



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 281 OF 2012

DAVID KIMUTAI KOTUT:.....PLAINTIFF

VERSUS

MARY JELIMO RUTO:.....1ST DEFENDANT

JOSEPH CHEMJOR:.....2ND DEFENDANT

MASAI KIBENDO:.....3RD DEFENDANT

CHEMURGOR CHEPKOCHOI MUREI:.....4TH DEFENDANT

RULING

INTRODUCTION

This ruling is in respect of an application brought by way of Chamber Summons dated 30th March, 2017 by the plaintiff/applicant who sought for the following orders.

1. THAT this application be and is hereby certified as urgent and its service be dispensed within the first instance.

That the Honourable court be pleased to set aside the orders made on the 29th March 2017 dismissing the Plaintiff's suit and all other consequential orders thereto.

2. THAT the Honourable court be pleased to reinstate the suit herein and the same be set down for hearing.

3. Cost of this application be provided for.

This application was brought under certificate of urgency before this court on 15th May 2017. The court referred it to Lady Justice Matheka who had dismissed the suit while on service week in the station. The court ordered that the application be served and the same be heard on 20th June 2017. On this date Counsels agreed to canvass the application by way of written submission. The same were filed and a ruling dated given by the court.

Plaintiff's Counsel's Submissions

Counsel submitted on the brief history of the case whereby he stated that the Plaintiff/ Applicant herein resides on the suit land together with his family and has made substantial development in the said parcel of land. He also stated that the Plaintiff instituted this suit in the year 2006 and it progressed well until 2013 when the 3rd Defendant died and the counsel on record for the 2nd, 3rd and 4th defendant on the 22/05/2013 made an application to the court for the matter to be stood over generally so that the 3rd defendant could be substituted which application was allowed by the Honourable court. Later the 4th defendant also passed on. Counsel further submitted that throughout the entire period the plaintiff herein has been desirous of prosecuting his matter but that has been made difficult by the conduct of the defendants herein.

Counsel also submitted that no party should be condemned unheard unless granting such a party an opportunity may appear undeserving or an abuse of the court process. He relied on Article 159 (2) (d) which obligates the Honourable court to administer justice without undue

regard to technicalities. He further echoed the provisions of order 2 rule 14 of the Civil Procedure Rules 2010 that provides: -

"No technical objection may be raised to any pleading on the ground of any want of form."

Counsel for the Plaintiff also invoked the provisions of Section 3A of the civil procedure Act, where the court is conferred powers to make any orders necessary at ensuring that ends of justice is met. He stated that the plaintiff/ Applicant was and is still desirous of prosecuting his matter considering that he brought the current application immediately after the dismissal for want of prosecution.

Counsel further submitted that the defendants herein are guilty of obstructing justice by refusing and/ or delaying to abide by their word of the 22/05/2013 and thus should in any way enjoy the fruits of the judgment. He urged the court to afford the parties an opportunity to ventilate their issues in court so that the Honourable court may be able to evaluate the matter on merit.

Counsel relied on three authorities to buttress the submissions and urged the court to allow the application as prayed.

Respondents' Counsel's written Submission

Counsel for the respondent filed his submissions and relied on the grounds of opposition filed on 30th May 2017 together with the Replying Affidavit of Joseph Chemjor filed on the same day. Counsel stated that the averments in the Replying Affidavit of Joseph Chemjor in response to the Plaintiffs application herein were not denied and/or challenged.

Counsel submitted that the principles under Order 17 of the Civil Procedure Rules (2010) require that once a suit is filed the same should be set down for hearing and/or prosecuted

within a period of twelve (12) months and where no action is taken to prosecute the said suit the same shall stand dismissed at the courts volition or through and application for dismissal by the Defendant.

It was counsel's submission that the Plaintiffs suit was dismissed on 29.03.2017 by the court upon notice since the same had not been prosecuted for a period of over eleven (11) years. He stated that the order dismissing the Plaintiffs suit is regular, meritorious and proper in law since the Plaintiff having been duly served with dismissal notice for want of prosecution. Counsel further urged the court to disregard the plaintiff's reason that he is yet to substitute the 3rd and 4th defendants to enable him prosecute the case. Counsel had issue with the form of the application which he states should have been brought by way of Chamber summons. He submitted that no good grounds have been advanced to warrant the reinstatement of the dismissed suit.

