



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 20 OF 2016

BONIFACE WEKESA.....PLAINTIFF/RESPONDENT

VERSUS

DAVID AKUDUKOR..... DEFENDANT/APPLICANT

RULING

1. By an application dated 13/3/2017 the applicant sought that the suit herein be dismissed for want of prosecution. The grounds on which the application is premised are stated at the foot of the application.

2. The applicant avers that the plaint was filed on 20/1/2016, appearance was filed on 26/5/2016, defence was filed on 20/7/2016, and that the matter was last in court on 3/3/2016. The applicant adds that no reply to defence has ever been filed and that as at date of the application no invitation had ever been served on him and alternatively the plaintiff has not made attempts to set the suit down for hearing. Since one year has lapsed without action being taken, the applicant argues, the plaintiff is no longer interested in the suit. He argues that the pendency of the suit without any action being taken is prejudicial to the defendant/applicant and inimical to the fair administration of justice. Most of these grounds are reiterated in the applicant's supporting affidavit sworn on 13/3/2017 and filed with the application.

3. The replying affidavit of Majune Kraido, an advocate for the High Court practicing in the Firm of Kraido & Company Advocates who have the conduct of the suit on behalf of the defendant has been filed in the record in answer to the application dated 13/3/2017. In that affidavit the deponent points out that the plaint was filed together with an application for interim orders which application came up twice for hearing in court in the absence of the defendant; that the defendant filed a memorandum of appearance on the 27th May, 2016; that the memorandum of appearance was served on the plaintiff's counsel on 10/6/2016; that the defendant filed his defence on 6/6/2016 and served it upon the plaintiff's counsel on 7/3/2017; that service of the defence after undue delay offended the provision of Order 7 Rule 1 of the Civil Procedure Rules; that the plaintiff is entitled to have the defence struck out, and that one year has not lapsed since the date of service of defence, that is 7/3/2017. The deponent reads mischief in the application.

4. A fact finding expedition through the court records demonstrates that the defence in this matter was filed on 6th June, 2016 as stated by the respondent and not on 20/7/2016 as stated by the applicant. The court record does not have any evidence of the date of service of that defence on the plaintiff. The Civil Procedure Rules envisage that a period of delay of at least one year would be sufficient to entitle the court, upon failure by the parties to take any step in the matter in that period, after notice to the parties to show cause why the suit should not be dismissed, dismiss the suit. Under Order 17 Rule 2(3) any party to the suit may apply for its dismissal if no step has been taken by either party for one year.

5. So, is the applicant entitled to bring this application? It all depends on the definition of one year in the first instance. Other factors are secondary to this. The one year period of delay is also to be computed from the date on which the last step was taken by any of the parties. Order 50 of the Civil Procedure Rules does not give any guidance on how one year is to be computed. However, the interpretation and General Provision Act Cap 2 of the Laws of Kenya define the term year to mean “a year reckoned according to the British Calendar” at Section 3. In part V of that Act at Section 57 the following provision is to be found in Section 57. In computing time for the purpose of a written law, unless the contrary intention appears,

(a) “a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day of which the event happens on the act or thing is done”.

6. The length of a year is normally 365 days. Have 365 days elapsed since the last step was taken by any party in the matter? It is clear from Order 17 Rule 2 (1) that the action that would be considered as a “step” in the matter is not confined to anything done by the plaintiff but includes anything done by the defendant. The defendant’s assertion that the matter was last in court on the 3rd March, 2016 appears to be meant to influence the court into computing the one year period from that date. There is, of course, an intervening period of more than 365 days between the date the matter was last called in court and the date that the application for dismissal for want of prosecution was filed.

7. However, in the court’s view a proper interpretation of Order 17 Rule 2 would not consider only the last date the matter was last in court in computing the one year period provided for therein if there is any other action that may have been undertaken by any of the parties in the matter, such as the filing of the memorandum of appearance or defence and service of these documents upon the plaintiff as happened in this case. There is much more to prosecution of a suit than just ensuring that the same comes up in court, otherwise every claimant may sustain the life of his suit by merely ensuring that it “comes up” in court every once in a while and at least once in every 365 days, so as not to fall afoul of the provisions of Order 17 Rule 2.

8. The period of the one year delay should be computed with effect from the date on which the defendant served his defence upon the plaintiff that is, on 6/6/2016 since there seems to be no other action taken in the matter after that date. The application dated 13/3/2017 was filed on 14/3/2017, many months before the expiry of one year since the date on which the defence was served upon the plaintiff.

9. For that reason, I find that the application dated 13/3/2017 has no merit and the same is dismissed. The costs of the application shall be borne by the plaintiff.

It is so ordered.

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. Lowasikou for the Applicant/defendant

Mr. Bisonga holding brief for Mr. Kraido

Ruling read in open Court.

MWANGI NJOROGE

JUDGE

29/05/2017