st</sup> defendant is over 80 years. The chances of both the plaintiff's and defendant's witnesses disappearing or losing interest is also high, not to mention the ever increasing cost of living which means that the 2<sup>nd</sup> defendant has to incur more expenses in terms of transport

and associated costs while attending court. There is no good reason why this should happen. Justice delayed is justice denied.

15. And finally the plaintiff has raised the issue that the plaintiff's advocate had not taken out a practicing certificate at the time he filed the plaintiff's pleadings. In **National Bank of Kenya Limited V Anaj Warehousing Limited (2015) eKLR** the Supreme Court pronounced itself on this issue as follows:

*“The facts of this case, and its clear merits lead us to a finding and the proper direction in law, that no instrument or document of conveyance becomes invalid under section 34 (1) (a) of the Advocates Act only by dint of its having been prepared by an advocate who at the time was not holding a practicing certificate. The contrary effect is that documents prepared by categories of unqualified persons, such as non-advocates, or advocates whose names have been struck off the roll of advocates shall be void for all purposes.*

*While securing the rights of the client whose agreement has been formalized by an advocate not holding a current practicing certificate, we would clarify that such an advocate's obligations under the law remain unaffected. Such advocate remains liable in any applicable criminal or civil proceedings well as any disciplinary proceedings to which he or she may be subject”*

16. The above decision settled with finality the fate of pleadings drafted by an advocate who has not taken out a practising certificate in terms of section 34 of the Advocates Act.

17. The plaintiff has failed to convince this court that he has a valid excuse for having failed to prosecute his case for the last 12 years. Litigation must come to an end. Accordingly, I dismiss the plaintiff's suit with costs to 1<sup>st</sup> the defendant.

**Dated, signed and delivered at Kericho this 23<sup>rd</sup> day of May, 2018.**

.....

**J.M ONYANGO**

**JUDGE**

**In the presence of:**

1. Mr. Koech for Mr. Otiso for the 1<sup>st</sup> Defendant
2. No appearance for the Plaintiff and 2<sup>nd</sup> Defendant
3. Court Assistant - Rotich