



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO107 of 2012

MAO OTIENO NDEGE.....PLAINTIFF

VERSUS

BARRACK OHULO OPWAPO.....DEFENDANT

RULING

1. **Barrack Ohulo Opwapo**, the Defendant, seeks through the notice of motion dated 25th November 2015 to have the suit filed by **Mao Otieno Ndege**, the Plaintiff, through the plaint dated 23rd November 2012 dismissed with costs for want of prosecution. The application is based on the five grounds marked (a) to (e) on the notice of motion and supported by the affidavit sworn by Bruce O. Odeny, the learned counsel on record for the Defendant, sworn on the 25th November 2015.
2. The application is opposed by the plaintiff through the replying affidavit sworn by Moses J.A. Orenge, learned counsel on record for the plaintiff, on the 8th April 2016.
3. The application came up for hearing on the 8th December 2016 when the court directed that written submissions be filed. The Defendant filed their submissions dated 14th march 2017 and served on the 15th march 2017. That when the matter came up on the same day for mention, the counsel for the Plaintiff informed the court that he had just been served with the Defendant's submission, and had opted not to file any submissions.
4. The following are the issues for the court's determination;
 - a. Whether the suit has remained without any steps being taken to prosecute it for more than one year.
 - b. Whether the suit should be dismissed.
 - c. Who pays the costs.
5. The court has carefully considered the grounds on the notice of motion, the affidavit evidence, submissions by Defendant's counsel and come to the following findings;
 - a. That the suit was commenced through the plaint dated and filed on 23rd November 2012. That the Defendant entered appearance vide memo dated 1st February 2013 and filed on the 4th February 2013. That the Defendant filed the statement of defence dated 15th February 2013 on the 19th February 2013. The Defendant then filed list of witnesses dated 12th June 2013 on the 17th June

2013. The Plaintiff filed a supplementary list of documents dated 8th August 2013. That on the 24th March 2014, a consent was recorded that the Surveyor and Land Adjudication Officers do visit the two parcels of land and determine their boundaries. They were also to determine whether or not either parcel has encroached onto the other. That subsequent to that, there has been mentions on the 23rd July 2014 and 22nd September 2014 and on both dates the court was informed that the exercise had not been done. That a further mention was fixed for 20th November 2014 but there is no indication on the file of what happened on that date.

b. That on 20th January 2016 the counsel for the Defendant fixed the notice of motion dated 25th November 2015 for hearing on the 18th April 2016. That from the date of the court appearance of 22nd September 2014 to the date the notice of motion dated 25th November 2015 was filed on 8th December 2015, a period of about one year three months had lapsed. The Plaintiff's counsel has deposed that they had been waiting for the surveyor and adjudication officer to do the exercise that had been agreed by parties on 24th March 2014. That the exercise had not been done due to lack of cooperation on the part of the Defendant. That deposition has not been disputed through a further affidavit by the Defendant.

c. That in view of the fact that the exercise agreed upon on 24th March 2014 has not been done and as the order has not been reviewed, varied and or set aside, and further as the Defendant has not availed any evidence to show that the Plaintiff is the one to blame for the delay in having the exercise done, the court finds that the application dated 25th November 2015 and filed on 8th December 2015 is without merit. The cause of delay in taking steps to prosecute this case is known to both parties and cannot be blamed on the Plaintiff alone.

6. That flowing from above, the Defendant notice of motion dated 25th November 2015 and filed in court on 8th December 2015 is

without merit and is dismissed with costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 14TH DAY OF JUNE 2017

In presence of;

Plaintiff Absent

Defendant Absent

Counsel Mr. Orenge for the Plaintiff

Mr. Odeny for the Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

14/6/2017

14/6/2017

S.M. K. Kibunja Judge

Parties absent

Mr. Orengo for the Plaintiff

Mr. Odeny for Defendant

Court: The ruling dated and delivered in open court in presence of Mr. Orengo and Odeny for the Plaintiff and Defendant respectively.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

14/6/2017