



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 368 OF 2013

NANCY WAITHERA MUTURI.....PLAINTIFF/RESPONDENT

VERSUS

NOAH MULWA.....DEFENDANT/APPLICANT

RULING

1. This is the Notice of Motion dated 1st November 2016 brought under Order 17 Rule 2(3), Order 51 Rule 1(1) of the Civil Procedure Rules 2010 and Section 3A of the Civil Procedure Act and all enabling provisions of the law.
2. It seeks order:-
 - (1) *That the suit herein be dismissed for want of prosecution.*
 - (2) *That the cost of this application and the suit be awarded to the defendant.*
3. The grounds are on the face of the application and are listed as in paragraph a – d.
4. The application is supported by the affidavit of Eric K Mutua, Advocate for the defendant, sworn on the 1st November 2016.
5. The application is opposed. There is a replying affidavit sworn by Joseph Wambugu Gaita, Advocate for the plaintiff on the 17th March 2017.
6. On the 20th March 2017, the court directed that the application be disposed by way of written submissions.
7. It is the defendant's/applicant's case that the plaintiff/respondent has failed/or refused to set down the matter for mention as directed by court or for hearing of the main suit. Further that, the defendant was not notified of the circumstances occasioning the delay in prosecuting of the suit herein. He prays that the suit be dismissed for want of prosecution.
8. It is the plaintiff's/respondent's case that the plaintiff's delay in prosecuting the suit was occasioned by the defendant's refusal to settle on one surveyor and the financial constraints on the plaintiff to meet the surveyor's fee. Further that the delay is not inordinate and is excusable in law. That the plaintiff has now managed to raise the surveyor's fee to enable the case to proceed expeditiously.
9. The plaintiff still has interest in the matter and is desirous of having it heard and concluded expeditiously. The plaintiff has relied on the case of **Mwangi S. Kimenyi vs Attorney General & another [2014] eKLR**. She prays that the application be dismissed with costs to the plaintiff.
10. I have considered the notice of motion and the affidavit in support. I have considered the replying affidavit, the written submissions of counsel and the authorities cited. The issue for determination is whether the suit herein ought to be dismissed for want of prosecution.
11. I have gone through the court record. The order dated 11th June 2013, Hon. J. P. Nyamweya, stated as follows;

1. "That the parties herein to jointly identify a surveyor and agree on the maps and plans to be relied upon for the survey of the disputed plots within 30 days of today 11th June 2013.

2. That the joint surveyor to undertake a survey of the parcels of land known as Plot No. 5/228 and Plot No. 3/413 situated in Kayole Soweto Scheme to determine their beacons, location and any structures contracted thereon.”

12. On 18th February 2014, 8th May 2014, 22nd September 2014 and 13th November 2014 the matter was mentioned with a view of confirming whether the joint survey had been undertaken. On all these occasions counsel for both parties were present. The defendant/applicant’s counsel therefore cannot plead ignorance of what has been going on.

13. I agree with the plaintiff’s counsel submissions that it is the defendant who digressed from the court order of 11th June 2013 by proposing that each party appoints his/her own surveyor.

14. Both parties were charged with the responsibility of ensuring that the court order is complied with and not the plaintiff alone.

15. I also note from the said orders that an order of status quo was granted. No prejudice has been occasioned to the defendant with this delay. In the case of **Prof. Mwangi S Keimenyi vs Attorney General and another [2914] eKLR**, the court held that;

“The defendant must however satisfy the court that he will be prejudiced by the delay or event that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus even if delay is prolonged, if the court is satisfied with the plaintiff’s excuse for the delay the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time”.

16. I find the explanation given by the plaintiff for delay reasonable. She now says she has raised the surveyor’s fees. The survey will now proceed expeditiously.

17. All in all I find the delay herein excusable. The plaintiff deserves a chance to prosecute her case to conclusion. She is however urged to set down the suit for hearing at the earliest opportunity.

18. The upshot of the matter is that I find no merit in this application and the same is dismissed. The costs do abide the outcome of the main suit.

It is so ordered.

Dated, signed and delivered in Nairobi on this 27TH day of NOVEMBER 2018

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L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate Plaintiff

.....Advocate for Defendant

.....Court Assistant