



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC CASE NO 314 OF 2017

JOHN NJOROGE WAWERU.....PLAINTIFF

VERSUS

KARIUKI KIRIGE.....1st DEFENDANT

SAMPET KENYA LTD.....2nd DEFENDANT

PHILIP KAMAU KARA.....3rd DEFENDANT

SAMUEL T. KABUE.....4th DEFENDANT

DIRECTOR OF LAND ADJUDICATION

AND SETTLEMENT.....5th DEFENDANT

LAND REGISTRAR.....6th DEFENDANT

FRANCIS CHEGE.....7th DEFENDANT

RULING

1. By a Notice of Motion dated 8th May 2017 made under order 17 Rule 2(1)(2) order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and all other enabling provisions of the Law, the plaintiff/Applicant seeks orders that:-

i. That the suit herein which stood dismissed on the 22nd February 2017 be re-instated for hearing and determination on merit

ii. That the costs of the application be provided for.

2. The said application was supported the grounds on the face of the application as well as by the Affidavit sworn by John Njoroge Waweru, the plaintiff/ Applicant herein wherein he deponed that indeed the suit was dismissed on the 23rd February 2017 pursuant to the orders made by the Land and Environment Court sitting in Nairobi on the 23rd June 2016. The application was unopposed.

3. This suit was commenced by way of a Plaint dated the 28th June 1996 and filed in court on the 12th

July 1996. On the 11th July 2002 there was an interlocutory judgment entered against the 1st Defendant herein for failing to enter appearance or to file a defence. Thereafter on the 26th May 2015, the suit was dismissed for want of prosecution under order 17 rule 2(1) of the Civil Procedure Rules.

4. Vide an application dated the 3rd September 2015, the Plaintiff applicant successfully sought for the re-instatement of the suit which application was allowed on the 23rd June 2016 with orders that the plaintiff sets down the suit for pre-trial case conference and thereafter for hearing within the next eight (8) months from the date of the order in default to which the suit shall stand dismissed automatically without any reference to the court.

5. That subsequently the matter was mentioned before the Judge sitting in Nairobi on the 7th February 2017 wherein parties were absent. There were further directions to the effect that since the suit premises was within the jurisdiction of this court that the file be transferred to the Land and Environment Court Nyahururu. This was done.

6. On the 4th May 2017 when this matter was placed before me and having noted that the Plaintiff had not set down the suit for pre-trial case conference and thereafter for hearing within the eight (8) months from the 26th June 2016, as per the orders of that date, the matter automatically stood dismissed and I marked the same as such.

7. The plaintiff then filed the current application which was urged by his Counsel, M/s. Ndegwa who acknowledged having not complied with the orders issued on the 26th June 2016 but gave reasons for the failure. The reason for non-compliance according to Counsel was that parties had consented that there be discovery pursuant to the provisions of order 11 of the Civil Procedure Rules, to which parties had not complied.

8. Secondly, that there had been some difficulties in accessing some crucial documents from the office of the Settlement Fund Trustee to which they had sought help from the Hon. Attorney General but to no avail, and so as they could not move the matter forward.

9. Counsel further submitted that they had further failed to prosecute the matter due to backlog at the Land and Environment Court in Nairobi, unavailability of hearing dates and shortage of judges.

10. Counsel however submitted that the Applicant had a legitimate proprietary claim over the suit property and that the Defendants would suffer no prejudice if the prayer sought for re-instatement was granted. She prayed that the applicant be given one more chance to prosecute his case on merit.

11. Having heard the submission by counsel as well as having read the application and seen the annexures thereto, I have also perused through the court record, and I am not satisfied that the reasons given by the applicant herein warrant the issuance of the orders so sought in the Applicant's application dated the 8th May 2017 which seeks for the re-instatement of the suit.

12. Order 17 Rule 2 (1) of the Civil Procedure Rules grants the court the power to dismiss a suit in which no step has been taken for one year. The Order also requires the court to give notice to the party concerned to show-cause why the suit should not be dismissed for want of prosecution, and if no cause is shown to the satisfaction of the court, the court may dismiss the suit. This order is permissive and allows quite significant room for exercise of discretion to sustain the suit.

13. This discretion was exercised on the 23rd June 2016 when despite the fact that the matter had not been prosecuted for close to thirteen (13) years, the trial judge reinstated the suit giving the applicant a chance to redeem himself within 8 months. **What is surprising is that since to orders were issued, the Applicant did not bother at all to progress his case.**

14. There is nothing on record to prove that within the 8 months the Applicant tried to set the matter down

for hearing or to address the Court on any difficulties he was facing so as to seek further direction for the court.

15. Further, when the orders were issued the Applicant was present in court yet as the record reflects on the 7th February 2017 and on the 4th May 2017 when the matter was called out in court, the Applicant had not moved the court. In fact on the 4th May 2017, the court, on its own motion, having found that the applicant had failed to comply with the orders issued on the 26th June 2016, dismissed the suit a second time.

16. The order for the dismissal of the suit was at the instance of the court. In other words, the court was not moved by any application, when it dismissed the suit.

17. Under Article 159, the Constitution demands, that cases should be disposed of expeditiously. Indeed justice delayed is justice denied. Here I am reminded that justice is to all the parties and not only the plaintiff.

18. The question I ask myself is whether it will be possible to conduct a fair hearing after the lapse of 21 years since the suit was filed. Having regard to the fact that the suit **was filed in 1996, I find that the delay and is a source of prejudice to the Respondent as well as to the fair administration of justice. I find that the amount of time which has passed is not conducive to having a fair trial in this matter. I also find that the Applicant's conduct in the prosecution of this matter is an abuse of the court process. Accordingly, and with a lot of trepidation, I dismiss the application dated the 8th May 2017.** I will, however, not condemn the Applicant to costs as he has already lost his right to be heard on merit.

19. It is so ordered.

Dated and delivered at Nyahururu this 20th day of November 2017.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE