



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 128 OF 2014

GEORGE GATERE KIBATA.....PLAINTIFF

=VERSUS=

1. GEORGE KURIA MWAURA

2. EMBAKASI RANCHING CO. LTD.....DEFENDANTS

RULING

Introduction

1. The issue for determination in this Ruling is whether or not the suit herein is liable for dismissal for want of prosecution within the framework of Order 17 Rule 2 of the Civil Procedure Rules. There are three key questions to be answered in the Ruling. The first question is whether the Applicant has satisfied the statutory threshold set out under Order 17 Rule 2 of the Civil Procedure Rules. The second question is whether there has been inordinate and inexcusable delay on part of the Plaintiff. The third question is whether it would cause grave injustice to the Defendants if this case were to be allowed to proceed to trial notwithstanding any preceding delay on part of the Plaintiff.

Background

2. This suit was lodged by the Plaintiff on 11/2/2014 through a Complaint dated 10/2/2014. The Plaintiff seeks, among other prayers, an injunction restraining the Defendants **against “building, erecting, encroaching or trespassing or continuing to build or erecting any further structures on the Plaintiff’s property”**. From the body of the Complaint, the suit property is described as “Plot Numbers 5352 and 5353” being unsurveyed plots within what is described as “LR 10904/2”. Whether or not LR 10904/2 does exist in the Lands Register is not an issue for determination in this Ruling.

3. Together with the Complaint, the Plaintiff filed a Notice of Motion dated 10/2/2014 seeking interim injunctive orders pending the hearing and determination of the suit herein. On 11/2/2014, the court set down the Application for hearing inter partes on 25/2/2014. On 25/2/2014 the court adjourned the Application to 10/3/2014, to give the Respondents time to respond to the Application. On 10/3/2014 the court adjourned the Application to 26/3/2014 to allow the Plaintiff time to file and serve a further affidavit. On 26/3/2014, the Plaintiff’s Notice of Motion dated 10/2/2014 could not be heard because the 1st Defendant had, a day earlier, filed a Chamber Summons Application dated 21/3/2015 seeking leave to enjoin Embakasi Ranching Company Limited as a second Defendant in this suit. The 1st Defendant’s Advocate served the said Application on the Plaintiff’s Advocate in court on 26/3/2014. The court fixed the matter for mention on 28/4/2014. From the court record, there were no court proceedings on 28/4/2014. Subsequently, on 15/7/2014, a Mr. Mutua from the Firm of Shaply Barret & Co. Advocates set down the matter for mention on 25/9/2014. On 25/9/2014 parties recorded a consent allowing the 1st

Defendant's Application seeking joinder of the 2nd Defendant herein. The court set down the matter for mention on 5/11/2014. Subsequently, on 5/11/2014, the court directed the Plaintiff to amend, file and serve the Amended Plaintiff within two weeks. The 1st Defendant was allowed 2 weeks within which to amend his defence. The Court returned the File to the Court Registry without a date for subsequent court activity.

4. Subsequently, on 5/8/2015, the Plaintiff filed an Amended Plaintiff. On 1/9/2015 the Deputy Registrar signed Summons to Enter Appearance in respect of the 2nd Defendant. On 9/10/2015, the Firm of Ngata Kamau & Co. Advocates filed a Notice of Appointment on behalf of the 2nd Defendant, Embakasi Ranching Company Limited. On 15/10/2015, the 1st Defendant filed a statement of Defence through the Firm of Owang & Associates Advocates. On 18/7/2016 the 1st Defendant filed a Notice of Motion dated 18/7/2016 seeking the following orders:-

1. That the Plaintiff suit as filed herein be struck out and dismissed.

2. That in the result, an order be issued declaring the 1st Defendant/Applicant as the bonafide owner of the suit property known as V-14581, situated within Embakasi Ranching Co. Ltd"

5. The Notice of Motion dated 18/7/2016 by the 1st Defendant was set down for hearing on 26/9/2016. On 26/6/2016, there were no court proceedings in the matter. On 9/12/2016, the 1st Defendant filed a second Application, a Notice of Motion dated 9/12/2016, seeking the following orders.

1. That the instant application herein be certified as urgent and dispensed with in the first instance.

2. That the Plaintiff's Application dated 18th July 2016, and which was coming up for interparty hearing on 26th September 2016, and which was taken out, be certified as urgent and heard together with instant Application.

3. That the Plaintiff suit herein be dismissed for want of prosecution.

4. That the cost of this Application be provided for by the Plaintiff

Subsequently, on 14/12/2016, Mr. Owang for Owang & Associates attended the Court Registry and set down the Notice of Motion dated 18/7/16 for hearing on 13/3/2017.

6. When this matter came up before me on 13/3/2017, counsel for the 1st Defendant orally applied to withdraw the Notice of Motion dated 18/7/2016. He further requested for a hearing date for the Notice of Motion dated 9/12/2016 seeking dismissal of this suit for want of prosecution. The request was granted, culminating in the filing of written submissions and reservation of a ruling date. This Ruling relates to this particular Notice of Motion dated 9/12/2012 by the 1st Defendant seeking dismissal of this suit for want of prosecution. I have taken this unusual approach of outlining the chronology of activities and events in this matter because of the nature of the Application under consideration.

