



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC. CASE NO.41 OF 2015

GEORGE TED OSEWE ODERO.....1ST PLAINTIFF

NAFTALI ARODI OYUGI.....2ND PLAINTIFF

CATHERINE ODERO.....3RD PLAINTIFF

(Suing as the office bearers of Lakeland Welfare Club)

VERSUS

PAULINE ADHIAMBO RAGET.....1ST DEFENDANT/APPLICANT

DEBRA OJANY MALOWA.....2ND DEFENNDANT/RESPONDENT

ROEBERT OCHOLLA.....3RD DEFENDANT/RESPONDENT

LAND REGISTRAR, KISUMU COUNTY.....4TH DEFENDANT/RESPONENT

THE HON. ATTORNEY GENERAL.....5TH DEFENDANT/RESPONDENT

KENYA COMMERCIAL BANK.....6TH DEFENDANT/RESPONDENT

RULING

1. Pauline Adhiambo Raget, the 1st Defendant, filed the notice of motion dated 4th December 2017, seeking for this suit to be dismissed with costs for want of prosecution. The motion is based on the six (6) grounds marked (a) to (f) on its face and supported by the affidavit sworn by Pauline Adhiambo Raget on the 4th October 2017.

2. The application is opposed by the Plaintiffs through the replying affidavit sworn by Nicholas Weru Munyoro, an advocate from the firm of advocates on record for the Plaintiffs, sworn on the 15th December 2017.

3. The application came up for hearing on the 30th May 2018. Mr. Musungu, M/s Orege and Mrs. Onyango the learned counsel for 1st, 5th and 6th Defendants respectively submitted in support of the application.

4. The issues for determinations are first whether the 1st Defendant had established that the plaintiff had taken more than one year without taking any steps to prosecute this suit by the time the application was filed, and secondly, who pays the costs.

5. The court has carefully considered the grounds on the application, the supporting affidavit, the record, counsels submissions and come to the following determinations;

a) That the record shows that after the court ruling on the Plaintiff's notice of motion dated 3rd February 2015, on the 13th April 2016, the following documents were filed before the instant application.

(i) Notice of Change of Advocates dated 22nd July 2016 and filed on 14th September, 2016 by M/s Musungu & Co. Advocates.

(ii) Notice of motion dated 8th November 2016 and filed on the 15th November, 2016 by M/s Obura Mbeche & Company Advocates for the Plaintiffs.

(iii) Notice of Change Advocates dated and filed on 31st August 2016 by M/s Musungu & Co. Advocates for 1st Defendant.

(iv) Grounds of opposition to the Notice of Motion dated 8th November 2016 by M/s Musungu & Co. Advocates for the 1st defendant dated 31st August 2017

b) That from the date of the ruling of 13th April 2016 to the date the Plaintiffs notice of motion dated 8th November 2016 was filed on the 15th November 2016, only a period of about seven (7) months and two (2) days had lapsed. That the filing of the said notice of motion was definitely a step taken towards prosecuting the Plaintiffs case for purposes of **Order 17 of Civil Procedure Rules**. That the 1st defendant opposed the application through their grounds of opposition dated 31st August 2017. That the court then issued notice to show cause under **Order 17 Rule 2 of Civil Procedure Rules** dated 11th September 2017. That when the notice came up for hearing on the 19th December 2017, the court ruled that the said notice had been issued in error as a period of more than one year had not lapsed in view of the notice of Change of Advocate and grounds of opposition dated 31st August 2017 by 1st Defendant, and the notice of motion dated 8th November 2016 by the Plaintiff. That the court then proceeded to fix the Plaintiffs' notice of motion dated 8th November 2016 for hearing on the 16th April 2018. That the application was dismissed with costs for non-attendance by the Plaintiffs and or their advocates on record.

c) That as is evident above, by the time the 1st Defendant filed their notice of motion dated 4th October 2017 seeking to have the suit dismissed for want of prosecution, only about eleven (11) months had lapsed from the 15th November 2016 when the Plaintiffs application dated 8th November 2016 to amend the pleadings was filed. That period falls short of the one contemplated in **Order 17 Rule 2 of the Civil Procedure Rules**. That the period could even be shorter if the court considered the grounds of opposition by the 1st defendant dated and filed on the 31st August 2017. That the foregoing shows that the 1st defendant's notice of motion dated and filed on the 4th October 2017 was filed prematurely, and therefore fails notwithstanding the absence of counsel for the Plaintiffs, and the support by counsel for 5th and 6th Defendants.

6. That in view of the foregoing, the 1st Defendant's notice of motion dated and filed on the 4th October 2017 is without merit and is dismissed with costs to the Plaintiff.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 31ST DAY OF OCTOBER 2018

In the presence of:

Plaintiffs Absent

Defendants Absent

Counsel Absent

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE