



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELCC NO. 368 OF 2014**

**FESTUS WANJOHI RUKOMIA..... PLAINTIFF**

**VERSUS**

**VINCENT GICHOMO KAMAU ..... DEFENDANT**

**RULING**

What I have before me is the plaintiff's Notice of Motion application dated 25<sup>th</sup> May 2015 in which the defendant is seeking to have the plaintiff's suit dismissed with costs for want of prosecution. When the application came up for hearing on 7<sup>th</sup> March 2016, the defendant applied to have prayer 2 of the application withdrawn and the same was allowed by the court.

The application is based on the grounds set out on its face and on the defendant's affidavit sworn on 25<sup>th</sup> May 2015. In his affidavit, the defendant has stated that this suit was instituted through a plaint dated 21<sup>st</sup> March 2014 which was filed in court on 25<sup>th</sup> March 2014. The defendant has stated that he entered appearance on 4<sup>th</sup> April 2014 and filed his defence and counterclaim on 29<sup>th</sup> May 2014. The defendant has contended that since then, the plaintiff had not taken any steps to prosecute the suit.

The application was opposed by the defendant through a replying affidavit sworn on 16<sup>th</sup> September 2015. In his affidavit, the defendant has stated that this suit is related to Nairobi ELCC No. 443 of 2003(OS). The defendant has stated that the subject matter of Nairobi ELCC No. 443 of 2003(OS) is a portion of the parcels of land known as LR. No. Nairobi Ruaraka Block 31/16 and 31/18 which is also the subject of this suit.

The plaintiff has stated that he was awaiting the outcome of the said ELCC No. 443 of 2003 in which an application to have the suit declared as res judicata had been filed. The plaintiff has stated that the defendant herein would also be affected by the proceedings in ELCC No. 443 of 2003(OS). The plaintiff has contended that he has a valid claim against the defendant and that the issues in contention can only be determined after full hearing.

The application was argued before me on 7<sup>th</sup> March 2016. The advocate for the defendant Mr. Kihara submitted that the court has discretion to strike out a suit where no step has been taken for a period of one year. He argued that the suit was instituted by the plaintiff to harass the defendant. He submitted that the plaintiff has not given any reasons as to why he had not taken any action in the matter. Mr. Kihara contended that the plaintiff filed a reply to defence after the filing of the present application. He submitted further that ELCC No. 443 of 2003 has no correlation to this suit.

In reply, Mr. Awino advocate for the plaintiff submitted that the plaintiff filed a reply to defence on 16<sup>th</sup>

September 2015 while the present application was filed on 29<sup>th</sup> May 2015. He submitted that the defendant has not denied that there are other pending cases in which the parties herein are involved touching on the subject matter of this suit. He argued that the determination of ELCC No. 443 of 2003 would have an impact on this suit. He urged the court not to dismiss this suit summarily as it raises weighty issues.

The power to dismiss suits for want of prosecution is provided for under Order 17 Rule 2 of the Civil Procedure Rules which provides as follows:

**“2. (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.**

**(4) The court may dismiss the suit for non-compliance with any direction given under this Order.”**

A perusal of the court record shows that the suit herein was filed on 25<sup>th</sup> March 2014. The last substantive action taken on the suit was the filing of the defendant’s defence and counterclaim on 29<sup>th</sup> May 2014. By the time, the application herein was filed on 29<sup>th</sup> May 2015, there had been no action on the part of the plaintiff for a period of 1 year with a view to prosecuting the suit thereby rendering the suit liable for dismissal for want of prosecution.

The plaintiff did not contest the assertion by the defendant that he had not taken any step in the suit for a period of one year. His contention was that this suit is related to ELCC No. 443 of 2003 and that he delayed in the prosecution of this suit because he was waiting for the outcome of ELCC No. 443 of 2003. I am satisfied with the reasons given by the plaintiff for his failure to take action in this matter for a year. I am not satisfied that the delay in the prosecution of this case is so inordinate as to justify the dismissal of this suit for want of prosecution. The defendant has not demonstrated that as a result of the plaintiff’s delay in the prosecution of the suit, justice cannot now be done to the parties.

In the case of **Ivita vs. Kyumbu (1984) KLR 441** the court stated that even where there is a prolonged delay, the court will not dismiss a suit for want of prosecution where it is satisfied with the plaintiff’s excuse for the delay and that justice can still be done despite the delay. In this case, I am not satisfied as I have stated above that the delay has been prolonged. I am also not convinced that justice cannot still be done to the parties.

For the foregoing reasons, I find no merit in the defendant’s application dated 25<sup>th</sup> May 2015. The same is dismissed. The costs thereof shall be in the cause.

**Delivered and Signed at Nairobi this 1<sup>st</sup> Day of July, 2016**

**S. OKONG’O**

**JUDGE**

**In the presence of**

Mr. Njiraini h/b for Oluoch for the Plaintiff

Mr. Kibanya h/b for Kihara for the Defendant