



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 91 OF 2015**

**JACTON MUKHWANA.....APPLICANT/DEFENDANT**

**VERSUS**

**RAEL NALIAKA SAWENJA.....RESPONDENT/PLAINTIFF**

**RULING**

1. In the application dated **28/8/2017** the defendant seeks dismissal of the plaintiff's suit for want of prosecution on the basis that since **20/7/2016** the plaintiff has taken no step to prosecute the suit and that that delay is inordinately long and prejudicial to the plaintiff.
2. It is urged that the plaintiff has clearly lost interest in the suit and that the overriding objective of the court dictates the dismissal of the suit for want of prosecution. The application is supported by the affidavit of Peter Kiarie Ndarwa, the defendant's counsel, sworn on **28/8/2017** which largely reiterates the above mentioned grounds.
3. The application is opposed. The plaintiff has filed her sworn affidavit dated **2/10/2017** stating as follows: that the application is unmerited; that she has always taken all necessary steps to prosecute the matter; that she received a letter from the Chairman, Board Committee, Birunda dated **29/6/2015** requesting that all court matters be withdrawn so that Birunda Farm occupants may be issued with titles; that subsequently her advocate wrote to the defendant's advocate proposing a withdrawal of the suit; that that letter proposing withdrawal has never been responded to; that on **6/6/2017** all genuine members of Birunda Farm including the plaintiff and her two sons were issued with title deeds; that the plaintiff and her two sons are the legal owners of **Plots Nos. 340, 341 and 342** and not the plot claimed by the defendant, and that the delay was for a good purpose and that the application for dismissal should be disallowed.
4. In a further affidavit dated **7/10/2017** the defendant states as follows: that the annexures of the plaintiff are at variance with the averments in the replying affidavit; that the letter dated 29/6/2015 marked "RNSI" and exhibited by the plaintiff show that the area list and the plot sizes submitted to the National Land Titling Programme were a fraud; that while claiming to have obtained titles to the suitland, the plaintiff evicted the defendant and she has been charged alongside others in **Kitale CMC Criminal Case No. 3233 of 2017** with the offence of malicious damage to property; that the titles held by the plaintiff and sons are fraudulently obtained and the defendant will challenge their legality, and that the alleged letter dated 27/8/2015 proposing withdrawal was never received in the defendant's counsel's office.
5. In the instant application the court is referred to the Provisions of **Order 17 Rule 2(1) and (3)** of the **Civil Procedure Rules**. **Order 17 Rule (2)(1)** provides that in any suit where no application has been made or step taken by either party for a period of one year, the court may give notice in wanting to the parties to show cause why the suit should not be dismissed and, if no cause is shown, the suit may be

dismissed. **Order 17 Rule 2(3)** states that any party may apply for a dismissal of the suit as provided for in **Order 17(2) (1)**.

6. An examination of the record shows that as at **28/8/2017** when the application for dismissal was filed, there had been a delay of more than one year since the last step was taken in the matter. The record shows that the suit was issued with a hearing date, at the instance of the defendant's counsel on **31/3/2016**. On that day the matter was fixed for hearing on **20/7/2016**. The record does not show, and the plaintiff does not attempt to explain what transpired on 20/7/2016. The only action that followed that date was the filing of the instant application. I agree with the defendant that the instant suit therefore falls within the category envisaged by **Order 17 Rule 2(1) and 2(3)** of the Civil Procedure Rules in so far as delay of over one year is concerned.

7. However the jurisprudence regarding dismissal for want of prosecution goes further than a mere consideration of whether there has been a delay. In the case of **Ivita -vs- Kyumbu 1984 KLR 44** the Hon. Justice Chesoni (as he then was) stated that the test as to whether a matter should be dismissed for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice may still be done despite such delay if the court were to order a hearing. In that case the court also stated that justice is justice to both the plaintiff and the defendant and both parties must therefore be considered.

8. In addition the court found that the defendant has to satisfy the court that he or the plaintiff will be prejudiced by the delay. Therefore, even where delay is prolonged, the court, may, if satisfied with the plaintiff's explanation, decline to dismiss the suit.

9. In the case of **Dr. Otsyula -vs- Children of God Relief Institute NBI Milimani Civil Case No. 1652 of 2002** the court stated that it is the plaintiff who is in pursuit of a remedy and who should take all the steps at his disposal to achieve the expeditious disposal of his claim failure to which the defendant is at liberty either to set the suit down for hearing or to apply for its dismissal. The court in the Dr. Otsyula Case also stated that delay is a matter to be decided on the circumstances of each case and where a reason for the delay is offered the court should be lenient and allow the plaintiff an opportunity to have his case determined on merits.

10. The issue that arises in the instant application is whether any good reason has been offered by the plaintiff in this case for the delay which has been noted by this court to have occurred and whether justice can still be done between the parties in the case if the suit proceeded for hearing.

11. The plaintiff, when charged with delay, has stated that her advocate proposed a withdrawal of the suit to enable issuance of titles to the occupants of Birunda Farm, and that in any event, titles have already issued in favour of the plaintiff and her sons. It can be safely presumed for the purpose of the present application that these titles were issued in favour of the plaintiff and her sons over the same land that the defendant lays claim to because the defendant has in the further affidavit averred that he will challenge the titles as fraudulently issued.

12. In my view there are not any good reasons given for the delay as, first, there are prescribed mechanisms for formally withdrawing a suit as is evident in **Order 25 of the Civil Procedure Rules** which the plaintiff does not seem to comply with, and secondly, the procurement of title in her name and in the names of her sons, in the opinion of this court, removed the wind from the sails of the ship that is this suit. In short, the plaintiff would not be interested in pursuing this suit any further or with keenness as she had already obtained legal documents in respect of the suit premises. In the circumstances, I do not consider that any good reason has been or could be given for the delay.

13. The further question is whether justice can still be done between the parties in this case. I think it is necessary to examine the issue in the context of the issuance of the titles and the averments that the defendant was evicted from the suitland as these issues well necessarily affect the pleadings currently filed and probably necessitate an amendment of the same. This may be a laborious task for all parties and the court, which task may be quite an unnecessary one. The original issues as seen in the pleadings may considerably mutate or increase, and other parties may find themselves involved.

14. I find that the plaintiff may have utilized the period of delay, or that the period of delay may inexorably have worked, to the plaintiff's great advantage and the defendant's detriment. It cannot be said now that the parties are still on the same footing. The greater prejudice will be occasioned to the defendant in the event this suit is allowed to proceed to hearing, while the plaintiff is safe in the knowledge that she has secured title documents to the suitland.

15. I also find that the defendant's choice was to apply for this suit to be dismissed which, I believe, the defendant considers to be in his best interest. I have no duty to question that. However on the part of this court, it is not necessary to propel this suit to hearing on the merits in the circumstances.

16. In conclusion I find that the defendant's application is merited and I allow the prayer **(i)** and **(ii)** thereof.

17. Consequently I dismiss the plaintiff's suit with costs for want of prosecution.

Dated, signed and delivered at Kitale on this **13<sup>th</sup>** day of **November, 2017**.

**MWANGI NJOROGE**

**JUDGE**

**13/11/2017**

Coram

Before – Mwangi Njoroge Judge

Court Assistant – Isabellah/Picoty

Ms. Oketch holding brief Kiarie for the Defendant/Applicant

N/A for the Plaintiff/Respondent

**COURT**

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

**MWANGI NJOROGE**

**JUDGE**

**13/11/2017**