



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC 9 OF 2014

ALI SULEIMAN BIN ALI (suing as the administrator

of the estate of Suleiman Bin Ali).....PLANTIFF

VERSUS

PHILIP MASON.....DEFENDANT

RULING

1. By a Notice of Motion application dated 10th April 2017, the defendant/applicant is seeking for the dismissal of the suit for want of prosecution on the grounds that:

a) There has been inordinate delay in the prosecution of this matter by the plaintiff/respondent.

b) It is more than one year since the matter was last in court and no action has been taken by the plaintiff to set the case down for hearing.

c) The defendant/applicant continues to suffer unnecessary anxiety due to the pendency of this suit.

d) It is fair and just that this application be allowed.

2. The application is further supported by the affidavit of Peter Muhoro Kimani Counsel for the plaintiff sworn on 10th April 2017 in which he deposes that as at 27th February 2014, parties had complied with the provisions of Order 11 of the Civil Procedure Rules and the suit was fixed for hearing on 4th December 2014 when the hearing did not commence. He deposes that since 4th December 2014, a period of over one year, no application has been made and no step has been taken by the plaintiff to prosecute the suit or set down the same for hearing. He further deposes that it is now four (4) years since the matter was last in court and there is no justification ground for such delay, refusal and/or neglect in taking hearing dates and/or setting down the suit for hearing. It is deponed that the plaintiff is not keen in prosecuting the suit and plaintiff's failure to set down the suit for hearing or furnish the list of documents is causing great prejudice to the defendant/applicant and prayed that the same be dismissed with costs for want of prosecution.

3. The defendant/applicant's counsel in his submissions relied on the affidavit in support of the motion and prayed that the application be allowed.

4. The plaintiff did not file any response to the application but in his submission and with the leave of

court counsel for the plaintiff submitted on a point of law that the application was defective as the same was filed by an advocate who is not on record. According to the plaintiff's counsel, the notice of change of advocate by P.M. Kimani & Company Advocates indicated the P. M. Kimani & Co Advocates are for the plaintiff and not for the defendant. Counsel relied on the case of **KENYA PETROLEUM REFINERIES LTD –V- HASSAN NGOE & OTHERS.**

5. I have carefully considered the application herein. I will begin by looking at the preliminary objection raised by the plaintiff. In the Notice of Change of Advocates dated 10th April 2017, it is clear that the plaintiff appointed the firm of M/S P. M. Kimani & Company Advocates to act for him in the Matter in place of M/S. Waruhiu & Gathuru Advocates who have been previously acting for him. However the problem is at the space for execution, where the firm of M/s P. M. Kimani & Company is indicated as Advocates for the plaintiff instead of Advocates for the defendant. Does this anomaly render the application of Notice of Appointment incompetent and the subsequent application filed by the firm of M/s P. M. Kimani & Company Advocates fatally defective? I find that this is a defect in form of the Notice of Appointment of Advocate that does not go to the substance of the Notice of Appointment and is curable by an amendment. A reading of the Notice of Change of Advocates dated 10th April 2017 is clear on which party the firm of P. M. Kimani & Company Advocates are coming on record for. The authority relied on by the plaintiff's counsel is not relevant as the same related to a matter where a party had initially been represented by a firm of advocates but after judgment a different firm of advocates purported to file an application in the matter. In the present case, there is no judgment that has been entered. The error in the Notice of Appointment has not caused a failure of justice or prejudice to the plaintiff and the preliminary objection has not merit and is overruled.

6. The application is stated to be brought under Section 1B (1)(b) and 3A of the Civil Procedure Act, Order 17 Rule 3 and Order 51 Rule 1 of the Civil Procedure Rules Order 17 Rule 3 provides for the procedure where parties fail to appear on a day to which the suit is fixed for hearing. The same is not relevant in the instant application. However, in any suit in which no application has been made or step taken by either party for one year, any party to the suit may apply for its dismissal under Order 17 Rule 2 (3) of the Civil Procedure Rules. Although it is not expressly indicated so, the defendant's application seems to be premised on the provisions of Order 17 Rule 2 (3). I will therefor proceed to decide on the application on that presumption.

7. In deciding the application, I will be guided by the principles which the law has developed to guide the courts in its discretion in application for dismissal of suits for want of prosecution. These principles include whether there has been inordinate delay on the part of the plaintiff in prosecuting the case; whether the delay is intentional and therefore inexcusable; whether the delay has caused prejudice to the defendant; whether the plaintiff has offered a reasonable explanation for the delay and what the interest of justice dictate in the case.

8. The plaintiff filed this suit on 22nd January 2014 and the defendant entered appearance and filed his statement of defence on 11th February 2014. The plaintiff then filed his reply to defence on 14th February 2014. The suit was fixed for pre-trial directions on 27th October 2014 when the court certified the matter as ready for hearing and directed the parties to fix a convenient date at the registry. On the same date, the plaintiff fixed the case for hearing on 4th December 2014 but the same could not proceed because the record shows that the date was not convenient to the defendants' counsel and the matter was taken out. The case then came up before the court on 8th April, 2015, 25th May 2015, 1st July 2015 and 17th December 2015 when for one reason or another, it was adjourned until the instant application was filed on 11th April 2017 and fixed for hearing on 12th June, 2017.

9. Whereas in his affidavit in support of the application the defendant alleges that no step was taken in the matter since 4th December 2014, the record is clear that there have been proceedings in between, the last one being on 7th December 2015 when in fact the court directed both the plaintiff and the defendant to pay court adjournment fees of Kshs.1000 each. It is apparent from the court's order that the defendant was to blame for the delay, hence the order to pay court adjournment fees too.

10. Even though it is the view of this court that the plaintiff has not offered any explanation for not taking any step in the matter between 7th December 2015 and 11th April 2017 when this application was fixed, I note that this is a dispute over land and dismissal of the suit without hearing the merits would be a draconian act. I wish to associate myself with sentiments of Gikonyo, J in **UTALII TRANSPORT COMPANY LIMITED & 3 OTHERS –VS- NIC BANK & ANOTHER (2014) eKLR** in which he stated as follows:

“I am guided by a high sense of promoting the principles of substantive justice enshrined in the constitution and therefore convinced that the circumstances of this case deserve a lenient exercise of discretion by the court in favour of sustaining rather than dismissing the suit”

11. Accordingly, I decline to grant the application dated 10th April 2017 and hereby dismiss it. The plaintiff will, however pay the costs of the application to the defendant. The parties are directed to file a statement of agreed issues within 30 days from the date of this ruling failure to which each party to file own issues within 7 days after the expiration of the 30 days assigned for filing of agreed issues. Thereafter, the matte shall be set down for hearing.

Delivered, dated and signed at Mombasa this 17th day of July, 2017.

C. YANO

JUDGE