



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

ENVIRONMENT & LAND CASE NO.87 OF 2016

TRUTEA NASAMBU WACHILONGO.....PLAINTIFF

VERSUS

TABITHA MWENDA M'IKIARA.....DEFENDANT

RULING

Order 17 Rule 2(1) of the Civil Procedure Rules states that:

“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.” Emphasis added.

Section 3A of the Civil Procedure Act on the other hand donates to the Court inherent powers to make such Orders as may be necessary for the ends of Justice or to prevent abuse of the process of the Court.

Citing the above provisions, the defendant filed a Notice of Motion dated 7th November 2017 seeking the following Orders:

- 1. That this suit be dismissed for want of prosecution.**
- 2. That the costs of this application be provided for.**

The application is predicated on the grounds set out therein and also supported by the affidavit of **TABITHA MWENDWA M'IKIARA**.

The gravamen of the application is that this suit was filed on 30th August 2016 and it is now over one year but the Plaintiff has not taken any steps to have it prosecuted. That the pendency of this suit is an abuse of the due process of law and it is therefore fair that it be dismissed with costs.

The Plaintiff **TRUTEA NASAMBU WACHILONGA** is acting in person and has filed a replying affidavit in opposition to the application. That affidavit is largely an exposition of the merits of her case and does not really address the application before me. She nonetheless describes the application as filed with bad motives and asks that she be permitted to prosecute her suit to conclusion.

When the Parties appeared before me on 24th July 2018, it was agreed by Mr. NYAMU Counsel for the defendant and the Plaintiff that the application be determined on the basis of the Parties respective affidavits.

I have considered the application and the rival affidavits.

From a perusal of the record, it is clear that this suit is not ripe for dismissal under the provisions of Order 17 Rule 2 of the Civil Procedure Rules. Whereas sub-rule (3) of the above provision allows a party, as the defendant has done, to apply for the dismissal of a suit in which no application has been made or step taken by either party for one year, it is clear that although this suit was filed on 30th August 2016, the suit was last in Court on 18th December 2017 when **MUKUNJA J** directed that it be heard on 30th April 2018. It is not clear why **MUKUNYA J** did not hear this application which was infact coming up for hearing on 18th December 2017 and instead made the order that the suit be heard on 30th April 2018. If the application had been canvassed on 18th December 2017, there is no doubt in my mind that **MUKUNYA J** would have dismissed this suit because by then, this suit had clearly run foul of the provision of Order 17 of the Civil Procedure Rules since the Plaintiff had not taken any action towards prosecuting this suit after filing it on 30th August 2016. Therefore by making the Order that he

made on 18th December 2017 directing that this suit be heard on 30th April 2018, **MUKUNYA J**, inadvertently or otherwise, saved this suit from the yoke of dismissal. And since this suit was last in Court on 18th December 2017 when the Plaintiff is recorded to have said:

“I want to proceed with the case”

and **MUKUNYA J** made the Order:

“Hearing on 30/4/08”, the application dated 7th November 2017 was, for all practical purposes, spent.

It was over-taken by the Orders made on 18th December 2017 and serves no purpose. I must dismiss it.

It is also clear from the use of the word **“may”** in Order 17 Rule 2(1) of the Civil Procedure Rules that dismissal of a suit is not mandatory but rather, it is permissive.

The Court has latitude in deciding whether or not to dismiss a suit for want of prosecution. In so doing, the Court will no doubt bear in mind the provisions of Article 159 of the Constitution and the need to do justice to the parties by, as much as possible, determining cases on their merits particularly land disputes which are quite sensitive. To deny a party the right to be heard should be the last resort of a Court – **SEBEI DISTRICT ADMINISTRATION V GASYALI 1968 E.A. 300**. There is no doubt, however, that this Court retains its inherent jurisdiction to dismiss cases which are merely clogging the Judicial system and taking up limited Judicial time and resources and where parties have gone to sleep. Each case must, however, be considered on its own peculiar circumstances. This is not one of the old Cases at this Court. It was only filed on 30th August 2016 and the Plaintiff, notwithstanding the challenges that she faces as a lay litigant, is clearly desirous to prosecute this case. I do not discern in her a party that has lost interest in her case. It would be an injustice to deny her that opportunity. Taking all that into account, I make the following Orders with respect to the defendant’s Notice of Motion dated 7th November 2017:

1. The application is dismissed with costs.

2. The Parties to comply with the pre-trial directions and have this Case ready for trial in the next sixty(60) days.

3. The suit shall be mentioned before the Deputy Registrar on 15th October 2018 for pre-trial after which a hearing date convenient to all the Parties shall be taken in the registry as soon as the diary for 2019 is available since we have no dates for this year.

BOAZ N. OLAO

JUDGE

11TH OCTOBER 2018

Ruling dated, delivered and signed in open Court this 11th day of October 2018 at Bungoma.

Plaintiff present

Defendant Absent

BOAZ N. OLAO

JUDGE

11TH OCTOBER 2018

COURT: Where is the land situated?

PLAINTIFF: In Kimilili

COURT: This suit is hereby transferred to the subordinate Court at KIMILILI for hearing and final determination. It be mentioned there on 22nd October 2018 for purposes of fixing a hearing date. Mention notice to issue.

BOAZ N. OLAO

JUDGE

11TH OCTOBER 2018