



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO 58 OF 2012

FABIO LUCHETTI

ALLESANDRO LUCHETTI.....PLAINTIFFS

VERSUS

MARIA ZACCAGNINO.....DEFENDANT

RULING

1. Before me for determination is a Notice of Motion application dated 13th February 2018. The Defendant/Applicant prays for the following orders:-

- i) That the Plaintiff's suit be dismissed with costs for want of prosecution and in the alternative the Plaintiff suit be stayed.***
- ii) That the Court do grant leave to the defendant to prosecute her counter claim.***
- iii) That the costs of this application be provided for.***

2. The said application is supported by an affidavit sworn by the Applicant Maria Zaccagnino and is premised on the following grounds:-

- i) That the continued existence of the suit indefinitely without prosecution is becoming oppressive and (amounts to) a denial of justice to the defendant.***
- ii) That there has been inordinate and inexcusable delay***
- iii) That the Plaintiff is in wrongful occupation of the defendant's property and he has no desire to have the suit prosecuted.***

3. Responding to the said Application, the 1st Plaintiff Fabio Luchetti swore an Affidavit filed herein on 12th March 2018 stating that they have not lost interest in the matter and that it was last in Court in February 2018. It was among other issues their case that dismissal of a suit as sought herein is draconian and punitive and urged the Court to proceed to hear the matter on its merit.

4. The said Replying Affidavit had however not been served upon the Applicant by the time this matter came up for hearing on 13th March 2018. Given their failure to attend Court during the hearing of the

application and the fact that the Replying Affidavit had not been served upon the Applicant, Mr. Ole Kina, Learned Counsel for the Applicant urged this Court to disregard the Affidavit. In support of his case, Counsel cited the position in the English Case of **Craig –vs- Kansen(1943)1KB 256** where Lord Greene MR stated that where service of process is required and a party fails to effect service, any order made based on that process is irregular.

5. The Learned Counsel further relied on the authority of **Jane Wambui Mwaura –vs- Independent Electoral & Boundaries Commission & 2 Others (2017) eKLR** where the election Court held that the failure to serve a petition upon the 3rd Respondent rendered it a nullity and proceeded to strike it out.

6. I am however not persuaded that the failure to serve the Replying Affidavit would have the same effect as the positions referred to by Counsel. Article 159(2) (d) of the Constitution demands that in exercising Judicial authority the Courts and tribunals shall be guided inter alia, by the principle that justice shall be administered without undue regard to procedural technicalities.

7. From the record, the application before me was filed in Court on 13th February 2018 and was served upon the Respondent's Counsels on record Messrs Khaminwa & Khaminwa Advocates on 26th February 2018. The failure to serve the Replying Affidavit in question which in any event was filed within reasonable time after service should not render such a document irregular and/or a nullity as to preclude the Court from taking cognizance of the same.

8. As was stated in **CFC Stanbic Ltd –vs- John Maina Githaiga & Another(2013) eKLR**,

“It is a widely accepted principle of law that a litigant should not suffer because of his Advocate’s oversight.”

9. In my view, it is the Counsel on record who failed to serve the Replying Affidavit and to appear in Court for the application after the 1st Plaintiff had sworn the Affidavit on 12th March 2013.

10. Turning to the substance of the application, the legal basis for dismissal of suits for want of prosecution is the requirement of expediency in prosecution of civil suits. This again is anchored in the provisions of Article 159(2) (b) of the Constitution that justice should not be delayed. Sections 1A, 1B and 3A of the Civil Procedure Act equally give the Courts unlimited power to make such order as may be necessary for the ends of justice or to prevent abuse of the process of Court.

11. The procedural underpinning to the above substantive provisions of the Constitution and the law is Order 17 Rule 2 of the Civil Procedure Rules which allows the Court on its own motion or on notice to the parties, where no action in a suit has been taken for one year to either have the suit set down for hearing or apply to have it dismissed for want of prosecution.

12. In my mind, the discretion given to the Court to dismiss the suit where no action has been taken for a stated period must be exercised on the basis that it is in the interest of justice regard being had to whether the party that instituted the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay.

13. In **Ivita –vs- Kyumba(1984) KLR 441**, the Court observed that:-

“The test applied by the Courts in the 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 set down for hearing at the earliest time. It is a matter of and in the discretion of the Court.

14. Arising from the foregoing, it is clear that the power to dismiss a suit in this manner is a discretionary one and must therefore be exercised judiciously. Examining the record herein, this suit was instituted on 7th December 2012. On the same day, the Plaintiffs brought an application under Certificate of Urgency seeking orders of injunction to issue against the Defendant. By a Ruling dated and delivered on 6th June 2013, the Honourable Justice Angote then seized of the matter dismissed the said application with costs.

15. Subsequently, the Plaintiffs filed a Notice of Appeal dated 11th June 2013. It would appear that nothing much was done thereafter and on or about 21st February 2017, the Defendants filed an application to strike out the Notice of Appeal. On 11th April 2017, the Plaintiffs conceded to the application and the Notice of Appeal was accordingly struck out.

16. The Defendants subsequently proceeded to fix their counterclaim for hearing on 7th February 2018. On the said day however, Counsel for the Defendant adjourned the matter after it emerged that the main suit was yet to be disposed off. It is noteworthy that on the said date when the matter came up for hearing, there was no appearance for the Plaintiffs in spite of an Affidavit of Service filed in Court on 6th February 2018 indicating that the Plaintiffs Counsel were served on 21st November 2017.

17. In the Replying Affidavit filed to the application before me, other than denying that they have lost an interest in the case, the Plaintiffs do not offer any explanation as to why they have not taken any steps to prosecute their case. They instead accuse the Defendant of being bent on disturbing the status quo and depriving them of the property.

18. There being no explanation why no steps have been taken to prosecute this case for more than five years, this Court can only make an inference that the Plaintiffs have lost interest in the suit and are only out to archive the pleadings in Court. The Defendants have a counterclaim to prosecute. The delay in settling down the matter for hearing no doubt prejudices the defendant as justice delayed is justice denied.

19. This Court is aware as the Plaintiffs point out in their Replying Affidavit that the act of dismissing a suit is a draconian measure which should be exercised cautiously as it drives the party away from the Judgment seat. Nonetheless the Court is bound to do justice to both parties, without undue delay as such delay occasions injustice to either party.

20. The Plaintiffs filed this suit, failed to get injunctive orders to preserve the status quo and went to slumber. In the premises, and as the Plaintiffs have failed to explain the delay, I find merit in the Defendant's application dated 13th February 2018.

21. The Plaintiffs suit is accordingly dismissed for want of prosecution.

22. The Defendant shall have the costs of this application and the suit.

23. For the avoidance of doubt, the Defendant is hereby granted leave to prosecute the counterclaim.

Dated, signed and delivered at Malindi this 3rd day of May, 2018.

J.O. OLOLA

JUDGE