

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO. 66 OF 2015

SAMUEL KINPNGETICH KOSKEI..... 1ST PLAINTIFF

NANCY CHEPKURUI..... 2ND PLAINTIFF

VERSUS

WILSON KIPKORIR KIPKATO..... DEFENDANT

RULING

What is coming up for determination is the Notice of Motion dated 6th March 2017. The application which is brought pursuant to Order 17 Rules 2(1) and 2(3) of the Civil Procedure Rules seeks to have the suit herein dismissed for want of prosecution.

The application is premised of the supporting affidavit of Musembi Ndolo, learned counsel for the Defendant/Applicant in which he gives a chronology of events since the suit was filed in December 2015. The long and short of it is that since pleadings closed on 26th January 2016, the plaintiff has not taken any steps to fix the suit for hearing.

The application is opposed by the respondent through the replying affidavit sworn by the Zehrabanu Janmohamed counsel for plaintiff in which she denies that there has been inordinate delay in prosecuting the case. She maintains that the plaintiffs are willing to proceed with the case. She emphasizes that this being a land matter, it is fair and just that it be heard on the merits.

It was agreed that the application be canvassed by way of written submissions, and both counsels filed their submissions. In his submissions, counsel for the applicant urges the court to be guided by Article 159 of the Constitution as well as sections 1A and 1B of the Civil Procedure Act, particularly the overriding objective of the Act which is to facilitate a just expeditious, proportionate and affordable resolution of disputes. On the other hand, counsel for the respondent has submitted that a delay of one year is not inordinate. In agreeing with counsel for the respondent I rely on the case of **Utalii Transport Company Limited and 3 Others V NIC Bank Limited & Another (2014) eKLR** where it was held that a period of eighteen months was not inordinate delay.

I am also guided by the case of **Ivita V Kyumbu (1984) KLR 441**. Where Chesoni J as he then was stated as follows:

“The test applied by the courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus even if the delay is prolonged, if the court is satisfied with the plaintiff’s excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter in the discretion of the court”

I have carefully considered the application, affidavits as well as the submissions of counsel. I also take judicial notice of the fact that the whole of last year, this court did not have a full-time ELC judge and it was not possible to fix cases for hearing in an expeditious manner. In view of the prevailing circumstances of this case and also considering the sensitivity of land matters, I am inclined to give the plaintiff a chance to have their case heard on the merits. I therefore disallow the application and direct that the parties comply with pre-trials within 30 days from the date hereof to pave way for an expeditious disposal of this case.

The costs of this application shall be in the cause.

Dated, signed and delivered at Kericho this 19th day of October 2017

J. M ONYANGO

JUDGE

In the presence of:

Miss Koech for Musembi Ndolo for the Applicant.

No appearance for the Respondents.

Court Assistant: Rotich