



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC.NO. 280 OF 2017

NJOWAMBU KENYA LIMITED.....PLAINTIFF/APPLICANT

VERSUS

JINIT MOHANLAL SHAH.....DEFENANT/RESPONDENT

RULING

There are two Notices of Motion Applications herein for determination. The first Notice of Motion is dated **23rd July 2015**, and is filed by the defendant herein under Order **17 Rule 2(1) and (3)** of the Civil Procedure Rules, Sections **1A 1B 3 and 3A** of the Civil Procedure Act and all enabling provisions of law and seeks for the following orders:-

- 1. That the suit be dismissed with costs for want of prosecution.***
- 2. That Costs of the application be provided for.***

The application is supported on the grounds stated on the face of the application and on the Supporting Affidavit of **Pauline Kamunya McAsila**. These grounds are:-

- I. That the matter was last in court on 19/12/2013 when the Court certified the matter ready for hearing after which the Plaintiff invited the Defendant for fixing of a hearing date but to date no further steps have been taken to prosecute the suit.***
- II. That the Plaintiff has neglected or has failed to follow up on the progress of the suit.***
- III. That the Plaintiff has lost interest to prosecute the suit and have the same determined and settled.***
- IV. That it is in the interest of suit that this application be granted.***

In her supporting affidavit, **Pauline Kamunya-McAsila Advocate** who is in conduct of this matter on behalf of the Defendant reiterated the averments made on the grounds in support of the application she urged the Court to allow the application.

The application is opposed and **Richard Nganga Kamiro Advocate** who was on record acting for the Plaintiff filed a Replying Affidavit. He averred that **Order 17 Rules 2(1)** does not grant the advocate for the Defendant room to file an application for dismissal of suit for want of prosecution. He further averred that the matter was last in Court on **19th December 2014** when the defendant failed to attend Court and the same was taken out of the hearing list. He urged the Court to dismiss the instant

application.

The 2nd Notice of Motion is dated **25th May 2016**, brought by the Plaintiff/applicant herein under Order 40 Rules 1 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all enabling provisions of the law. The applicant has sought for the following Orders.

I. That the Defendant whether by himself, his agent and/or servants be restrained by a injunction order from building a perimeter wall on or any other manner interfering with Land Parcel No. LR No 4953/4350 pending the hearing and determination of this application interparties.

II. That the Status quo be maintained pending the hearing and determination of this application interpartes.

III. That the court do issue a directive that the District Surveyor do visit the site and make a report on the boundaries of Land Parcels No LR No 4953/4350 and LR No 4953/2020.

IV. That Cost be in the cause

The application is supported by the grounds stated on the face of the application and the affidavit of **John Mburu Mwaura**. These grounds are:-

a) That the Defendant/Respondent has began Construction of a Perimeter wall on the disputed property.

b) That the said perimeter wall is being constructed on part of the Plaintiffs land parcel.

c) That the Plaintiff is the registered proprietor of LR No 4953/4350 on which the Defendant is encroaching.

d) That it is in the interest of Justice that the Defendant be restrained from interfering with the said Land parcel pending the hearing and determination of this application.

In his supporting Affidavit, **John Mburu Mwaura**, the Managing Director of the Plaintiff Company reiterated that the Plaintiff is the registered proprietor of **LR No 4953/4350** and that the Defendant has encroached on the said parcel of land by constructing a perimeter wall which wall has obstructed the Plaintiff from having access to his land parcel. He also averred that for conducive determination of the issues in the suit, it is imperative that the District Land Surveyor do visit the site and make a report on the boundaries of **LR No 4953/4350** and **LR No 5953/2020**. Therefore, it is in the interest of Justice that Status quo be maintained.

The application is opposed and **Jinit Mohanlal Shah** swore a Replying Affidavit dated **20th June 2016**, and averred that he is the registered owner of **LR No 4953/2020** as evidenced by **exhibit A**. That the certificate of title was granted to him on **1st May 2009** and he has been in occupation and possession of the said parcel of Land parcel since the said registration. It was his contention that in the **year 2016**, he applied to the County Government of Kiambu for permission to erect a stone perimeter wall so as to secure the said parcel of land and the said approval was granted on **8th April 2016**. Further that the plaintiff/applicant claims to be the registered owner of **LR No 4953/4350** which was allegedly alienated from his parcel of Land but he denied ever selling any part of his Land to the Plaintiff. It was his Contention that the Plaintiff fraudulently and illegally alienated part of his parcel of land and caused the same to be issued to the Plaintiff without the consent of the deponent. He reiterated that he has always been in possession and he is still in possession and the Plaintiff/applicant has never been in possession of the said parcel of Land and has not developed the same and he stands to suffer no irreparable loss, if Injunction is not granted. Further that the Plaintiff stands to suffer no prejudice should this application be dismissed.

The two applications were canvassed together by way of Written Submissions which this Court has carefully considered.

