



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 140 OF 2013

MARK JOSEPH SIMIYU KISEMBE.....1ST PLAINTIFF
SAMUEL ODUORI CHUMA.....2ND PLAINTIFF
MICHAEL FRANCIS CHEMONGES KITIYO.....3RD PLAINTIFF

VERSUS

MICHAEL KIMTAI.....1ST DEFENDANT
EDWARD WEKESA SITUMA.....2ND DEFENDANT
LENA NALIAKA MULIRO.....3RD DEFENDANT
MATHEW PIERRE NGICHABBE SISENDA.....4TH DEFENDANT
THE COUNTY LAND REGISTRAR
TRANS-NZOIA COUNTY.....5TH DEFENDANT
THE CHIEF LAND REGISTRAR.....6TH DEFENDANT
THE ATTORNEY GENERAL.....7TH DEFENDANT

RULING

1. The first and second defendants/applicants brought a notice of motion dated **22/6/2016** in which they seek orders that the plaintiffs' suit be dismissed with costs for want of prosecution. The applicants contend that this case was last in court on **7/5/2015** and since then, the plaintiffs have not taken any step towards the prosecution of the same.
2. The applicants contend that the plaintiffs/respondents obtained an injunction ex-parte which injunction was subsequently confirmed and that this is why the plaintiffs are not in hurry to prosecute their application as they are enjoying injunctive orders.
3. The applicants application is opposed based on two replying affidavits filed in court on **1/7/2016** and **18/7/2016**. The respondents contend that the applicants application is premature in that pleadings have

not closed. The plaintiff/respondent in **ELC No. 136 of 2013** contends that this suit could not be set down for hearing as there was no compliance with the court's order of 18/9/2014.

4. I have carefully gone through the applicants application as well as the opposition to the same by the plaintiffs/respondents. The applicants application is brought under the provisions of **Order 17 Rule 2 (1) and (4) of the Civil Procedure Rules**.

Order 17 Rule 2(1) states 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".

Rule 4 states as follows:-

"Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding such default, proceed to decide the suit forthwith".

5. It is clear that a party who wishes to have a suit dismissed for want of prosecution can do so by invoking the provisions of **Order 17 Rule (3) which refers to Rule 2(1)**. In the instant case, the applicants are contending that the matter was last in court on 7/5/2015 and that no step has been taken since then. The record of proceedings in the file however shows the contrary. The matter was in court on **7/5/2015** when the plaintiffs were granted time to file an application for amendment of the plaint. The record shows that a notice of motion dated **29/4/2015** was filed in court on **25/5/2016** and was allowed by consent dated **11/5/2015** and filed in court on **25/5/2016**.

6. The application allowed joinder of other parties including the County Land Registrar Trans-Nzoia, the Chief Land Registrar and the Attorney General. The record further shows that the Attorney General filed memorandum of appearance on **11/8/2015**. The current application was filed on **22/6/2016**. A case can only be dismissed if there is no application made or step taken by either party for one year. The filing of an application to join other parties was a step taken towards the prosecution of the case. The filing of a memorandum of appearance by the Attorney General on **11/8/2015** was another step taken towards the prosecution of the case.

7. A simple calculation of months from **11/8/2015** to **22/6/2016** shows that the period of one year had not elapsed. It is therefore clear that the applicants' application for dismissal of this case is premature. The plaintiffs are not enjoying any orders of injunction as alleged. The plaintiffs were granted ex-parte orders of injunction on **28/10/2013**. The orders were extended once on **11/11/2013**. Those orders were never extended or confirmed as alleged. It is the present applicants who brought an application for injunction and were given ex-parte orders on **18/2/2014**. The application was heard inter-partes on **5/3/2014**. The application by the present applicants was dismissed vide ruling of **30/4/2014** and the injunctive orders which had been given discharged.

8. The plaintiff/respondent in the **ELC No. 136 of 2013** alleged that the suit has not been set down for hearing because there was no compliance with the court's order of 18/9/2014. This is not true. The court's order of 18/9/2014 was fully complied with in that the surveyor was present in court on 30/9/2014 as directed and he went and surveyed the disputed plots as per consent order recorded on 30/9/2014. He filed a report in time. It is the plaintiffs who disputed the report and sought an independent one which was subsequently prepared. This is the report which prompted the plaintiffs to enjoin other parties. There was no time limit given by the court for parties to adduce evidence. There was therefore no need for the applicants to ask the court to deal with the case under **Rule 4 of Order 17 of Civil Procedure Rules**.

9. It is clear that the plaintiffs are not keen on proceeding with this case. Were it not for the fact that this application was made prematurely, I would have allowed it. But as the same is premature, I proceed to

dismiss it with costs to the respondents. To ensure that the case proceeds to hearing expeditiously, I direct that the parties fully comply with **Order 11 of the Civil Procedure Rules** and set a hearing date for this case within the next three months. For avoidance of doubt, the period of 3 months is for taking a hearing date and not for the hearing of the case itself.

It is so ordered.

Dated, signed and delivered at Kitale on this **19th** day of **September, 2016**.

E. OBAGA

JUDGE

In the presence of Mr. Ingosi for Respondents.

Court Assistant - Isabellah.

E. OBAGA

JUDGE

19/9/2016