



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 118 OF 2013**

**VINCENT NARISA KROP & 3 OTHERS.....PLAINTIFFS/RESPONDENTS**

**VERSUS**

**MARTIN SEMERO LIMAKAU &12 OTHERS.....DEFENDANTS/APPLICANTS**

**RULING**

1. The defendant has brought an application dated 18/7/2017 seeking an order dismissing the plaintiffs' suit with costs on the basis that no step has been taken to prosecute the suit since 17/9/2013 when the suit was filed. It is claimed that the plaintiff has lost interest in the suit and the same should be dismissed for want of prosecution as the delay in prosecuting the suit is inordinately long and prejudicial to the defendant.
2. It is urged that the interlocutory orders of injunction issued on 30/7/2014 have lapsed provided for under ***Order 40 Rule 6 of the Civil Procedure Rules***. In addition the defendant has urged that the overriding objective of the court dictate the dismissal of this suit for want of prosecution. The applicant through his advocate, who has sworn the supporting affidavit states that the defendants are prejudiced by having to await orders of eviction from the land and an injunction permanent for over three years.
3. The application is opposed. The plaintiffs have filed the replying affidavit sworn by the 1<sup>st</sup> plaintiff on 14/8/2017. The plaintiff's case is that they are still interested in pursuing the suit as they are the registered proprietors of the land; that though the plaintiff obtained an injunction and served the order upon the defendants with the assistance of the Chief Kipkomo Location, the defendants have disobeyed the court order in that they still continue to farm and graze their animals on the land. The plaintiffs aver that they have in the meantime been seeking to enforce compliance with the court orders by asking for the assistance of the O.C.S Kapenguria but in vain. It is the plaintiffs' belief that the defendants are in contempt of the court and should not be granted audience until they purge the said contempt. They state that they have a strong case and aver that the defendants have substantially contributed to the delay by failing to honour court orders.
4. Without stating what the other plaintiffs have been doing in the meanwhile, the 1<sup>st</sup> plaintiff avers that the lapse in prosecuting the case occurred when he got employed in Uganda and the distance rendered it difficult to give proper instructions, hence his inaction should not affect the other plaintiffs. It is also alleged that the delay has been occasioned by the non-availability of the file and dates at the Registry on the several occasions that the plaintiffs have attempted to proceed.

**THE APPLICANT'S SUBMISSIONS**

5. In the applicant's written submissions filed on 11/10/2017, the applicants accuse the plaintiffs of

inordinate and inexcusable delay which occasion injustice to the defendants. They cite the ***Court of Appeal case of Ragesh Rughani –vs- Fifty Investments Ltd and Another 2016 eKLR*** where they submit that the Court of Appeal came to the conclusion that no credible, satisfactory and sufficient explanation for the delay by the applicant had been given in the High Court application for dismissal. In that case the Court of Appeal dismissed the appeal. The defendants herein urge that in this case the plaintiffs have also failed to give any reasonable explanation for the delay in prosecuting their case.

6. On the issue of contempt the defendants maintain that no application for contempt of court orders has ever been filed by the defendants since the order was issued.

7. On the issue of lapse of the temporary orders of injunction the defendant rely on ***Nairobi Civil Case No. 1321/2013 – Maria Lwande & Others -vs- The Registered Trustee of Teleposta Pension Scheme 2015 eKLR***, where the court stated that the plaintiff had not given any reasons why the injunction should continue and declared the injunction orders to have lapsed.

### **THE RESPONDENT’S SUBMISSIONS**

8. The plaintiffs in their submissions filed on 9/10/2017 maintain that the injunction order of 30/7/2014 has never been complied with by the defendants hence the defendants, who are the applicants, have come to court with unclean hands.

9. The plaintiffs also submit that the defendants have failed to comply with **Order 2** of the Civil Procedure Rules to pave the way for the fixing of a hearing date. The plaintiffs aver that they are the registered proprietors of the suitland and that the defendants are illegally in possession of the same. The plaintiffs cite the case of ***Dr. Otsyula –vs- Children of God Relief Institute NBI Milimani Civil Case No. 1652/2002 and Professor Mwangi S. Kimenyi –vs- A.G. & Others NBI Commercial & Admiralty Division Civil Suit No. 720 of 2009***.

10. The main issues arising in the instant application are whether there has been an inordinate delay in the prosecution of the suit and if so whether the suit should be dismissed for want of prosecution.

