



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 41 OF 2008

GEORGE OWUOR OKAKA.....PLAINTIFF

VERSUS

THE LAND REGISTRAR

TRANS-NZOIA.....1ST DEFENDANT

THE COMMISSIONER OF LANDS.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

PAUL K. MURUGA.....4TH DEFENDANT

RULING

1. By an application dated 19/12/2016 the 4th defendant in the suit seeks an order that the plaintiff's suit be dismissed with costs on the grounds that: the respondent has not taken any step to prosecute the suit having filed it in the year 2008; that the delay is inordinately long and prejudicial to the applicant; that the plaintiff has lost interest in the suit and that the overriding objective of the court dictates the dismissal of the suit for want of prosecution.

2. The application is supported by the affidavit of Peter Kiarie Ndarwa sworn on the 19th December, 2016. Based on information from the applicant, the counsel for the applicant avers, albeit without giving grounds; that the applicant is seriously prejudiced by having a pending suit for orders such as those claimed in the plaint.

3. A replying affidavit sworn by the plaintiff on 23/1/2017 was filed on the same day. It states that the matter was last in court on 29/6/2015; that both advocates for the plaintiff and for the defendant were present then; and that the adjournment was not occasioned by the plaintiff; that given the value of the land and the seriousness of the issues raised in this case the suit cannot be dismissed as requested by the applicant; that there is evidence of fraud; that the delay is inordinate that he is in occupation of the land; that three other defendants have not been served with the application and besides, they have not filed any pleadings; that both parties have an obligation to set the suit down for hearing; that the plaintiff has been diligently pursuing his claim until the last adjournment that the advocate the plaintiff had appointed last had acted for the defendant in the same suit and could not proceed due to conflict of interest; and that the plaintiff opted to act in person; that he filed his notice to act in person in 2016 but by then there was no diary for the year 2017 and that this is a suit that can be heard without any further delay.

4. The question that arises is whether there is any inordinate delay in the prosecution of this suit. A study

of the record will show. The suit was filed on 23/5/2008 together with a Chamber Summons seeking interim orders. These were filed by one George Wambura Advocate. Later on 29/7/2008 a notice of appointment of advocate was filed on by Ms. Kidiavai & Co. Advocates for the plaintiff. On 9th June, the application filed with the plaint dated 19/5/2008 was set down for hearing on 30/9/2008. On 30/7/2008 there was no appearance for either party and Ombija J had the matter marked stood over generally. On 2/10/2008, a memorandum of appearance was filed by Kiarie & Co. Advocates for the 4th defendant. On 24/10/2008, the plaintiff's counsel fixed the motion dated 19/5/2008 for hearing on 2/2/2009. On the 2nd February, 2009 a Mr. Koros told the court that there seemed to be no service upon the State Counsel or the 4th defendant. On that day the court again marked the matter "stood over generally" and condemned the plaintiff to pay Kshs.20,000/= being costs to the 1st respondent. The court also ordered the 4th respondent to be paid Kshs.2500/=. The applicant was condemned to pay court adjournment fees

5. On the 3rd February, 2009 the plaintiff's counsel fixed the application for hearing on 4/5/2009. It is noted that on the 4th May, 2009, the matter came up before the Deputy Registrar who fixed the application for hearing on 1/7/2009 in the presence of the plaintiff's counsel. It appears the plaintiff's counsel never effected service in respect of the date given by the Deputy Registrar because on 1/7/2009 the 4th defendant's counsel complained in court that he was not aware of the date. The matter was for the third time stood over generally and the plaintiff condemned to pay court adjournment fees.

6. The next action was taken on 20/12/2010 when the plaintiff's counsel took a hearing date for the suit that is 13/4/2011. On 13/4/2011 Mr. Wanjala for the plaintiff stated that he was not ready to proceed because the plaintiff had not complied with discovery or drawn up issues. He also stated that the 1st, 2nd and 3rd defendants had not been served. On that day Mr. Wanjala withdrew the plaintiff's application dated 19/5/2008. The matter was for the fourth time stood over generally. On 3rd June, 2011 the plaintiff again fixed the case for hearing on 7/12/2011, when the case was adjourned to 15/2/2012. On 15/2/2012, Mr. Wanjala for the plaintiff and Mr. Kiarie for the 4th defendant were ready to proceed while Ms. Mbiyu was engaged in the Court of Appeal and asked for an adjournment which was granted and the matter adjourned to 9/5/2012. On 9/5/2012, Mr. Wanjala for the plaintiff was not ready to proceed as his client was indisposed and the matter was stood over generally for the fifth time. On 26/9/2012 when the matter came up for hearing it was adjourned on the basis that the plaintiff had just been served with the 1st to 3rd defendants' defence.