The Court will first deal with the Notice of Motion dated **23rd July 2015**, seeking to dismiss the suit for want of prosecution. The application for dismissal of suit for want of prosecution is governed by **Order 17. Order 17 Rule 2(1)** upon which the application is anchored states as follows:-

“In any suit in which no application has been made or steps taken by either party for one year, the Court may give a notice in waiting to the parties to show cause why the suit should not be dismissed---“

The court however did not give such **notice** and therefore the applicant has relied on provisions of **Order 17 Rule 2(3)** which provide that:-

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

Though the Plaintiff/Respondent in its Replying Affidavit averred that there is no room for the Defendant Advocate as provided by Order 17 Rule 2 to apply for dismissal of suit for want of prosecution, Sub Rule 3 gives any party a leeway to file for such an application. The Counsel who swore the Supporting Affidavit in support of the application is in conduct of this matter. Courts in Kenya have had occasions to deal with applications of this nature. However the Principles to be considered in an application for dismissal of the suit for want of prosecution were set out in the case of ***Ivita Vs Kyumbu (1984) KLR 441*** where the Court held that:-

“The test in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable and if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and the Defendants, so both parties to the suit must be considered and the position of the Judge too. The defendant must however satisfy the court that he will be prejudiced if the delay or even that the Plaintiff will be prejudiced. He 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. Thus even if the delay is prolonged, if the court is satisfied with the Plaintiffs excuse for the delay and that justice can still be done to the parties notwithstanding the delay, the action will not be dismissed but will be ordered that it be set down for hearing at the earliest available time”

The Court has considered the matter and noted that it was last in Court on **12th November 2014**, when the same was taken out of the hearing list because the Defendant had not been served with Hearing Notice. The Defendant/Applicant filed this application on **25th July 2015**, which was less than one year since action was taken. The action had not been delayed for more than one year as provided by **Order 17 Rule 2(1)(3)** for an application for dismissal of suit for want of prosecution to qualify.

Further, the Plaintiff/Respondent has submitted that he is ready to set the matter down for hearing. Though the Plaintiff has delayed setting this matter down for hearing, the court finds such delay is not so prolonged as to warrant dismissal of the suit without having heard the parties and decide to suit on merit.

The Court therefore finds that the instant Notice of Motion dated **25th July 2015**, is not merited and the same is dismissed entirely with costs being in the cause

On the second Notice of Motion for Injunction, the Court finds that in prayers No (b) and (c), the applicant sought for Orders pending the hearing and determination of the application interparties. The said prayers were not sought pending the hearing and determination of the suit. The said prayers were not granted in the first instance. Since the Plaintiff/applicant had sought for them pending the hearing and determination of the application, then they said prayers have been overtaken by event and are now

spent. The court will therefore not consider the said prayers as they were not sought pending the hearing and determination of the suit.

The Plaintiff/applicant has sought for an Order that the court do direct the District Surveyor to visit the site and make a report on the boundaries of **LR No 4953/4350** and **LR No 4953/2020**. It is not in dispute that the Defendant was allocated and registered as the proprietor of **LR No 4953/2020** in the year **2009**. The Plaintiff on his part was allegedly allocated and registered as proprietor of **LR No 4953/4350** in the year 2010. The Defendant has alleged that the Plaintiff's Land was wrongly curved out of his parcel of Land and the Title Deed that is held by the Plaintiff is fraudulent, null and void. The dispute herein is therefore over ownership of the suit property but not a boundary dispute. The Defendant has not admitted that his parcel of land borders that of the Plaintiff and that the only issue is the boundary dispute. The Plaintiff's certificate of title is questioned by the Defendant. The Court would therefore find it not ripe at this stage to direct that the District surveyor do visit the site and make a report on the boundaries of the two parcels of land. The court finds that this is a matter that first needs to go for full trial and determine the ownership dispute of the two parcels of land before determining the boundaries.

The Court is of the humble view that the Plaintiff has first to prove that he lawfully owns the suit property and that the registration of the same was procedural and then the court can direct the re-surveying of the disputed parcels of Land. For now, the Court finds that the prayer for directing the District Survey to visit the site and draw boundaries of the two parcels of land is premature.

The Court finds the instant Notice of Motion dated **25th May 2016**

not merited and consequently, the same is dismissed entirely with cost being in the Cause.

Further, the Plaintiff is directed to set the matter down for hearing within the next 90 days from the date of this Ruling. Failure to do so, the Court will direct that a Notice to show Cause should be issued accordingly as provided by Order 17 rule 2(1) of the Civil Procedure Rules.

It is so Ordered

Dated signed and delivered this 12th June 2017.

L. GACHERU

JUDGE

In the Presence of

M/s Kinyua for Plaintiff/Respondent/Applicant

No appearance for Defendant/Applicant/Respondent

Court - Ruling read in open Court in the presence of M/s Kinyua for the

Plaintiff/Respondent/Applicant and in absence of the

Defendant/Applicant/Respondent

L. GACHERU

JUDGE

12/6/2017