



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC CASE NO.739 OF 2015
[FORMERLY HIGH COURT CIVIL CASE NO.116 OF 2010]
IN THE MATTER OF MARRIED WOMEN PROPERTY
AND
IN THE MATTER OF DIVISION OF PROPERTY BETWEEN
WINNIE NJAMBI JUMA AND JUMA MUCHEMI
AND
IN THE MATTER OF AN APPLICATION BY WINNE NJAMBI JUMA
WINNE NJAMBI JUMA.....APPLICANT
VERSUS
JUMA MUCHEMIRESPONDENT
RULING

1. The Respondent, Juma Muchemi, filed the notice of motion dated 1st November 2016 seeking to have this suit commenced by Winnie Njambi Juma, the Applicant, through the originating summons dated 13th July 2010 dismissed for want of prosecution. The Respondent also prays for costs. The application is based on the five grounds on its face and supported by the affidavit of Juma Muchemi, sworn on the 1st November 2016.
2. The application is opposed by the Applicant through her replying affidavit sworn in the 22nd February 2017.
3. The application came up for hearing on the 22nd May 2017 when Mr. Karanja and M/S Adwar, learned counsel for the Respondent and Applicant respectively, made their oral submissions.
4. The following are the issues for determination by the court;
 - a. Whether the Applicant has taken more than one year without taking any steps to prosecute her case.
 - b. What orders to issue.

c. Who pays the costs.

5. The court has carefully considered the grounds on the notice of motion, affidavit evidence, submissions by counsel and come to the following findings;

a. That following the court appearance of 12th March 2014, when the notice of motion dated 8th March 2011 allowing one Mary Wanjiku Juma to be enjoined in the proceeding was granted, the matter was fixed for mention on the 5th June 2014. That only counsel for the Applicant was represented on the 5th June 2014 and the court directed that another date be fixed at the registry.

b. That the next court appearance was initiated by the court through notice to show cause why the suit should not be dismissed for want of prosecution on the 13th July 2015. The record shows that only counsel for the Applicant was in court and after informing the court that parties were negotiating with a view of coming up with an amicable settlement, a mention for 21st September 2015 was fixed.

c. That the Respondent filed the notice of motion dated 1st November 2016 and on the same date fixed it for hearing on the 8th February 2017. The application was rescheduled to 22nd May 2017 when it was heard.

d. That the Respondent did not disclose in the notice of motion that the parties had been involved in any out of court negotiations. The applicant has availed five copies of letters dated 22nd January 2014, 8th March 2014, 10th March 2014, 21st March 2014 and 6th May 2014 which show that the parties had been involved in negotiation with a view of settling this matter. That the contents of the letters and communication to the court by Mr. Omondi for Mwamu Advocate on the 13th July 2015 leads the court to conclude that though there were no steps taken in court to prosecute the suit for more than a year, the parties were engaged in negotiations aimed at settling the matter during that period.

e. That the Applicant has in her replying affidavit deposed that she met with the Respondent at Windsor Hotel, Nairobi, last on the 26th November 2016 and that they had agreed to have a further meeting in January 2017, which was later rescheduled to February 2017 to allow the Respondent, who had been unwell and hospitalized, recuperate. That deposition has not been challenged or rebutted by the Respondent. That though the negotiations between the parties were being carried out without informing or involving the court, they are welcome efforts and in line with Article 159 (2) (c) of the Constitution. That such efforts must be taken to be steps aimed at leading to the settlement or determination of the suit pending in court the same way steps taken to prosecute the case in court would also be aimed at settling or determining the case.

f. That from the perspective of the Applicant, the out of court negotiations were ongoing up to late last year. The parties had not yet reached a deadlock or resolved to come back to court. That as such, the filing of the notice of motion dated 1st November 2016 seeking to dismiss this suit for want of prosecution by the Respondent, while appearing to continue with the out of court negotiations and failing to disclose that negotiations have been ongoing, amounts to lack of good faith on the part of the Respondent.

6. That in view of the foregoing, the court finds that the Respondent's notice of motion dated 1st November 2016 is without merit and is dismissed with costs to the applicant.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 11TH DAY OF OCTOBER 2017

In presence of;

Applicant Absent

Respondent Absent

Counsel Mr. Omondi for the Plaintiff/Respondent

Mr. Odumbe Mutiso for Defendant/Applicant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

11/10/2017

11/10/2017

S.M. Kiunja Judge

Oyugi court assistant

Mr. Omondi for the Plaintiff/Respondent

Mr. Odube for Mutiso for Defendant/Applicant

Court: Ruling dated and delivered in open court in presence of Mr. Omondi for the Plaintiff/Respondent and Mr. Odube for Mutiso for Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

11/10/2017