The Application

7. The Application dated 9/12/2016 is brought under Order 17 Rules 2(1) and 4 of the Civil Procedure Rules and seeks an order dismissing this suit on account of want of prosecution. It is supported by the 1st Defendant's Affidavit sworn on 9/12/2016 in which the 1st Defendant contends that the Plaintiff abandoned his Application dated 10th February 2014 and has completely failed to prosecute the said Application for a period of more than one (1) year contrary to the provisions of Order 17 Rule 2(1) and (4) of the Civil procedure Rules. Secondly, the 1st Defendant contends that the delay by the Plaintiff is a clear indication that the Plaintiff has failed to discharge the burden of showing that he has a bonafide prima facie case against the 1st Defendant. The rest of the averments in the said Supporting Affidavit are largely irrelevant to the key issue in the Application under consideration. The Respondent's Replying Affidavit too did not address the gist of the Application.

Legal Framework & Guiding Principles

8. The legal framework on dismissal of suit for want of prosecution is found in Order 17 Rule 2 which provides as follows:-

“2. (1) 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.

(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.

(4) The court may dismiss the suit for non-compliance with any direction given under this Order.”

My understanding of the framework contained in Order 17 Rule 2 is that a court may *suo motto* dismiss a suit for want of prosecution. Within the same framework, the court may dismiss a suit on the same ground on the application of either party to the suit.

9. Besides the legal framework set out in Order 17 Rule 2, the guiding criteria to be applied in considering whether or not a suit should be dismissed for want of prosecution has been articulated and settled in a number of leading authorities, among them, the case of Ivita -vs- Kyumbu(1984) KLR 441 where it is summarized as follows:

“The test is whether the delay is prolonged and inexcusable and, if it is, can justice be done despite such delay.”

10. In Mwangi S. Kimenyi -vs- Attorney General and Another, Civil Suit Misc. No. 720 of 2009, the court restated the test as follows:-

1. When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.

2. Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the Plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and 5) what prejudice will the dismissal cause to the Plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.”

Determination

11. I have carefully considered the affidavits in support of and against the Application, the submissions by counsel for the Applicant, the legal framework and the guiding jurisprudential principles on dismissal of suit for want of prosecution.

12. In my view, a defendant seeking dismissal of a suit on the ground of want of prosecution must satisfy the legal requirement of one year threshold stipulated in Order 17 Rule 2 of the Civil Procedure Rules.

After satisfying the one year threshold, he must also show that there was inordinate and inexcusable delay in the circumstances of the case. Thirdly, he must satisfy the court that he will be prejudiced by the delay if the suit were to be allowed to proceed to trial. Lastly, he must satisfy the court that owing to the delay, a fair trial cannot be achieved. In **Ivita Vs. Kyumbu**, the court echoed this view by stating as follows:

“(the defendant) must show that justice will not be done in the case due to the prolonged delay on the part of the Plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution.”

13. In answering the three questions set out in the opening paragraph of this Ruling, the court is to be guided by the legal framework in Order 17 Rule 2 and the guiding jurisprudential principles on dismissal of suit on account of want of prosecution. The court should also carefully and critically examine and evaluate the court record, the explanation tendered by the respondent in response to the application for dismissal, the general prevailing circumstances within the judicial system at the time of the alleged inaction, and the grounds put forth by the applicant in advancing the view that he would be exposed to grave injustice if the suit were to proceed to trial.

14. The legal ramifications of the statutory threshold set out under Order 17 Rule 2 of the Civil Procedure Rules is that a suit qualifies to be dismissed for want of prosecution if no application has been made or no step has been taken in the suit by either party for at least one year preceding the presentation of the application seeking dismissal of the suit. In the chronology of activities and events outlined in the preceding paragraphs, an Application was filed by the 1st Defendant in this suit on 18/7/2016. He took 26/9/2016 as the hearing date for that Application. About four months later, and while the Application dated 18/7/2016 was pending hearing, the same Applicant lodged the present Application, seeking an order dismissing this suit for want of prosecution. His counsel then proceeded to the Court Registry and took a hearing date for the earlier Application. In my view, the first Application filed by the 1st Defendant on 18/7/2016 is an action that interrupted the running of time for the purpose of computing time under Order 17 Rule 2 of the Civil Procedure Rules. Clearly, the threshold of one year of inaction by both parties started running on 26/9/2016 when the Application dated 18/7/2016 was to be heard. Only a period of two months had lapsed when the present Application was filed. Consequently, the present Application does not satisfy the one year threshold stipulated under the law. That threshold is a mandatory requirement. Any application seeking dismissal of a suit for want of prosecution is a non-starter if it does not satisfy the one year threshold, and any such Application ought to be rejected in limine.

15. Having determined that the Application dated 9/12/2016 does not meet the mandatory one year statutory requirement stipulated under Order 17 Rule 2, it would be a moot exercise to answer the other two questions. Answers to the other two questions would be necessary if the one year threshold had been satisfied. I would have said more in my Ruling had the Applicant satisfied the one year threshold.

Disposal

16. The upshot of this Ruling is that the 1st Defendant’s Notice of Motion dated 9/12/2016 and presented to court on the same day does not satisfy the mandatory one year threshold stipulated under Order 17 Rule 2 of the Civil Procedure Rules and the same is hereby dismissed for lack of merit. The Plaintiff shall have costs of the Application. I will proceed to give directions on expeditious disposal of this suit.

Dated signed and delivered at Nairobi on this 5th day of May 2017.

B M EBOSO

J U D G E

In the presence of:-

Mr. Mwangi holding brief for Mr. Khan Advocate for the Plaintiff

Mr. Donald Owang Advocate for the 1st Defendant

Mr. Ngata Kamau for the 2nd Defendant

John -Court Assistant