



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI NAIROBI

ELC. CASE NO. 516 OF 2012

HELLEN WANGARI SAMUEL.....PLAINTIFF

=VERSUS=

SIMON KAMAU MUNGA.....1ST DEFENDANT

ANTONY WAWERU.....2ND DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 28th November 2014 in which the 1st Defendant/Applicant seeks for the dismissal of this suit for want of prosecution with costs.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of Kimandu Gichohi, the advocate acting for the 1st Defendant/Applicant, in which he averred that the Plaintiff and the 1st Defendant filed two separate Notices of Motion dated 14th August 2012 and 20th October 2012 respectively, of which the court gave a ruling on 1st November 2013. He further averred that since the delivery of that ruling which is well over a year ago, the Plaintiff/Respondent has never taken any further step in prosecuting her claim in this suit, thereby causing detriment and anguish to the 1st Defendant/Applicant. He added that it is in the interest of justice that this suit be dismissed and the Plaintiff/Respondent be condemned to pay costs of this Application and suit.

The Application is contested. The Plaintiff/Respondent, Hellen Wangari Samuel, filed her Replying Affidavit sworn on 26th May 2016 in which she averred that after the court gave directions, she filed and served the amended plaint upon the Defendants and further that during the intervening period since the ruling was delivered, she was engaged in **Makadara Criminal Case No. 3739 of 2012** Republic versus **Hellen Wangare Samuel** which case is connected to the suit property. She informed the court that the evidence of some witnesses in that case has been taken. She further added that in this suit, she has also filed her further witness statement together with statements for her other witnesses during the intervening period. She averred that she has every desire to have this suit heard and determined on merit as she purchased the suit property with her own sweat. On those grounds, she sought for this Application to be dismissed and this suit fast tracked to hearing and determination.

In response thereto, the 1st Defendant/Applicant filed the Further Affidavit of his advocate Kimandu Gichohi sworn on 26th July 2016 in which the deponent averred that the Plaintiff/Respondent has never served them with the original plaint and summons and that summons have never been extracted to date. He further averred that the procession of a criminal case is not sufficient reason as to the reason why the Plaintiff failed to prosecute this civil suit. It was his further averment that the Plaintiff/Respondent has not given any plausible reason why she failed to prosecute her case all this time or failed to serve the Defendants with the original plaint and summons. On those grounds, the 1st Defendant/Applicant urged the court to allow this Application.

The issue that I am called upon to determine is whether or not to dismiss this suit for want of prosecution. The applicable law is **Order 17 Rule 2(1) of the Civil Procedure Rules, 2010** which provides as follows:

“In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.”

The dismissal of a suit for want of prosecution is meant to prevent an abuse of the court process. The test in an application for dismissal of suit for want of prosecution was laid out in the case of **Ivita vs. Kyumbu [1984] KLR 441**, where Chesoni, J. (as he then was) held that,

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is

justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents and or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."

Further in **E. T. Monks and Co Ltd v Evans (1985) KL R 584** the court stated as follows,

"The court when pondering over an application to dismiss a suit for want of prosecution should among other things ask whether the delay was lengthy, has it made a fair trial impossible and was it inexcusable. Whether or not the application should be allowed is a matter for the discretion of the judge who must exercise it, of course, judicially. Each turns on its own facts and circumstances..... If the plaintiff has caused or consented to the delay which led to its suit being dismissed for want of prosecution then it must blame itself..... It is the duty of the plaintiff to bring his suit to early trial, and he cannot absolve himself of this duty by saying that the defendant consented to the position."

Whether or not this Application should be allowed is a matter for the discretion of the judge who will be guided by the reasons advanced by the Plaintiff as to why she did not set the suit down for hearing. In this particular case, the Plaintiff has informed the court that the reason why she has not set down this suit for hearing is because she was involved in a criminal case being **Makadara Criminal Case No. 3739 of 2012** Republic versus Hellen Wangare Samuel involving the suit property. She has also told the court that during the one year period complained of, she has served the 1st Defendant with the amended plaint and has further filed her further witness statement and the witness statements of her other witnesses. Firstly, I observe that the delay has only been for one year. Though this is the time period referred to in the legal provision cited above, I do not consider the one year delay to have been so lengthy as to make a fair trial impossible or as to prejudice the Defendants. Further, it is also noteworthy that the Plaintiff has taken several actions during the one year period being to serve the amended plaint and to file her further witness statement and the witness statements of her other witnesses. Overall, I am not satisfied that this case warrants dismissal for want of prosecution. Accordingly, this Application is dismissed and costs shall be in the cause.

SIGNED AND DATED BY LADY JUSTICE MARY M. GITUMBI AT NAIROBI THIS 19TH DAY OF JUNE 2018.

MARY GITUMBI

JUDGE

DELIVERED BY JUSTICE BERNARD EBOSO AT NAIROBI THIS 21ST DAY OF JUNE 2018.

BERNARD EBOSO

JUDGE