



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 520 OF 2013

JOSEPH MUIRURI NDEGWAPLAINTIFF

VERSUS

PETER NGIGE T/A GILGIL MATTRESSES... DEFENDANT

RULING

(Application for dismissal of suit for want of prosecution; plaint filed and amended; amended plaint not served upon the applicant; plaintiff having obtained interim orders but not moving to prosecute the case; more than 3 years lapsing since date of last action; no replying affidavit filed by the respondent to show cause why he has not taken steps to prosecute the suit; mere presence of counsel by itself is not the equivalent of showing cause; application allowed; suit dismissed with costs for want of prosecution)

1. The application before me is that dated 3 March 2017 filed by the defendant. It is an application brought pursuant to the provisions of Order 17 Rule 2 of the Civil Procedure Rules, 2010 and seeks orders that the plaintiff's suit be dismissed for want of prosecution. The application is opposed by the plaintiff/respondent who has asked that he be allowed the opportunity to prosecute his case.

2. The suit itself was commenced by way of plaint on 4 September 2013 against Peter Ngige who was described as "Trading as Gilgil Mattresses." The respondent's claim is that he is the owner of the land parcel Gilgil Township Block 3/678 situated in Gilgil. He averred that on or about 14 August 2013, the applicant illegally entered the said land and began erecting a perimeter wall. In the suit, the respondent sought orders that the applicant be permanently restrained from the suit land together with costs and interest. Together with the plaint, the respondent filed an application dated 4 September 2013, for injunction, seeking to restrain the applicant from continuing with the erection of the wall. The applicant entered appearance on 11 September 2013. He also filed a defence and a replying affidavit to the application for injunction. His position was that he has no interest in the suit land and he is not the one erecting the wall in issue. He averred that he has been wrongly sued.

3. The application for injunction came up for hearing on 19 September 2013 when counsel for the respondent applied to amend the plaint and leave was granted. An amended plaint was then filed on 23 September 2013 together with a fresh application for injunction still seeking orders to have the applicant restrained from erecting a wall in the suit property. There was nothing much in the amendment save to give the full names of the defendant as Peter Ngige Gitiya and remove the description "Trading as Gilgil Mattresses." The respondent appeared before my predecessor, Waithaka J on 30 September 2013, and was given interim orders of injunction against the applicant. The case was fixed for mention on 14 October 2013. That is the last time that the plaintiff appeared in court as he did not appear on 14 October

2013 as scheduled.

4. There was no further activity until this application was filed on 6 March 2017, more than 3 years after the matter was last in court. In his supporting affidavit, the defendant/applicant has deposed that neither he nor his counsel have ever been served with the Amended Plaintiff. He has pointed out that no step has been taken by the plaintiff to prosecute his case.

5. No replying affidavit was filed by the respondent and when the application came up for hearing inter partes on 21 June 2017, Ms. Amulabu, learned counsel for the respondent, applied for adjournment which I found no merit in and ordered the application to proceed. Mr. Kahigah for the applicant urged me to allow the application. Ms. Amulabu submitted that the plaintiff was operating under the premise that this suit was consolidated with two other cases. She submitted that the fact that she is present in court is testimony enough that the plaintiff is keen to prosecute his case.

6. I have considered the application which is premised under Order 17 Rule 2 which provides as follows :-

2. Notice to show cause why suit should not be dismissed [Order 17, rule 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.

7. It will be seen from the above provision of the law, that where no step is taken by a party within one year, the case may be dismissed for want of prosecution unless "cause is shown" as to why there was no action taken in the suit.

8. It is apparent that since the plaintiff filed his amended plaintiff and obtained interim orders of injunction, he went to sleep. He never prosecuted his application for injunction and never served the Amended Plaintiff. More than 3 years down the line, he has never moved this matter in any fashion. As I outlined earlier, no replying affidavit was filed by the plaintiff to explain why he has not prosecuted his case. It was mentioned by Ms. Amulabu that there was an order of consolidation with other matters, but I am afraid that without the order being displayed by the respondent through a replying affidavit, I cannot assume that one exists. Neither am I moved by the mere presence of counsel in court on the date of the application for dismissal for want of prosecution. What is needed is an explanation as to why the case has never been prosecuted and the mere presence of counsel when the application for dismissal is being heard is not by itself a reason not to have the suit dismissed for want of prosecution. The mere presence of counsel with nothing more, does not meet the test of "showing cause" as required by Order 17 Rule 2.

9. I have no doubt in my mind that the plaintiff has lost interest in the prosecution of this suit. The fact that he has not even served the amended plaintiff is testimony enough of his indifference. He did not reply to this application nor even bother to be present when this application was being argued. There is no point in this matter remaining in the court shelves gathering dust for no reason at all. Since no cause has been shown as to why the case should not be dismissed, I hereby dismiss it. For the avoidance of doubt, any interim orders are hereby vacated. The costs of the suit and of this application will be to the defendant.

10. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 20th day of September 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of :-

Mr. Simiyu holding brief for M/s Geoffrey Otieno & Co. Advocates for the plaintiff/respondent.

No appearance on the part of M/s Mirugi Kariuki & Co. Advocates for the defendant/applicant.

Court Assistant: Toroitich.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU