



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.338 OF 2016

ELIUD MACHARIA MUNGAI PLAINTIFF

VERSUS

THE ATTORNEY GENERAL 1ST DEFENDANT

THE COUNTY LAND REGISTRAR NAKURU.....2ND DEFENDANT

THE CHIEF KAPTEMBWA 3RD DEFENDANT

THE COUNTY SURVEYOR 4TH DEFENDANT

BEATRICE KAGWANYA ANDALA 5TH DEFENDANT

ESTHER CHEBATI NGETICH 6TH DEFENDANT

JOSIAH OMAMBIA OUMO 7TH DEFENDANT

LOISE BWOGO RUTO 8TH DEFENDANT

RULING

(Application for dismissal of suit for want of prosecution; Order 17 Rule 2 requiring that one year must lapse from the date of the last court action; application filed before lapse of one year of the last court action by the plaintiff; application premature; application dismissed)

1. The application before me is that dated 27 March 2018 filed by the 8th defendant (although wrongly mentioned as 7th defendant). It is an application brought pursuant to the provisions of Order 17 Rule 1 & 3 and seeks orders to have this suit dismissed for want of prosecution. I have not seen any response by the plaintiff, opposing this application, and neither did the plaintiff nor his counsel appear at the hearing of the application, despite being duly served. As far as the applicant is concerned, the plaintiff appears to have lost interest in the suit and the suit is ripe for dismissal for want of prosecution.

2. I have gone through the record and the application. I observe that the suit itself was filed on 19 August 2016. In the suit, the plaintiff pleaded that around the year 1975, he purchased 25 shares from one Chesire arap Chepkwony, who was a shareholder in a company known as Kalenjini Enterprises Limited. It is averred that these 25 shares entitled the plaintiff to a parcel of land measuring approximately 1.8 acres and that the plaintiff was allotted the land parcel No. 1016 measuring 3/4 of an acre and the land parcel 1027 measuring approximately 1/2 acre, totaling 1.8 acres. He has pleaded that on 4 May 2003, he sold to the 6th defendant a parcel of land measuring 50 X 100 feet excised from the land parcel No. 1016 but a search done on 9 October 2015 shows the 6th defendant as having title to the whole of the parcel of land which he avers is fraudulent. The plaintiff has further pleaded that he has never known the 5th, 7th, 8th and 9th defendants but they do have titles excised from the land parcels No. 1016, 1027 and 1028. It is his position that these titles are also fraudulent. He pleaded that on 20 July 2016, the 3rd defendant, the Chief of Kaptebwa location, recruited and armed 25 youth and a surveyor, and they invaded the plaintiff's parcels of land with the aim of creating a public road of access through the same. In his suit the plaintiff wishes to have a declaration that the titles of the 5th - 9th defendants over the land parcels Nakuru Municipality Block 29/23, 1016, 1027, 1028 and 1238 are fraudulent and for the plaintiff to be issued with titles to these parcels of land. He also wants damages for trespass, costs and interest. Together with the suit, the plaintiff filed an application for injunction seeking to restrain the defendants from any further interference with the suit properties until the case is finalized.

3. I have only seen appearances by the 6th, and 8th defendants, and only the 8th defendant filed defence and a reply the application for injunction. On 18 October 2017, the plaintiff withdrew the suit against the 6th defendant.

4. The application for injunction first came before the Deputy Registrar on 29 August 2016, and she ordered that the same be placed before the judge on 6 September 2016. There was no judge on 6 September 2016, and the Deputy Registrar gave a mention for 4 October 2016. The case was mentioned on that day and on 6 October 2016 before the Deputy Registrar, and finally placed before me on 9 November 2016, when I directed that the application for injunction be heard on 8 May 2017. On that day, Ms. Chelangat, who held brief for Ms. Omwenyo for the plaintiff, submitted that the application for injunction be deferred, as there were investigations being done on the ownership of the suit properties which could lead to a settlement. She asked that the case be mentioned in 2 months time, which was agreed by Mr. Kirui, learned state counsel, who appeared on behalf of the 1st to 4th defendants. Given that position, I directed that the case be mentioned on 12 September 2017. The file does not appear to have been placed before the judge on this day, and no activity has taken place, until this application was filed on 28 March 2018.

5. I have assessed the application. Order 17 Rule 2, which is operative, provides as follows :-

Notice to show cause why suit should not be dismissed [Order 17, rule 2.]

(1) 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.

(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.

(4) The court may dismiss the suit for non-compliance with any direction given under this Order.

6. It will be seen from the above that if the plaintiff takes no step within one year, a defendant can apply to have the suit dismissed, or the court on its own motion, can apply for its dismissal.

7. I have noted that the last time this case was before court was 8 May 2017, when the application for injunction was coming up for inter partes hearing, and when I was informed of the possibility of a settlement. This application was filed on 28 March 2018, and it is apparent that one year had not lapsed from the last time a step was taken to move the suit. The earliest that such application could be filed would be 8 May 2018, that is one year from the last action by the plaintiff in the matter. I am of the view that this application is therefore premature and I really do not see the point of saying more. It was filed before the lapse of one year to the last court action.

8. For the above reasons, I find no merit in this application and it is hereby dismissed. I will however make no orders as to costs as the plaintiff did not respond to the application.

9. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 19th day of September 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of :-

All parties - Absent

All counsels – Absent

Court Assistant :Nelima

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU