



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 514 OF 2014

RAMADHAN NYANGWESO KANDUWI & 9 OTHERS..... PLAINTIFF/APPLICANTS

VERSUS

THE HON. ATTORNEY GENERAL *on behalf of* MINISTER OF LAND & SETTLEMENT

MUMIAS SUGAR CO. LTD.....DEFENDANT/RESPONDENTS

RULING

This application is dated 9th August 2018 and is seeking the following orders:-

1. That the honourable court be pleased to vary, set aside or review its order delivered on 12th July, 2018 dismissing the matter for want of prosecution and all other consequential orders thereto.
2. That the honourable court be pleased to reinstate the plaintiffs' suit.
3. That costs of this application be in the cause.

The applicants submitted that, the plaintiffs filed this suit on 24/10/2009 vide a plaint dated 15/10/2008 claiming the following reliefs:-

- a. A declaration that the plaintiffs are entitled to be paid rents by the 1st defendant from 1st February, 1968 to 31st December, 2001 with interest thereon at commercial rates.
- b. A declaration that the plaintiffs are entitled to damages as compensation for crops, buildings and other improvements removed from the plaintiffs' parcels of land after execution of the leases with interest thereon at commercial rates.
- c. A declaration that requisite accounts with regard to (a), (b) and (c) be taken.
- d. (i) A declaration that the purported consolidation of the plaintiffs' parcels of land into parcels Mumias Scheme/1 and Mumias Scheme/2 by the 1st defendant is null and void.

(ii) a declaration that, consequently, the purported leases of Mumias Scheme/1 and Mumias Scheme/2 by the 1st defendant to the 2nd defendant is null and void.
- e. A declaration that the plaintiffs' are, in law, entitled to have their parcels of land returned to them physically and legally to them.
- f. Apropos to (e) above and in the alternative a declaration that the plaintiffs are entitled to adequate compensation for their plots of land such compensation to be assessed under market forces evaluation.
- g. Any other and alternative relief as this honourable court may deem appropriate.

By an Amended plaint filed on 31/8/2010 introduced an amendment to include several hundred other plaintiffs making the suit a representative suit brought on behalf of the Abahuyi Community. That subsequently the advocate who was in personal conduct of the matter, the late Luis Gonzaga Menezes Advocate unfortunately got ill for an extended period of time in which he sought treatment abroad and no steps were taken to comply with pre-trial requirements and fix the matter for hearing. That upon the demise of Luis Gonzaga Menezes advocate sometime in the year 2015 the case file pertaining to this matter was handed over to the present counsel. That upon perusing the file

he noted that the plaintiffs/applicants had not complied with pre-trial requirements whereupon he embarked on the singular goal of taking down witness statements and collating documents that would support the representative suit brought by the numerous plaintiffs in this matter. Consequently, on 16/3/2016 he managed to file witness statements and a few documents on behalf of the officials of the Abahuyi Mumias Nucleus Association. (Annexed and marked "CM-2 (a) and (b) are the list of witnesses and list of documents). That when the matter came up for mention on 15/1/2018 the plaintiffs/applicants had only filed five witness statements and a few documents in support of the plaintiffs' suit which is of a representative nature hence insufficient to support the plaintiffs' case.

That several files containing documents relating to the Abahuyi Mumias Nucleus Association which previously had been in the possession of the late Luis Gonzaga Menezes Advocate but had been returned to the Association and had been misplaced in the wake of his death and were only discovered a few days before the hearing date of 12/7/2018. That whereas the association members who are elderly had looked for the crucial documents their discovery in the week the matter was scheduled for hearing coincided with another hearing in the Kitale Environment & Land Court being Kitale ELC Case No. 105 of 2017 Cosmas Stephen Nabungolo vs. African Banking Corporation Limited which he attended hence his absence on the 12/7/2018 which led to the dismissal of the matter for want of prosecution.

The 1st defendant/respondent opposed on the following grounds that the applicant/plaintiff have failed to demonstrate sufficient grounds to warrant issuance of the orders sought in the said application. That the honourable court dismissal of the suit was fair and in accordance with the principles of administration of justice that is judicious and that justice delayed is justice denied.

The 2nd defendant's submitted that following the demise of Mr. L.G. Menezes, the other counsels in the firm of M/s L.G. Menezes & Co. Advocates who have been involved in this matter are Mr. Joseph Oduor who has appeared twice (on 15/1/2018 and on 14/6/2018), Mr. Chris Maganga and Mr. Wangoda who appeared on 12/7/2018. When the matter came up for mention to confirm compliance on 15/1/2018, Mr. Joseph Oduor took a hearing date that was convenient to him. That it is therefore untrue that Mr. Chris Maganga has the personal conduct of this suit and it is clear that his involvement at this stage is merely intended to prop up this application. That it is important to note that this is not the first case the plaintiffs have brought against the defendants relating to the same subject of this suit. The plaintiffs brought two earlier cases in the year, 2001 and the year 2002 filed in Kisumu and Nairobi respectively. As they have pleaded in paragraph 22 of the plaint and amended plaint, the two suits were unexpectedly withdrawn without reasons but there was not the slightest hint that the Plaintiffs did so because they lacked documents to support their case.

That this matter came up for mention on 15.1.2018, he requested the court for more time to file a witness statement because the earlier witness had retired. For his part, counsel for the 1st Defendant requested for time for file documents. The Plaintiffs told the court their case was ready for trial. As a consequence, the court gave a hearing date with the consent of all the parties.

There had never been any indication in court when the matter came up for mention on 15.1.2018 that there were documents that the Plaintiffs intended to use other than the ones that were filed. The Plaintiffs' counsel informed the court on 14.6.2018 that he was ready to proceed save that the Plaintiffs wanted Mr. Maganga to handle the case and that the Plaintiffs wanted leave to file a further list of documents. It is clear that the Plaintiff's had those documents even at that time. The claim that they discovered the documents a few days before the hearing date of 12.7.2018 demise of the counsel previously handling the case cannot therefore be correct and confirms that the Plaintiffs' lack candor and honesty. If the documents had been returned to the Plaintiffs as alleged, then the claim that they got misplaced in the wake of the death of the advocate previously on record is illogical. This claim also contradicts Paragraph 7 of the affidavit of Mohammed Rajab. If it is true that the counsel previously on record returned certain documents as claimed while retaining others which were subsequently filed, it can only mean that the advocate found that the documents were irrelevant and of no help to the Plaintiffs' case.

That the allegation that Mr. Maganga was engaged elsewhere is unsupported and is untrue. In any event, it is now clear from the Plaintiff's application that Mr. Maganga's presence would not have made a difference as the Plaintiffs were not ready to proceed and intended to apply for an adjournment which they did anyways.

That the Plaintiffs have never been willing to prosecute this matter. Instead, they are using the suit as leverage to scare and intimidate the 2nd Defendant by asking for prayers as far-reaching as the return physically of the land on which Mumias Sugar Company actually sits. The implications of the pendency of such a claim, even if utterly untrue and misguided are grave, especially for a listed company as no serious investor will put his money into a company facing such an action. That the fact that the Plaintiffs are misusing their right of access to court by filing suits they do not intend to prosecute is confirmed by the fact that they have twice filed suits which they have withdrawn unexpectedly and for known reasons. I verily believe that the suits were filed merely to place an albatross on the neck of the 2nd Defendant in the hope that it will be so scared it will propose to negotiate some form of a settlement. The Plaintiffs have always moved to withdraw such suits whenever it becomes clear that hearing was imminent and the 2nd Defendant was not willing to enter into any form of negotiations outside court. That to confirm that the Defendant has been groping about for answers to this problem away from the court, I wish to disclose that even during the pendency of this suit the Plaintiffs went and lodged the same complaint before a committee of Parliament being The Joint Parliamentary Committee on Lands, Agriculture and Livestock Development. This confirms that the Plaintiffs are merely using this suit as a way of buying time and as their Option "B" in the event the other options fail. Had their complaint before Parliament succeeded, they would have withdrawn this suit just like they withdrew the two previous suits. (Annexed hereto and marked 'FO 1' is a copy of our letter dated 20/9/2012 asking our counsels to deal with the matter).

This court has carefully considered the application and the submissions therein. The application is premised on the grounds that, there has been a discovery of new and important evidence which was not placed before the court and which would have occasioned different orders being issued by the learned judge. That the new and important evidence relates to land ownership documents which were within the knowledge of the counsel on record for the plaintiffs at the time the dismissal order was made but no leave had been granted to allow their filing. That it was not possible to file the said new evidence at the time the order dismissing the suit was made. That there are sufficient reasons which when disclosed will warrant a review of the order made on 12th July, 2018. That the dismissed suit raises triable and issues and this a perfect case for the court to invoke its inherent jurisdiction in order to do justice. That the court has a wide discretion to make orders in the interest of justice.

I have perused the court file and I find that this matter was filed way back in 2008. The plaintiffs' have never been ready to proceed and on

the 14th June 2018 were granted the very last adjournment. Come the day of hearing on 12th July 2018, the advocate for the plaintiff's claims to have been in Kitale handling another matter. I find that there was inordinate delay in prosecuting the suit by the plaintiffs which has not been sufficiently explained and therefore in excusable. I find that the conduct of the applicant in prosecuting the suit is indolent and does not excite any lenient exercise of discretion by this court. I find that it was the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendants to court.

In the case of *Utalii Transport Company Ltd & 3 Others v NIC Bank & Another* (2014) eKLR, the court held that it is the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court. The decision on whether the suit should be reinstated for trial is a matter of justice and it depends on the facts of the case. In *Ivita v Kyumbu* (1984) KLR 441, Chesoni J as he then was, stated that the test is whether the delay is prolonged and inexcusable and if justice will be done despite the delay. Justice is justice for both the plaintiff and the defendant. I find this application is not merited and I dismiss it. Cost of this application to the defendants/respondents.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 9TH DAY OF OCTOBER 2018.

N.A. MATHEKA

JUDGE