11. The application before court is brought under ***S. 1 A(1) of the Civil Procedure Rules Order 17 Rule 2(1) and (3) of the Civil Procedure Rules***.

**Section 1 A of the Civil Procedure Act** states as follows:-

**“The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.”**

The above is a general provision outlining the overriding objective of the Act and the Rules thereunder which it mandates the court to give effect to and is applicable in the instant application.

**Order 4 Rule 1(4) of the Rules** states as follows:-

**“Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.”**

Clearly no case has been made against the plaintiffs in respect of that Rule in the instant application.

12. **Order 17 Rules 2(1) and 3** state 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) .....

**(3) Any party to the suit may apply for its dismissal as provided in Sub Rule 1”.**

13. It is clearly under these provisions immediately hereinabove stated that the instant application falls.

14. The issue arises as to whether any step has been taken in the suit for the last one year before the application as made. The court record shows that the suit was filed on 17/9/2013. With it were filed the list of plaintiffs’ documents, list of witnesses and witness statements. An authority to plead was given by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs to the 1<sup>st</sup> plaintiff to “swear any affidavit or” sign any pleadings on their behalf in the matter

15. The defendants filed a memorandum of appearance on 27/9/2013. It is clear that the application for an order of temporary injunction was finalised on 30/7/2014. The only other thing that happened after that was the filing of the instant application on 18/7/2017 and issuance of a hearing date to it.

16. It is clear that indeed a lengthy period spanning more than 3 years elapsed between the date the matter was last in court and the date of making the instant application without the plaintiffs taking any action in the matter.

**Has the delay been explained?**

17. The 1<sup>st</sup> plaintiff appears to have been granted authority to plead and take action in respect of this suit by the other plaintiffs. He states that he obtained some employment in Uganda which occasioned the delay. In his absence the other plaintiffs never took any action. Apparently the other plaintiffs having granted the 1<sup>st</sup> plaintiff authority may have looked up for him for guidance and pursuit of their interests in this litigation. Upon an examination of the record the court finds that the issuance of authority to the 1<sup>st</sup> plaintiff is a genuine act of trust on the part of the other three plaintiffs, at least one of which demonstrates his illiteracy by executing the very authority document by way of a thumbprint.

18. It is clear that the 1<sup>st</sup> plaintiff is not the only person claiming to be entitled to the land. Dismissal of this suit would affect even the claims of the other plaintiffs. The court recognizes the peripheral role that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs must have played in the running of this litigation since its inception to date. It was stated in the case of **Dr. Moses Otsyula –vs- Children of God Relief Institute**(supra) that the power of dismiss a suit for want of prosecution is nonetheless a discretionary power which should be exercised judiciously. In that case the court cited the case of **Ivita –vs- Kyumbu 1984 KLR 44 where the Hon. Justice Chesoni** (as he then was) stated as follows:-

***“The test 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 defendant so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time.***

***The defendant must however satisfy the court that he will be prejudiced by the delay or 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 execute its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff’s explanation or excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”***

19. The question as to whether justice can be done despite the delay in the instant suit may be partially

answered by considering whether the plaintiff filed all the documents needed to support his case in compliance with the Civil Procedure Rules.

20. The statements that were made at the inception of the suit are in the court record so the issue of disappearance of human memory resulting from lapse of time, is partially taken care of, at least with regard to the issue of evidence in chief. If anything, the defendants themselves are guilty of not complying with the Rules as they have not filed anything save a reply to the application for an order of temporary injunction, a memorandum of appearance, authority to plead, and a joint defence.

21. Upon the authority of *Halsburys Laws of England Vol. 37 para 448*, cited in the Otsyula case (Supra) there needs to be a clear demonstration that any delay complained of will give rise to a substantial risk such that it is not possible to have a fair trial of the issues in the action or that it is likely to occasion the defendants serious prejudice as between themselves and the plaintiff or between each other or between them and a third party.

