



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 44 OF 2018

ZACHARY NDUNGU KANGETHE.....PLAINTIFF

VS

JOYCE MUTHONI NGUGI.....1ST DEFENDANT

NDUNGU NGUGI.....2ND DEFENDANT

JOHN NGUGI.....3RD DEFENDANT

NJOROGE NGUGI.....4TH DEFENDANT

JAMES NGUGI.....5TH DEFENDANT

RULING

1. The Defendant filed a Notice of Motion on the 3/7/17 under Order 17 rule 2(1) and (3) and Order 51 Rule 1 of the Civil Procedure Rules and section 1A and 3A of the Civil Procedure Act seeking orders that the suit against the Defendant/applicant be dismissed for want of prosecution. The grounds of the application inter alia are that the Plaintiff had not taken steps within one year to prosecute his claim since 15/4/15.

2. The application has been supported by the affidavit of Joyce Muthoni Ngugi sworn on the 3/7/17 wherein she deponed that the non prosecution of the suit has prejudiced the Defendants in two ways in terms of the suit hanging in limbo and incurring unnecessary expenses in fees and maintaining a dormant suit.

3. The Plaintiff has opposed the application vide a Replying affidavit dated the 14/12/2017 stating inter alia that he is still interested in pursuing his case; the delay is neither inordinate nor intentional; delay is not an abuse of the process of the Court and does not give rise to substantial risk to a fair trial. He further stated that if the orders are given he will be unjustly be evicted and that the Defendant has not demonstrated any prejudice that they will suffer is the suit is heard.

4. Parties elected to file written submissions which I have carefully read and considered.

5. Order 17 Rule 2 (1) of the Civil Procedure Rules provides as follows;

“(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 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.

6. The above provision gives the Court discretion to dismiss a case where no action has been taken for one year either on its own motion or on application by a party. The principles applicable in determining a case such as this are; is the delay inordinate; is the inordinate delay inexcusable; is the Defendant going to be prejudiced by the delay.

7. For proper exercise of judicial discretion, it is important to look at the conduct of the parties in the suit as well as the factual circumstances of the case. This case was filed by way of originating summons on the 10/7/13. The Plaintiff filed a notice of motion seeking injunctive orders on the even date which ruling was rendered on the 15/4/15. Thereafter no action has been taken towards the prosecution of the matter.

I note that the Defendants have equally not filed any response to the Originating summons more than 5 years after the suit was instituted.

8. No cogent reasons have been adverted by the Plaintiff for the delay in prosecuting the case other than to allude in his written submissions that delay was occasioned by the mode of operation at the Environment and Land Court Registry at Milimani Nairobi where matters are fixed for hearing on the basis of their year of filing. This reason is vague. The Court would have expected the Plaintiff to annex correspondences between him and the registry requesting for a date or personal attendance to the Registry to fix the matter for hearing. Upon losing the application for injunction in 2015 the Plaintiff went into slumber only to be woken up by the Court on the 6/7/17 when the Court on its own motion gave a mention notice to the parties.

9. Granted the above scenario the Court is satisfied that the inordinate delay has neither been explained nor is inexcusable and that the continued delay in so prosecuting the matter is prejudicing the Defendant in terms of fees and expense in prosecuting a dormant case. The Court is aware that dismissing a case is a draconian measure that should be the last resort. On the other hand, the Court is duty bound by Article 159(2) of the Constitution to do justice to both parties without undue delay. Delay occasions injustice to either party to the dispute and justice delayed is justice denied. This Court being a Court of law and a Court of equity espouses the doctrine that delay defeats justice.

10. The application is allowed with costs to the Defendants.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 15TH NOVEMBER 2018

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Plaintiff: Advocate is absent.

Defendants:

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5 Ms Endoo HB for Njoroge Kugwa for the Defendants.

Irene and Njeri, Court Assistants