



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT OF KENYA

AT MILIMANI

ELC CASE NO. 1125 OF 2013

FRANCIS KARUMWA GATHEKIA.....PLAINTIFF

= VERSUS =

KAHINDO KATALIKO KAMUNGELE.....1ST DEFENDANT

JASON PALUKU KATALIKO KAMUNGELE.....2ND DEFENDANT

RULING

1. The second Defendant/Applicant filed a Notice of Motion dated 6th April 2016, in which he seeks dismissal of the Plaintiff /Respondent's suit for want of prosecution. The Applicant contends that it has been over a year since the case was before the Court and that the Respondent has not taken any step towards prosecuting the same. The applicant further contends that the first defendant has never been served with summons to enter appearance and no effort has been made by the Respondent to have the summons renewed with a view to proceeding with the suit.

2. The Respondent has opposed the applicant's application through grounds of opposition filed on 7th November 2016 and a replying affidavit filed in Court on 29th March 2017. The Respondent contends that the Applicant's application is an abuse of the process of Court. That the applicant approached him with a view to having this case settled. A letter to that effect was written by the applicant's lawyer. The Applicant then commenced reconstruction of the common perimeter wall which took time. Because of these developments the Respondent asked his lawyer to suspend prosecution of the case in the hope that there was going to be a settlement. The Respondent's lawyer responded to the offer for settlement upon which the Applicant's new lawyer responded saying that they had no instructions to settle the matter. A month did not pass before the current application was filed.

3. Parties were directed to file written submissions. The Applicant filed his submissions on 8th June 2017. The Respondent filed his submissions on 27th June 2017. I have considered the Applicant's application as well as the opposition to the same by the Respondent. The only issue for determination in this matter is whether the Respondent's suit should be dismissed or not.

4. Order 17 Rule (3) of the Civil Procedure Rules provides that *any party to a suit may apply for its dismissal if there is no application or step taken by either party for one year*. Rule 2 of Order 17 provides that *where cause is shown to the satisfaction of the Court why the suit should not be dismissed, the Court may make such orders as it thinks fit to obtain expeditious hearing of the suit*.

5. In the instant case, the last activity before Court was on 20th March 2015 when a ruling was delivered. The current application was filed on 7th April 2016 slightly over a year after the matter was last in Court. The Respondent has demonstrated that there were attempts to settle this suit. The initiative was taken by the Applicant whose advocate wrote to the Respondent's Advocate on 9th April 2015 proposing a settlement. The Applicant went ahead to re-construct the common perimeter wall which was the source of the present suit. Further attempts at settling the case hit a brick wall when the applicant's advocates rejected the Respondent's offer. The negotiations broke down on 31st March 2016. Shortly thereafter, the Applicant filed the present application.

6. It is clear that the Respondent was slowed down by the Applicant's attempts to settle the case. The Respondent would not have been expected to go on with the case when there were negotiations going on. In the case of **Ivita Vs Kyumbu 1984 KLR 441 Justice Chesoni** as he then was held 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 available time. It is a matter in the discretion of the Court”.

7. There is no inordinate delay in prosecuting this case. If there is any delay, it was delay for not more than a month. This short delay has been amply explained. There were negotiations which were going on which negotiations broke down and in less than a month, the present application was filed. I find that there is a reasonable cause shown by the Respondent as to why this suit should not be dismissed. I notice from the Ruling of Lady Justice Nyamweya delivered on 20th March 2015, that there was no service upon the first Defendant as required. The first defendant who is father to the second defendant was said to be out of the country. Though he had been served through advertisement in the Daily Nation of 30th July 2014, that service was contrary to the law. To ensure that this case progresses, the Respondent is directed to ensure that service of summons is effected upon the first Defendant with summons to be properly obtained from Court within a period of 60 days from today and thereafter the suit set down for hearing within six months from the date hereof failing which this suit shall stand dismissed without any further recourse to Court. Costs of this application shall be costs in the cause.

It is so ordered.

Dated, Signed and delivered at **Nairobi** on this **9th** day of **November, 2017**.

E.O.OBAGA

JUDGE

In the presence of :

M/s Motabori for Plaintiff

Court Assistant: Hilda

E.O.OBAGA

JUDGE