22. In the Dr. Otsyula case (supra) the court stated as follows:-

**“Dismissal of suit for want of prosecution is intended to prevent delayed justice or injustice and or abuse of court process. It is also trite that in any civil suit, it is the plaintiff who is in pursuit of a remedy, that he should take all the steps at his disposal to achieve an expeditious determination of his claim. He should not be guilty of laches. On the other hand, when the plaintiff fails to bring his claim to a speedy conclusion, a defendant ought to invoke the process of court towards that end as soon as is convenient by either applying for its dismissal or setting down the suit for hearing. Delay is deprecated by the law and more so, Article 159 of the Constitution which commands that justice shall be administered without undue delay. And it is the duty of the plaintiff to get on with the case. It is also trite that every year that passes prejudices the fair trial as witnesses may have died, documents mislaid, lost, destroyed and the memory tends to fade( see Dickson J in Nilan v Pater (1969) EA Page 341.)**

**Nonetheless, it is also settled that delay is a matter to be decided on the circumstances of each case where a reason for the delay is offered, the court should be lenient and allow the plaintiff an opportunity have his case determined on merit (see AGIP (K) Ltd v Highlands Tyres Ltd (2001) KLR 630.”**

It has not been established that the defendant herein has been attempting to set the instant suit down for hearing or that they would suffer the kind of prejudice envisaged in the **Halsbury’s Laws** cited above.

23. The court stated as follows concerning the need for leniency in circumstances akin to the instant application:

**“Nonetheless, it is also settled that delay is a matter to be decided on the circumstances of each case where a reason for the delay is offered, the court should be lenient and allow the plaintiff an opportunity have his case determined on merit (see AGIP (K) Ltd v Highlands Tyres Ltd (2001) KLR 630.**

**Whereas dismissal of a suit for want of prosecution is a matter of discretion of the court, a court of law should always avoid acting intuitively on such application or hastily dismiss a suit for want of prosecution, but rather, it should make further inquiries into the matter to establish whether**

- 1. There has been inordinate delay on the part of the plaintiff in prosecuting the case.**
- 2. The delay is intentional, contumelious and therefore inexcusable;**
- 3. The delay is an abuse of the court process.**

**4. The delay gives rise to substantial risk to fair trial or causes serious prejudice to the defendant.**

**5. What prejudice will the dismissal occasion to the plaintiff?**

**6. The plaintiff has offered a reasonable explanation for the delay.**

**7. Even if there has been delay, what does the interest of justice dictate; lenient exercise of discretion by the court.”**

24. The delay that the court was dealing with the Otsyula case was a period of 4 ½ years. The suit had been consolidated with others. While acknowledging delay, the court observed as follows:-

**“Albeit there has been delay in setting down this matter for hearing this court appreciates the dilemma in which the parties find themselves in. It is not disputed that one of the parties is ill and cannot conduct proceedings on his own accord. On the other hand, the court while consolidating the two suits never gave directions as to how such a consolidated suit should be conducted. It has not been shown that the delay, though inordinate, is deliberate, contumelious and, therefore, inexcusable. It has also not been shown that the delay is an abuse of the court process.**

25. The court took consideration of the fact that one of the parties was ill, and that at consolidation of the suits no directions had been issued as to how the trial should be conducted.

26. Each and every plaintiff has an interest in the suit land in the instant case. The defendants have ignored the rules and I find that they have come to court with unclean hands as urged by the plaintiffs. I find that this is a case in which great prejudice, incommensurate with the inconvenience of “*waiting*” for eviction which the defendants have expressed themselves to be laboring under, would be occasioned to the plaintiffs if dismissal orders issued.

27. In addition, the explanation for the delay is plausible in that if it is the 1<sup>st</sup> plaintiff who was authorized to deal with the matter and he was abroad as pleaded, there is every reason to believe that the others who hang on his every assistance would await his return to enable them move the litigation forward.

28. In the circumstances I hereby dismiss the application dated 18/7/2017 as the same is lacking in merit. The plaintiffs shall fix this matter for hearing expeditiously and in any event that action of fixing the case for hearing must be undertaken within **45 days** from the date of this order. Each party shall bear its own costs of the application.

Dated, signed and delivered at Kitale on this **30<sup>th</sup>** day of **October, 2017**.

**MWANGI NJOROGE**

**JUDGE**

**30/10/2017**

**CORAM**

Before Mwangi Njoroge - Judge

Court Assistant – Isabellah/Picoty

Mr. Kariuki for plaintiffs/respondents

Ms. Mufutu for defendants/applicants

**COURT**

Ruling read in open court in the presence of counsel for the parties.

**MWANGI NJOROGE**

**JUDGE**

**30/10/2017**