



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KAJIADO
ELC CASE NO. 498 OF 2017
(formerly Nairobi ELC No. 173 of 2017)

NONA OLE MUSANJA.....1st PLAINTIFF

KASAINO OLE LOLMUNGE.....2nd PLAINTIFF

LEMOYIAN OEL ORMAKAO.....3rd PLAINTIFF

VERSUS

MILION KARNA.....1st DEFENDANT

STANLEY PARIT.....2nd DEFENDANT

PAUL M. NGUNA.....3rd DEFENDANT

RULING

The application before Court is the Defendants' Notice of Motion dated 2nd May, 2017 brought pursuant to Section 1A, 1B and 3 B of the Civil Procedure Act, Order 17 Rule 2 (1) and Order 51, Rule 1 of the Civil Procedure Rules.

The application is based on the following grounds which in summary is that two (2) years have lapsed without the Plaintiff taking any step to progress and/or prosecute their case. The Plaintiffs are riding on the ex parte orders issued on 26th June, 2015 and as such not keen on prosecuting this suit. Since the grant of the ex parte interim orders, the Plaintiff has not taken any initiative to proceed with the suit. The Plaintiff has lost interest in this suit and its pendency is prejudicial to the Defendants.

The application is supported by the affidavit of PHANICE A. KWEGAH who is an advocate handling the matter on behalf of the Defendants where she deposes that this suit was filed at the Nairobi ELC on 18th June, 2015. She avers that alongside the main suit, the Plaintiffs filed an application under certificate of urgency dated the 15th June, 2015 which was heard and ex parte orders granted on 26th June, 2015. She claims that the interim ex parte orders of the court ordered that the Plaintiffs application be heard inter partes on 16th July 2015 before any ELC Judge but the same has never taken place to date. She reiterates that since the issuance of the ex parte interim orders, the Plaintiffs have not taken any initiative and or further steps to prosecute the application and the suit. She states that the Plaintiffs have not shown any effort to have the suit set down for hearing and prosecution despite numerous invitations by the Defendant do so. She affirms that there is no reason offered by the Plaintiffs on their inability to move the

case forward nor explanation offered for the delay and it is unfair and prejudicial on the part of the Defendant for the Plaintiffs to keep the suit alive without prosecuting it.

The Plaintiffs never filed any replying affidavit to oppose the application.

The application proceeded for hearing on 18th September, 2017 and the Plaintiffs' counsel was absent though I note from the affidavit of service that they were duly served.

Mr. Rono who was Counsel for the Defendants/ Applicants provided a brief of the application and submitted that when they appeared in Court on 16th July, 2015 the Plaintiffs' requested for time to have the matter settled out of Court and the Judge made orders to that effect, after which the Plaintiffs' never took any action. He stated that this application was served upon the Plaintiffs' advocates on 7th May, 2015 and they have not filed a replying affidavit. He submitted that in line with the Civil Procedure Rules that requires resolution of dispute within a reasonable time, he prayed that the suit be dismissed for want of prosecution.

Analysis and Determination

Upon perusal of the Notice of Motion dated 2nd of May 2017, including the supporting affidavit and the Court proceedings herein, I find that the only issue for determination is whether the suit should be dismissed for want of prosecution.

I note from the Court records that this suit was indeed filed on 18th June, 2015 and on 16th July, 2015 the Judge made an order that the parties were allowed time to seek an out of court settlement with the matter fixed for mention on 22nd September, 2015. From 22nd September, 2015, the matter has not been fixed for hearing nor as the Plaintiff's Counsel appeared in Court despite the several mention dates. Further, I note that on 20th June, 2017 and 18th September, 2017 respectively, the Plaintiffs' Counsel never appeared in court for mention and for hearing of the instant application despite being duly served.

Order 17 rule 2(1) (2) (3) provides as follows:

- 1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.**
- (2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.**
- (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.**

In line with the above provisions and based on the Court records and facts provided by the Defendants, I find that the Plaintiffs have failed to take any steps to prosecute the instant suit. the Plaintiffs' never filed a replying affidavit to oppose this application and that being the case, the court can only deduce that the plaintiff has lost interest in the suit. Further, they have not controverted the Defendants' claim. I note that the act of dismissing a suit is a draconian measure which should be exercised cautiously but the court is bound to do justice to both parties without undue delay. The decision in the case of **Ivita vs. Kyumbu [1984] KLR 441** set the test to be applied by the courts in an application for the dismissal of a suit for want of prosecution. Firstly, whether the delay is prolonged and inexcusable, and, secondly if the delay is excusable, whether justice can still be done to the parties despite the delay.

In the above circumstances and since this application is unopposed, I find that the application dated the 2nd May, 2017 is merited and I proceed to dismiss this suit for want of prosecution. The costs are awarded to the Defendants.

Dated signed and delivered in open court at Kajiado this 7th day of November, 2017.

CHRISTINE OCHIENG

JUDGE

REPRESENTATION

Court Assistant – Mpoye

No appearance parties