



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 131 OF 2004

ALFRED JUMA WANAMBISI.....PLAINTIFF

VERSUS

ALICE NALIKA SIMIYU.....DEFENDANT

RULING

1. The plaintiff came before this court and vide an application dated **30/11/2017** obtained an order that that application is partially successful and that the suit should be listed for him to show cause as to why it should not be dismissed.
2. The plaintiff, instead of fixing the suit for show cause purportedly fixed it for hearing on the **31st October 2018**. On that day the court did not hear the plaintiff's case but ordered that he shows cause.
3. At that juncture the plaintiff submitted through his counsel Mr. Kraido that the suit should be sustained and be heard on its merits as it raises interesting issues. The counsel submitted that he had only come into the matter in 2014 and that upon being furnished with additional documents by the plaintiff he had formed a new opinion different from that of other counsel who had earlier dealt the matter on the plaintiff's behalf. In particular he had found that it was necessary to have some other parties enjoined to the suit at this juncture.
4. To show the seriousness the plaintiff had in having the matter heard and determined on its merits Mr. Kraido submitted that the plaintiff was in court as the notice to show cause was being argued. The court confirmed his presence.
5. On his part Mr. Kiarie for the defendant delved deeply into the history of the matter and stated that the plaintiff had never shown that he was willing to prosecute the matter for a period of **14 years**. He submitted that on **17/3/2014** and **1/1/2014** the plaintiff tried to adjourn the matter; that the plaintiff filed an application for eviction and when it came up on the **30/4/2014** he applied for its adjournment; that on **15/5/2014** the application was withdrawn; that thereafter nothing happened in the suit until **15/2/2016** when the suit was dismissed for want of prosecution.
6. Mr. Kiarie also gave other details based on factual matters in the pleadings and documents in the file which go to the merits of the main case, arguing that the suit was a non-starter. I am not inclined to consider the merits or demerits of the suit for the moment. The plaintiff must at this point be allowed to suffer the pains occasioned by his earlier sins by only being made to account for his failure to prosecute his suit.
7. In this case I have noted that the conduct of the plaintiff before the dismissed of this suit was rather lackadaisical. After the suit was reinstated the plaintiff again went to sleep until he was awoken by the notice to show cause dated **22/1/2016**.
8. It is the policy of the court that where parties have shown interest in having their matters determined on the merits the court should encourage the hearing and determination of those matters on their merits for that is the reason for the court's existence anyway.
9. What this court has noted is that it is the plaintiff who fixed the matter for the hearing of the main suit for **31/10/2018**. Had it not been that the court still was of the opinion that the notice to show cause should be argued the suit may have proceeded and, this time around; at the instance of the plaintiff. The plaintiff's counsel has also indicated that he holds a view diverse from those of the counsel who represented the plaintiff before him and that the plaint required to be amended to include fresh parties.
10. When taken to task by this court the plaintiff's counsel stated that the court may issue any limitations as to time for the hearing of the matter. This may well be the case but it is noteworthy that joinder of a party at this stage is quite belated and would lead to more delay because of the mandatory minimum statutory timelines that require to be observed to enable a fresh party file his defence and the resultant exchanges. The plaintiff's lethargic approach is the cause of all this. 14 years is too long a period past. If the plaintiff never joined those parties during the time he cannot be allowed to inconvenience the defendant by insisting on doing so now.
11. The need to add parties to the suit can not therefore form a good ground for sustaining this case and in this court's view, it is rather more of a deterrent.

12. In any event, there is no draft amended plaint attached to the application and I find this quite irregular. If the plaintiff was serious about joinder of the intended additional defendants there would have been no easier thing than to attach such a draft amended plaint. That would have enabled the defendant to respond adequately to the proposal, for indeed there are some proposals that can even be readily agreed to by a defendant.

13. In this case I consider that the delay of **14 years** that have lapsed before the plaintiff sought to enjoin other parties, however necessary they may be to the suit, is likely to be quite prejudicial to the defendant and that ordinarily such an application should be rejected.

14. This court will exercise its discretion in favour of the plaintiff, having been persuaded by the plaintiff's act of listing this suit, albeit wrongly, for hearing, that the plaintiff is now interested and may, given another chance, prosecute his case on its merits within a given timeline.

15. The oral arguments in the Notice to show cause and the submissions in the application dated **30th November 2018** are very closely related, bearing in mind that prayer **(d)** sought reinstatement of the suit and prayer **(e)** was contingent upon that reinstatement. I have found that the plaintiff's suit can be sustained.

16. For this reason I hereby order that the suit be spared from dismissal and that prayer no. **(d)** in the application dated **30/11/17** is now deemed as fully and unconditionally granted.

17. Before the joinder of a party is allowed it must be demonstrated that their presence in court is necessary for the court to effectually and completely adjudicate upon and settle all questions involved in the suit. This has not been done by the plaintiff in respect of the proposed new parties. The proposed inclusion of the company and its unstated directors in a proposed amended plaint is rejected as it may occasion more delay in this matter. Prayer No. **(e)** in the application dated 30/11/2017 is therefore declined.

18. In the final analysis I issue the follows orders:-

(a) That the plaintiff's suit is hereby spared from dismissal.

(b) The plaintiff shall pay to the defendant the costs of the application dated 30/11/17 and of the notice to show cause which this court has assessed in the global sum of Kshs. 25,000/= before the close of business day on 12th November 2018.

(c) This suit shall be mentioned on the 13th November 2018 for further orders and all parties personally and their advocates shall attend for issuance of further orders.

(d) That in default of compliance with any one or more steps ordered in (b) to (c) by the plaintiff this suit shall be stand automatically dismissed.

Dated, signed and delivered at Kitale on this 1st day of November, 2018.

MWANGI NJOROGE

JUDGE

01/11/2018

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Kiarie for respondent

Ms. Chebet holding brief for Kraido for plaintiff

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

01/11/2018