



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 80 OF 2009

DAVIES WAFULA NAKITARE.....1ST PLAINTIFF

POLLY NOYCE NAKITARE.....2ND PLAINTIFF

VERSUS

AGRICULTURAL DEVELOPMENT CORPORATION....DEFENDANT

RULING

This suit was dismissed for want of prosecution on 15th August, 2016. The plaintiff thereafter lodged an application dated 4/12/2016. In this application they sought that the exparte orders issued on 15/8/2016 dismissing the suit be set aside and/or reviewed and that leave be granted to the applicant to prosecute their case within a period the court will deem fit. That is evident in prayers No.1 and 2 of their application. By consent of the parties recorded by court on 23/2/2017, which was adopted as an order of the court, it was agreed that:-

- 1. The exparte order made on the 15/8/2016 dismissing the suit for want of prosecution be set aside and**
- 2. The suit be listed for mention for the purpose of the plaintiff showing cause why it should not be dismissed.**

After this consent was recorded the court fixed the matter for a mention on 15/3/2017 during which both parties understood they would be submitting on the issue of dismissal for want of prosecution. The events in court on 23/2/2017 therefore gave ample time and notice to the parties to prepare on the issue of dismissal.

It is unusual for a litigant who has previously been strenuously opposed to a suit to allow for its reinstatement, even for the purpose of a fair hearing on a notice of dismissal for want of prosecution, for this necessarily places the matter in the hands of the court, whose exercise of discretion can favour either side in the matter.

When he rose to submit on the issue, counsel for the plaintiffs was brief: he stated that he had had consultations with his clients and he had looked at the court record (insufficiently I must say, as it will be clear from the latter part of this ruling). He had found that J.M. Wafula the counsel who had represented the plaintiffs had passed on in the year 2013 and that is why the matter stalled. For that reason, he concluded, the court ought to exercise its discretion to give the plaintiffs another chance to prosecute their suit.

Counsel for the defendant responded by saying that this is a matter not prosecuted for nearly 8 years; that there is no good reason for non prosecution; that previous orders directing the plaintiffs to file a fresh verifying affidavit and amend their plaint had not been complied with for about 7 years; that the firm of the deceased J.M. Wafula came on the record after those orders were made; that the firm of Kalya & Co. was representing the plaintiffs at the time of those orders; that the defendant had filed an application for dismissal for want of prosecution which was struck out for non attendance, and even after that event, the plaintiffs never prosecuted their suit. That court ought to dismiss the suit with costs.

Counsel for the plaintiff in reply emphasized that due to the passing on of counsel for the plaintiff earlier on, the information on the need to file a fresh verifying affidavit and amended plaint could not have been communicated to the plaintiffs and that for that reason it would be in the interests of justice to grant the plaintiffs a second chance.

Upon being questioned by the court counsel appeared not to have been made aware by his clients the plaintiffs that there was a previous suit related to this one, that is ***Kitale High Court Civil Case No. 73 of 2007***, which had also terminated in the defendant's favour, on almost similar issues relating to the same land.

The plaint in this case was filed on 2/6/2009 seeking special damages in the sum of Kshs.93,275,944/= . It also sought permanent injunction to restrain the defendant or its agents from entering into, occupying, working, felling trees or in any way whatsoever interfering with the 1st plaintiff's proprietorship rights over the suit premises and or causing destruction to the plaintiff's fence in respect of **IR. No. 58371** and/or **LR. No. 1948/12**. It also sought a declaration that the defendant's acts are intrusive, illegal and unwarranted.

In a notice of preliminary objection dated 10/6/2009 and filed on the same day the defendant objected to the suit on three grounds, first that the 3rd plaintiff's name has been used without a resolution passed in a meeting of the Company's Board of Directors, that it is not possible to separate the reliefs sought as between the three plaintiffs, and that the plaint and verifying affidavit had failed to disclose the existence of Kitale HCCC No. 73 of 2007 (Captain Davies Nakitale -vs- Agricultural Development Corporation).

