



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 151 OF 2017

OLE UNUA OLE TONKEI & 45 OTHERS.....PLAINTIFFS

VERSUS

SUKEI OLE NKOYIEI & 3 OTHERS.....DEFENDANTS

RULING

1. By Notice of Motion dated 19th March 2018, the defendants seek dismissal of this suit for want of prosecution. The application is supported by an affidavit sworn by Sukei Ole Nkoyiei, the 1st defendant. He deposed that despite filing the suit in the year 2004, the plaintiffs have taken no step to prosecute it. He therefore urged the court to allow the application.

2. The plaintiffs opposed the application through a replying affidavit sworn by Ole Unua Tonkei, the 1st plaintiff. He deposed that the plaintiffs are very much interested in the case and that their livelihoods depend on the parcel known as Transmara/Kimindet 'D'/1280, the suit property. He added that they filed this suit through Odhiambo & Odhiambo Advocates but the said advocates did not take steps to prosecute the matter despite being fully instructed. As a result, they had to change advocates. He urged the court not to make the plaintiffs suffer the consequences of the failures of their previous advocates.

3. In brief oral submissions, counsel for the defendants pointed out that the plaintiffs' new advocates came on record as an afterthought after the present application was filed and served. On his part, Counsel for the plaintiff conceded that there has been a long delay but added that dismissal of the suit would render the plaintiffs homeless. He further submitted that the defendants have a counterclaim and a dismissal of the suit would leave the counterclaim hanging.

4. I have considered the application, the affidavits filed and the submissions. **Order 17 rule 2** of the **Civil Procedure Rules** provides:

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.

5. Proceedings in this matter commenced on 10th June 2004 when the plaintiffs filed the suit in the High Court at Nakuru as HCCC No. 160/2004. The matter was later transferred to this court and was given the new number ELC No. 151 of 2017.

6. A perusal of the plaint reveals that the plaintiffs seek a declaration that the 1st defendant is registered as proprietor of the suit property as a trustee for the plaintiffs and a cancellation of the 1st defendant's title among other reliefs. I further note that on 14th July 2004, the 1st defendant filed a defence and counterclaim in which he sought among others an eviction order against the 46 plaintiffs.

7. When a litigant files a case in court, he is under a cardinal duty to take all necessary steps to ensure prompt prosecution and conclusion of the case. Needless to state, the court too should be ready to facilitate all willing litigants to conclude their cases. Whenever litigants have shown lethargy, the law gives avenues for bringing deadwood cases to a real end: dismissal for want of prosecution.

8. The plaintiffs have readily and honourably conceded that there has been delay in prosecution of this case. They have however urged the court not to dismiss the case for want of prosecution firstly because they blame the delay on their former advocates and secondly because they would like the dispute between them and the defendants to be finally heard and concluded. Though the plaintiffs suggested that there were correspondence showing that they had fully instructed their advocates, copies of the said correspondence were not annexed to the replying affidavit. It is thus not possible for the court to verify their claim that they had instructed their advocates. I thus find that there is no

proof that the plaintiffs' erstwhile advocates were to blame for the delay.

9. The dispute between the parties revolves around ownership of the suit property. The plaintiffs are in occupation of the suit property and they seek cancellation of the 1st defendant's title. The 1st defendant seeks eviction of the plaintiffs. If I were to dismiss the suit for want of prosecution, the result will be that the plaintiffs will remain in occupation of the suit property while the 1st defendant will continue demanding vacant possession. Such an outcome would not assist the parties.

10. Under **Article 159(2)** of the **Constitution**, the court is under a duty to ensure among others that justice is administered without delay and without undue regard to procedural technicalities. Further, under **Section 1B (1)** of the **Civil Procedure Act**, the court is under a duty to ensure timely disposal of the proceedings and efficient use of the available judicial and administrative resources. To ensure efficiency in the matter and taking into account the general circumstances of the parties with regard to the dispute in this matter, I am persuaded that a hearing and determination of the suit on the merits will be necessary as opposed to a summary dismissal of the suit for want of prosecution. The plaintiffs have pleaded that they be given a chance to prosecute the case though they have not been proactive in the past. I will give them another chance. In that context, I am not persuaded that Notice of Motion dated 19th March 2018 should be allowed.

11. In view of the foregoing, I make the following orders:

a) Notice of Motion dated 19th March 2018 is dismissed. Costs in the cause.

b) The plaintiffs to fix this suit for hearing within six (6) months from the date of delivery of this ruling. In default, the suit shall stand dismissed with costs to the defendants.

12. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 30th day of October 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Yogo holding brief for Mr Miruka for the defendants/applicants

Mr Mutai for plaintiffs/respondents

Court Assistants: Gichaba & Lotkomoi