



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 200 OF 2006**

**PKIECH CHISIMAYA..... PLAINTIFF**

**VERSUS**

**LIMAKORWAI ACHIPA..... DEFENDANT**

**RULING**

1. This is a ruling in respect of a notice of motion dated 2/4/2016 in which the defendant/applicant seeks to have the plaintiff/respondent's suit dismissed for want of prosecution. The applicant contends that the respondent has not taken any step towards prosecution of his case. That the case has been pending in court for over **nine (9) years** without the respondent taking any step towards prosecuting it. The applicant further contends that the delay is long and unexplained and that in the interest of justice, this case ought to be dismissed with costs.

2. The respondent has opposed the application by the applicant based on a replying affidavit sworn on 15/7/2016. The respondent concedes that there has been long delay to prosecute his case but says that the delay has been due to sickness. That he has been in and out of hospital receiving treatment and that this being a land matter which requires a lot of preparation he has been unable to gather his witnesses with a view to proceeding with the case. That following medication, he is now stable and ready to proceed with the case. That the applicant will suffer no prejudice as he is the one in occupation of the disputed portion and that in any case the applicant also had a duty to fix the case for hearing.

3. I have gone through the pleadings in this case as well as the application and the opposition thereto by the respondent. **Order 17 Rule 2(1)** obligates the court to issue a notice to show cause why a suit should not be dismissed if there has been no application or step taken by either party for one year. **Sub rule (3) of Rule 2** gives any party to the suit liberty to apply for its dismissal under **Sub rule (1)**.

4. In the instant case, it is the defendant/applicant who has applied for the dismissal of the respondent's suit. Under **Order 17 Rule 2(1)**, the court must be satisfied with the reasons given for the delay, otherwise it will dismiss the suit for want of prosecution. Now the only issue for determination in this application is whether the respondent has shown sufficient cause why the suit should not be dismissed. This case was filed on 8/12/2006. A defence was filed on 17/1/2007. The respondent was expected to take further steps after pleadings closed. He did not take any step since January, 2007 up until the present application was filed.

5. The reason the respondent is giving is that he has been sick and that he has been in and out of hospital. There is absolutely no evidence that he has been in and out of hospital. If indeed he has been sick for over nine years, he would have at least brought even medical chits to confirm this. He was faced with a serious application seeking to dismiss his suit. He should have brought medical documents. He cannot just assume that the court will take judicial notice that age comes with various ailments.

6. When the court is considering an application of this nature, the respondent's previous conduct and conduct prior to filing of the suit has to be looked at. The applicant herein had filed a claim before the Chepareria Land Disputes Tribunal. The Tribunal ruled in favour of the applicant. The respondent never appealed against the verdict of the Tribunal to the Provincial Appeals Committee as provided under the **Land Disputes Tribunal Act No. 18 of 1990** (now repealed). He did not even file a Judicial Review Application in the High Court. He only came to file this suit in which he is faulting the process which led to the verdict of the Tribunal which was adopted as judgment of the court. What in essence the

respondent is seeking to do is to appeal against the Tribunal's verdict through the back door. Under the repealed Act, the procedure for faulting such decisions was clear. One could not file a separate suit to challenge the decision of the Tribunal other than in the manner provided for in the Act. It is apparent that the respondent failed to act as per the repealed Act and he is now trying to get a second bite through this suit.

7. The reasons which have been given by the respondent are not convincing. A suit can only be spared dismissal if sufficient cause is shown. In the present case, no sufficient cause has been shown. I therefore allow the application by the applicant with costs. The upshot of this is that the respondent's suit is hereby dismissed with costs to the defendant/respondents.

It is so ordered.

**Dated, signed and delivered at Kitale on this 29<sup>th</sup> day of August, 2016.**

**E. OBAGA**

**JUDGE**

**In the presence of Mr. Samba for Applicant and Mr. Kiarie for respondent. Court Assistant - Isabellah.**

**E. OBAGA**

**JUDGE**

**29/8/2016**