A defence was also filed on 10/6/2009 and a reply to that defence was filed on 15/6/2009. On 16/12/2009 the court (Ombija J.) ruled on the preliminary objection, partly upholding it by ordering that the plaintiffs were granted leave to amend the plaint to include an admission that Kitale HCCC No. 73 of 2007, had been filed by the 1st plaintiff and later dismissed for want of prosecution and that a verifying affidavit be sworn. The 3rd plaintiff was also struck out of the proceedings. It is surprising that the plaintiffs never disclosed this to their current counsel and that in perusal of the court record, these details escaped the counsel. He never addressed them in his submissions while urging that the plaintiffs be granted a last chance.

The issue of notice of dismissal having been dispensed with and the parties having made submissions, it behoves the court now to determine whether this suit should be dismissed or allowed to continue and if so allowed, on what conditions.

There is no doubt from the record that there has been inordinate delay on the part of the plaintiffs in prosecuting their case. Has the defendant contributed to the delay? It may be said that the defendant could have as well set down the suit for hearing, but in this case the defendant was, as is evident from the defence, only interested in defending and not counterclaiming anything from the plaintiffs. Consideration may be given to the fact that other than desiring that he be not condemned to any unjust orders the defendant has no other interest in the form of a claim, which may compel him to set down the suit for hearing to ensure a vindication of his rights. The courts approach to this issue would be quite different where the defendant has filed a counterclaim, as it is considered a separate suit from the plaintiffs. In such a situation both parties would upon lapse of time as in this case be blameworthy for failure to prosecute their respective suits.

A perusal of the record shows that since the preliminary objection was upheld on 16/12/2009, only the

defendants put action into this matter, and in a limited way, by seeking dismissal, and taxing their bill of costs as against the defendant whose claim was struck out. From the year 2012 the matter rolled into somnolescence till the Deputy Registrar served the notice of dismissal upon the parties, dated 28th June, 2016. After dismissal the plaintiffs never moved this court till 6th December, 2016 when the application dated 4/12/2016 mentioned herein was filed. The inordinate delay in the prosecution of this suit can only be attributed to the plaintiffs' disinterest or unwillingness to move the court as required by rules.

It is more unfortunate that counsel urged only one main ground: the demise of the counsel previously handling the matter. However if the deceased passed on in the year 2013, what caused the delay between the year 2009 and the year 2013. The court was not informed. After the demise of the said counsel which must have been known to the plaintiffs if they were serious about this litigation, what occasioned the delay in taking any action between the years 2013 and 2016? Again no good explanation has been offered. Interest *reipublicae ut sit litium finis*, so goes the latin maxim. It is in the public interest that litigation must have an end.

The court asked counsel what guarantee was before court that such inordinate delay could not occur again if the case was retained in the court records. Counsel only had his oral word, which the court does not find sufficient security for performance on the ground that first he is speaking from the bar and, secondly it came from him and not the plaintiffs. The statements made by the 1st plaintiff in the supporting affidavit to the application dated 4th December, 2016 are bare. He only states that he and his co-plaintiff are now desirous to prosecute their case.

The reinstatement of the case for the purposes of prosecution would reverse both the parties and court to the year 2009 when orders of amendment of plaint and filing of a verifying affidavit were made. This would, if allowed, pave the way for reopening of pleadings, 8 years later, yet the plaintiffs had all the time. While this is going on, there would be other litigants milling around the corridors of justice seeking a hearing of their more recently filed cases. I find that it would not be in the interests of justice, either to the defendant, or other stakeholders in our justice system, to grant the plaintiffs another chance. The golden chance they squandered upon the dismissal of the defendant's application for dismissal for want of prosecution dated 13/3/2012 was a heavenly sent opportunity to prosecute their case which they never saw as such.

I therefore order that the plaintiffs' suit is hereby dismissed with costs for want of prosecution.

Signed, date and delivered at Kitale on this 17th day of March, 2017.

MWANGI NJOROGE

JUDGE

In the presence of:

Ms. Mufutu holding brief for Mr. Kiarie for the Defendant present

Ms. Arunga holding brief for Mr. Wafula for the Plaintiff/applicant present

Court Assistant – Isabellah.

MWANGI NJOROGE

JUDGE

17/3/2017