

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 100 OF 2003

FLORENCE KATHAMBI MUTISO.....PLAINTIFF

VERSUS

MERCY NJAMWEADEFENDANT

RULING

1. In the Notice of Motion dated 27th November, 2014, the Defendant is seeking for the following orders:

a. That this suit be dismissed for want of prosecution.

b. That the cost of this Application and of the suit be awarded to the Defendant.

2. The Application is premised on the grounds that the Defence came up for hearing on 23rd November, 2011; that the matter was adjourned to allow for the typing of the proceedings; that it has been over two (2) years since the Plaintiff prosecuted the suit and that it is apparent that the Plaintiff has lost interest in the suit.

3. In his Replying Affidavit, the Plaintiff's advocate deponed that the Plaintiff's suit was heard and closed on 13th July, 2011; that the suit was adjourned on 23rd November, 2011 at the instance of the Defendant and that when the matter was mentioned on 3rd February, 2012 to confirm if the proceedings had been typed, the Defendant's counsel did not turn up.

4. It is the Plaintiff's advocate's deposition that by way of a letter dated 20th July, 2012, the Defendant's advocate alleged that the court file was missing and that the delay in prosecuting the suit was caused by the Defendant.

5. The Plaintiff's advocate deponed that in any event, the High Court in Machakos did not have an Environment and Land Court Judge and all the land matters pending in the court were kept in abeyance until late 2014 when the Environment and Land Court was established.

6. The Defendant's and the Plaintiff's advocates filed their respective submissions which I have considered. I have also considered the filed authorities.

7. The record shows that the Plaintiff commenced her suit on 7th March, 2007 when her evidence was taken. However, it was not until 13th July, 2011 when the evidence of PW2 was taken. On the same day, the Plaintiff closed her case. The court then fixed the matter for Defence hearing for 23rd November, 2011. On the said date, the Defence applied, which Application was allowed, for the adjournment of the matter.

8. When the matter was mentioned on 3rd February, 2012, the court was informed that the proceedings had not been typed. The matter was never mentioned again until when this Application was filed in the year 2014.

9. It is trite that when the Environment and Land Court (ELC) was established and operationalized in October, 2012, none of the Judges in the court were posted in Machakos. Indeed, it was not until the year 2017 that a judge was posted in the court. It is therefore obvious that the Plaintiff cannot be faulted for having not fixed the matter for hearing between the year 2012 and 2014 because there was no ELC Judge in the station.

10. In any event, the Plaintiff having closed her case in the year 2011, the obligation to fix the matter for Defence hearing shifted to the Defendant. Consequently, the Defendant cannot claim that it is the Plaintiff who has delayed in prosecuting the claim. Indeed, the filing of the current Application has gone a long way in delaying the prosecution of this matter.

11. For those reasons, I dismiss the Application dated 27th November, 2014 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 10TH DAY OF DECEMBER, 2018.

O.A. ANGOTE

JUDGE