When the matter came up on 20/3/2013, the plaintiff was not ready to proceed as he had not filed certain documents and hearing was set for 5/6/2013.

7. On 5/6/2013, the plaintiff expressed that he was not ready to proceed as he did not have one document. On 26/2/2014 when the matter came up for hearing the 4th defendant was not ready to proceed but the plaintiff had no objection and the matter was stood over to 3/6/2014. On 3/6/2014 the plaintiff was not ready to proceed and hearing was adjourned to 31/7/2014. When, owing to a long hearing going on in court, the matter could not be reached, and the matter was adjourned to 10/12/2014.

8. On 10/12/2014, Mr. Teti for the plaintiff said Mr. Ingosi would be taking over the matter and that the matter should be stood over generally. On 29/6/2015, the date next taken by the new firm of advocates, Mr. Wanyama holding brief, informed court that the plaintiff's case could not proceed that day and the case was stood over generally.

9. On 22/2/2017 the court was informed of the pendency of this application, which was then fixed for hearing on 8/3/2017. On 8/3/2017 the 4th defendant's counsel said he had been served with an application to cease acting for the plaintiff. The plaintiff, also in court on that day, told court that he had filed a notice to act in person. The matter was placed aside to enable the plaintiff serve the 4th defendant with the notice to act in person. That is when the matter was stood over to 4/4/2017 for hearing and the plaintiff was asked to obtain his record from his erstwhile advocates.

10. On 4th April, 2017, the plaintiff was represented by Mr. Wambura who said that he came on record after the plaintiff had filed his reply to the application currently under consideration and both parties agreed to have the application disposed of by way of written submissions while ruling was set for 14/6/2017.

11. From the 29th June, 2015 to 19th December, 2016 is a period of more than one year. The application for an order of dismissal of the suit for want of prosecution was filed on the latter date. The former date is the date when the matter was last in court. The plaintiff never took any action there in between the two dates. Besides, a scrutiny of the court record does not leave the plaintiff in good light. It is inconceivable that almost eleven years since the suit was filed the plaintiff is still not ready to proceed. It is true that some action was put into this matter at the instance of the plaintiff from time to time, and that on one or two occasions the defence was not ready to proceed, but this remains the plaintiff's case; there is no counterclaim by any of the defendants, if that will answer paragraph 19 of the respondent's replying affidavit, which avers that both parties have an obligation to set the suit down for hearing. The only interest of the defence is to keep the plaintiff from obtaining the orders that may affect them, sometimes with the foresight that if the plaintiff fails to move the court to have the case heard, the defendant can easily keep the plaintiff from getting those orders by way of an application such as the one under consideration.

12. The observation that both parties have an obligation to set the suit down for hearing should be heard to come up, not as a defence to any plaintiff's lackadaisical handling of his suit, but from a court of law to chide anyone who applies for orders of dismissal for want of prosecution when their own positive claim in the matter, such as a counterclaim, informs all and sundry that they too have a separate suit which they should prosecute. But one can never prosecute a mere defence before the plaintiff prosecutes his case. The defence is merely an answer to the case.

13. In my consideration the statement that the defence also had a duty to fix the matter for hearing does not suit the plaintiff. **Order 17 Rule 2(1)** states that:-

“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 should not be dismissed, and, if cause is not shown to its satisfaction, may dismiss the suit”.

Order 17 Rule 2(3) provides as follows:-

“Any party to the suit may apply for its dismissal as provided under sub-rule 1”.

14. The applicant herein has approached court under the above two rules. Is he entitled to do so? The answer is yes, for a period of one year and a half lapsed since the date of the last action in the matter before the current application was filed. It was the application dated 19th December, 2016 that broke the delay in prosecuting the suit, the slumber that the plaintiff had fallen into. This should not have been the case.

15. The latter day flurry of activity on the part of the plaintiff has had no relation to action calculated to end the case. Indeed, it is suspect. The quick changeover from one advocate to another, then the filing of a notice to act in person and after that a notice of appointment of yet another advocate, all reek of an attempt to slow down these proceedings even further. This is the kind of conduct the court should not condone in a case that was filed in the year 2008. So is the latter day realization by the plaintiff that as at the date 26/2/2014, he does not have some relevant documents and thus has to seek that the case be adjourned to enable him obtain them!

16. The upshot of all the above is that I find that there has been inordinate delay by the plaintiff in the prosecution of this case and I therefore dismiss it with costs to the 4th defendant only.

Signed, dated and delivered at Kitale on this 29th day of May, 2017.

MWANGI NJOROGE

JUDGE

29/05/2017

Before - Mwangi Njoroge Judge

Court Assistant - Isabellah

Mr. Kiarie for Applicant

N/A for the Respondent

Ruling read in open Court.

MWANGI NJOROGE

JUDGE

29/05/2017