



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL SUIT NO.7 OF 2013

1. BEATRICE MBENYU MASHA.....PLAINTIFF

-VS-

1. MOHAMED MANGO

2. ABDALLA GUDE.....DEFENDANTS

RULING

1. For determination is the Notice of Motion dated 12th July 2016 brought under Section 1A, 1B and 3A of the Civil Procedure Act and Order 17 Rule 2(1) of the Civil Procedure Rules in which the Defendants/Applicants are seeking the following orders:

- 1. Spent**
- 2. The suit herein be and is hereby dismissed for want of prosecution.**
- 3. The costs of this application is provided for.**

2. The application is premised on the grounds that the Plaintiff has not taken any step for over a year in the prosecution of the suit and that the plaintiff is guilty of inordinate delay. The application is further supported by the affidavit of Mohamed Mango (aka Mohamed Ali Mango) sworn on 14th July 2016 in which he deposes that since the last hearing of the suit on 23rd May 2013, the Plaintiff has not done anything towards the prosecution of the suit. That the Plaintiff has not caused the matter to be set down for directions or hearing before court as required and wants the suit dismissed as it would appear that the Plaintiff has lost interest in the case.

3. The Application is opposed by the Plaintiff who filed a replying affidavit dated 2nd October, 2017 in which she deposes inter alia that it not her intention not to proceed in the matter for the reason that on 27th February 2013, the Court (Mukunya J) ordered **Case No. 356 of 2010** to be consolidated with this case but the order (for consolidation) has not been complied with because the file cannot be found. She pointed out that the court proceedings are not complete as some proceedings are not in the court file. The Plaintiff deposes that she is also a party in **Case No.356 of 2010 (OS)** in which they are praying to be declared owners of the land in dispute. She adds that the matter cannot be determined without looking at the merits of the case. The Plaintiff avers that she is claiming ownership by way of adverse possession while the defendants allege she is a squatter and therefore the case ought to be heard and decided on merit.

4. Mr. Kimani, learned Counsel for the Defendants submitted that this suit is independent of **Case No.356 of 2010 (OS)** and that the Plaintiff is not a party in that other case. He submitted that the plaintiff has not taken any action since 2013 despite coming to court under Certificate of Urgency. It was Counsel's submission that it is not excuse to state that the court had called for other files, pointing out that the delay has not been explained. Counsel further submitted that if the court is persuaded not to dismiss the suit, the same should be stayed to avoid multiplicity of suits.

5. On his part, Mr. Ambwere, learned Counsel for the Plaintiff submitted that the suit should not be dismissed and pointed out that on 25th June, 2013 Mukunya, J had ordered that the case be consolidated with **HCCC No.356 of 2010**. Counsel submitted that this is a dispute over land in which some families are living and dismissing it would be so drastic. He further submitted that the issues herein need to be determined on merit. He pointed out that some proceedings in the court file have been plucked out, including the order for consolidation.

6. I have carefully considered the application. The only issue for determination is whether the suit should be dismissed for want of prosecution. The power to dismiss a suit for want of prosecution is donated by Order 17 Rule 2 of the Civil Procedure which provides as follows:

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.

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

7. In deciding the application I will be guided by the principles which the law has developed to guide the courts in its discretion in application for dismissal of suits for want of prosecution. These principles include whether there has been inordinate delay on the part of the plaintiff in prosecuting the case; whether the delay is intentional and therefore inexcusable; whether the delay has caused prejudice to the defendant; whether the plaintiff has offered a reasonable explanation for the delay and what the interest of justice dictate in the case.

8. The plaintiff filed this suit on 17th January 2013 and the Defendants filed their pleadings and documents on 31st January 2013. The plaintiff then filed an amended plaint on 12th February 2013. The defendants filed the present application on 15th July 2016. It is not clear what transpired between February 2013 and July 2016 as the proceedings are missing from the court record. The plaintiff has stated that sometime in the year 2013, the court (Mukunya, J) ordered for the consolidation of this suit with HCCC N. 356 of 2010 (OS). The said order for consolidation is not in the court file. As already stated, the proceedings in the court record are not complete.

9. Even though it is the view of this court that the plaintiff has not offered any explanation for not taking any step in the matter between February 2013 and July 2016 when this application was filed, I note that this is a dispute over land and dismissal of the suit without hearing the merits would be a draconian act. I wish to associate myself with the sentiments of **Gikonyo J in Utalii Transport Company Ltd & 3 others –v- Nic Bank** in which he stated as follows:

“I am guided by a high sense of promoting the principles of substantive justice enshrined in the constitution and therefore convince that the circumstances of this case deserve a lenient exercise of discretion by the court in favour of sustaining rather than dismissing the suit.”

10. Although there has been delay on the part of the plaintiff to set down the matter for hearing, this court has not been shown that the delay, though inordinate, is deliberate, contumelious and therefore inexcusable. In my view, in as much as there is delay, the interest of justice can still be served if the plaintiff is given an opportunity to prosecute her case.

11. Accordingly, I decline to grant the application dated 12th July 2016 and hereby dismiss it. Costs of the application to be in the cause. The parties are directed to comply with order 11 of the Civil Procedure Rules within 30 days and thereafter the matter shall be set down for hearing.

Delivered, signed and dated at Mombasa this 19th September, 2018.

C. YANO

JUDGE