Further that the plaintiff has not demonstrated that he has commenced substitution proceedings.

He therefore urged the court to dismiss the Plaintiff/Applicant's application with costs to the respondents.

Analysis and Determination

I have considered the submissions for both counsels of the parties together with the authorities cited and wish to address the issue as to whether this is a suitable case for the court to exercise its discretion to reinstate it.

The law concerning dismissal of suits for want of prosecution is contained in Order 17 which provides as follows: -

'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'.

From the affidavits and the submissions by both counsels, it is not disputed that they received a notice for dismissal for want of prosecution. Infact the notice was also attached as an annexure to the replying affidavit. It should also be noted that both counsels for the parties did not attend court when it was scheduled for dismissal. Counsel for the respondent should therefore not be seen as a saint shouting from the roof top how the suit was dismissed according to the law.

This is a suit involving four defendants whereby the 3rd and 4th are allegedly deceased. From the court records, the plaintiff has always been desirous of prosecuting this case. The same was derailed by circumstances that were beyond him.

I wish to be guided by the case of **Utalii Transporters C Ltd & Others vs NIC Bank & Another** where the court held inter alia that:-

"the first intuitive feeling one gets is that the offending proceeding should quickly be removed out of the way of the innocent party. But, the law prohibits a court from such impulsive inclination, and requires it to make further inquiries into the matter under the guide of defined legal principles on the subject of dismissal of cases for want of prosecution; a view which is undergirded by the fact that dismissal of a suit without hearing the merits is draconian act which drives the plaintiff from the judgement seat. It is, therefore, a matter of discretion by the court.....Accordingly, I will discern the principles which the law has developed to guide the exercise of discretion by the court in an application for dismissal of a suit for want of prosecution. These principles are:-

- a. Whether there has been inordinate delay on the part of the plaintiffs in prosecuting the case;*
- b. Whether the delay is intentional, contumelious and, therefore, inexcusable;*
- c. whether the delay is an abuse of the court process;*
- d. whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the defendant;*
- e. what prejudice will the dismissal occasion the plaintiff?;*
- f. whether the plaintiff has offered a reasonable explanation for the delay;*
- g. Even if there has been delay, what does the interest of justice dictate; lenient exercise of discretion by the court?*

These principles are very useful in determining applications for dismissal of a suit for want of prosecution. The respondents explain the delay and blames the plaintiff for the same. They do not apportion the blame to themselves too which is evident from the court record. There was no intentional or inexcusable delay.

In response to the principles enumerated above, I would exercise my discretion to allow the reinstatement of this case to go for full trial. The dismissal of the suit for want of prosecution would prejudice the plaintiff. This is a case against four defendants, if the plaintiff feels that the suit has abated against the 3rd and 4th defendants then counsel for the plaintiff knows what to do. If counsel has started the process of substitution as was submitted then he needs to fast track it.

I note from the pleadings that this case was consolidated with HCCC No. 117 of 2006 by consent of the parties. I further note that the defendants also have a counterclaim which has

not been prosecuted. How will they pursue the counterclaim if the case does not proceed for full trial or was it just a sham to delay the finalization of the case?

Having looked at the application in its totality together with the authorities cited, I therefore find that this is case whereby reinstatement would be just so as to allow parties to ventilate their issues. I however make specific orders as to timelines within which the plaintiff has to move the court appropriately. This is not a blank cheque for the plaintiff to continue “*waiting for Godot*’ who never arrives.

Accordingly, I make the following orders: -

- a. That the orders of this court made on 29th March 2017 dismissing this suit for want of prosecution be and are hereby set aside and this suit is hereby reinstated and I direct that the same proceeds for hearing and be determined on its merits.
- b. The parties herein to comply with order 11 of the Civil Procedure Rules if any within 30days
- c. That the plaintiff is further ordered to fix a hearing date for this suit in the next 30 days from today in default of which this suit stands dismissed.
- d. No orders as to costs.

Dated and delivered at Eldoret on this 19th day of September, 2017.

M.A ODENY

JUDGE

Read in Open court in the presence of:

Mr. Tarus holidng brief for Songok for Applicant.

CC: Koech

No appearance for defendant