



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

CIVIL SUIT NO. 381 OF 2014

BENARD KARIUKI WATAARI & 10 OTHERSPLAINTIFFS

VERSUS

THE REGISTERED TRUSTEES OF

TELEPOSTA PENSION SCHEMEDEFENDANT

RULING

What is before the court is the defendant's Notice of Motion application dated 17th March 2016 seeking the dismissal of this suit with costs for want of prosecution. The application has been brought on the grounds that the suit has been dormant for more than a year during which period the plaintiffs have not taken any steps to set down the suit for hearing. The application is supported by the affidavit of the defendant's advocate, Ms. Miriam C. Metto sworn on 17th March 2016 in which she has stated that the last time the matter was in court was on 26th March 2014 when the suit was transferred from the Civil Division of the High Court to this court. She has stated that the file was received by this court on 27th March 2014 and that the plaintiffs have since then not taken any active steps for the purposes of setting down the suit for hearing. Ms. Metto has contended that the plaintiffs have lost interest in prosecuting this suit. She has contended further that the plaintiffs are guilty of inordinate delay and that the continued pendency of the suit is prejudicial to the defendant as the plaintiffs are relying on the temporary injunctive orders issued herein in the year 2008 to stay in the suit premises without paying rent.

The application is opposed by the plaintiffs. The plaintiffs filed a replying affidavit sworn by their advocate, Mr. Larry Mulomi on 18th July 2016 in opposition to the application. In their response to the application, the plaintiffs have contended that the defendant's application has been brought in bad faith. The plaintiffs have denied that they are guilty of inordinate delay in setting down this suit for hearing. The plaintiffs have contended that there are other suits touching on the suit properties herein in which the parties herein are involved and in which the parties have been engaged in numerous applications. The plaintiffs have set out the particulars of the said suits and the various applications the parties have been involved in. The plaintiffs have contended that the delay in the prosecution of this suit has been occasioned by the numerous applications which were made in ELC No. 157 of 2016 which had serious impact on the plaintiffs' continued occupation of the suit properties. The plaintiffs have contended that due to the numerous suits and applications touching on the suit properties herein, the plaintiffs' advocates were overwhelmed and as a result thereof forgot to set this suit down for hearing. The plaintiffs have contended that failure by their advocates to set the suit down for hearing was as a result of an oversight which should not be visited upon them.

The plaintiffs have contended that the defendant has not demonstrated that the delay in the prosecution of this suit has been inordinate and prejudicial to them. The plaintiffs have averred that they are ready, able

and willing to prosecute this suit. The plaintiffs have averred that the dismissal of this suit would occasion them grave prejudice as this suit was brought to seek possession and ownership of the suit properties which they are currently occupying.

The application was argued orally before me on 20th July 2016 when the advocates for the parties reiterated the contents of their respective affidavits in support of and in opposition to the application which I have analyzed above at length. Learned Counsel for the defendant Ms. Mathenge submitted that this suit had been pending for more than a year without any action being taken. She contended that the plaintiffs sought and obtained an injunction herein on 21st August 2007 on account of which the plaintiffs stopped paying rent to the defendant. Ms. Mathenge submitted that the plaintiffs have lost interest in the suit.

In reply, the plaintiffs' advocate Mr. Mulomi submitted that the plaintiffs are keen on prosecuting this suit. He submitted that the plaintiffs were unable to proceed with this suit because of the existence of many other suits touching of the suit properties and involving the parties herein. Mr. Mulomi submitted that the plaintiffs are ready and able to prosecute this suit and urged the court to exercise its discretion in favour of the plaintiffs.

I have considered the defendant's application and the opposition thereto by the plaintiffs. The principles upon which this court exercises its discretion in applications for dismissal of suits for want of prosecution were set out in the case of Ivita vs. Kyumbu (1984) KLR 441 as follows:-

"The test applied by the courts in an application for the dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and, if it is, whether justice can be done despite the delay"

What I need to determine is whether there has been prolonged and inexcusable delay by the plaintiffs in prosecuting this suit and if so, whether justice can still be done despite the delay. A perusal of the court record shows that prior to the filing of the instant application on 18th March 2016, this suit was last in court on 26th March 2014. Between 26th March 2014 and 18th March 2016 which is a period of about 2 years no action was taken in the matter by the plaintiffs with a view to setting down the suit for hearing. This suit was in the circumstances liable for dismissal under Order 17 Rule 2 of the Civil Procedure Rules as at the time the present application by the defendant was brought.

The defendant having demonstrated that the suit had been dormant for 2 years, the onus was upon the plaintiff to show cause why the suit should not be dismissed for want of prosecution. In the case of Ivita vs. Kyumbu (supra) the court stated as follows in this regard:-

"Where the defendant satisfies the court that there has been prolonged delay and the plaintiff does not give sufficient reason for the delay, the court will presume that the delay is not only prolonged but it is also inexcusable and in such case the suit may be dismissed."

The plaintiffs argued that the delay in prosecuting this suit had been occasioned by numerous applications filed in other suits concerning the suit properties herein and involving the same parties. Although the defendant had contended that the suits which the plaintiffs had referred to were not related to this suit, I am satisfied upon perusal of the annexures to the plaintiffs' replying affidavit that the parties herein are involved in other suits which touches on the suit properties herein. I am also satisfied that there were various applications in the said suits in which orders were given touching on the suit properties herein. I am in agreement with the plaintiffs that it would have been difficult to set down this suit for hearing while the orders given in the said suits particularly, ELC No. 157 of 2016 (formerly HCCC No. 477 of 2010) were subsisting. On the material before me, I am satisfied that the plaintiffs have given reasonable excuse for the delay in prosecuting this suit and why the suit should not be dismissed. I am also convinced that justice can still be done in this matter despite the delay complained of by the defendant.

For the foregoing reasons, I find no merit in the defendant's Notice of Motion application dated 17th

March 2016 which I hereby dismiss. The costs of the application shall be in the cause.

Delivered and Signed at Nairobi this 31st day of March, 2017.

S. OKONG'O,

JUDGE.

In the presence of:-

Ms. Onyango h/b for Malomi for Plaintiffs

Mr. Bundotich for Defendant

Kajuju Court Assistant