



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 260 OF 2014

SAMUEL GAKONO NGARE.....PLAINTIFF/RESPONDENT

VERSUS

JANE WANGECI KURIA.....DEFENDANT/APPLICANT

RULING

This is in respect to the defendant/applicant's Notice of Motion dated 6th October 2016 seeking the following orders:-

- 1. That this Honourable Court be pleased to dismiss this suit for want of prosecution and being an abuse of the Court process.***
- 2. That costs be provided for.***

The application is premised under ***Order 17 Rule 2 (3) of the Civil Procedure Rules*** and is supported by the affidavit of **JANE WANGECI KURIA** and premised on the grounds set out therein. Basically, the applicant's case is that having filed this suit on 23rd September 2014, the respondent has not taken any steps to prosecute it. There are other issues raised in the applicant's supporting affidavit including that there is another suit pending at **GICHUGU SENIOR RESIDENT MAGISTRATE'S COURT** being Civil Case No. 13 of 2009 involving the same parties. However, those other issues are, in my view, peripheral to what I am required to resolve in this application.

When this application came up before me on 24th November 2016, **Mr. MACHARIA** advocate holding brief for **Mr. MWAI** advocate addressed the Court stating that the application had been served but there was no reply to the same. He therefore urged me to allow the application and dismiss the suit.

Mr. MWANGI holding brief for **Mr. NGANGA** for the respondent asked the Court to grant counsel seven (7) days to put in a replying affidavit. He also stated that there may be need to consolidate this suit with another and that to allow the application for dismissal would deny the respondent a fair hearing and in any event, no prejudice is caused to the applicant.

Mr. MACHARIA however opposed that application for adjournment stating that the application for dismissal was filed in good time and the respondent has not been diligent in prosecuting his suit and is holding the applicant to ransom. Further, that the respondent did not even reveal that he had filed another suit.

I have considered the application and the submissions made.

Order 17 Rule 2 of the Civil Procedure Rules provide as follows:-

2: (1) ***“In any suit in which no application has been made a 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”.***

From the record herein, the following facts are not disputed:

1. That this suit was filed by the respondent on 23rd September 2014.
2. That the respondent has not taken any action in the matter and on 4th October 2016, the applicant filed the current application for the dismissal of the suit.
3. That even as at the time this application was being canvassed and notwithstanding that it was served upon the respondent’s advocate on 1st November 2016, there was no Preliminary Objection, replying affidavit or grounds of opposition filed by the respondent.

Order 51 Rule 14 (1) of the Civil Procedure Rules provides as follows:-

“Any respondent who wishes to oppose any application may file any one or a combination of the following documents –

(a) a notice of Preliminary Objection and/or

(b) replying affidavit; and/or

(c) statement of grounds of opposition”

As the respondent has not taken any of the steps available under **Order 51 Rule 14 (1) of the Civil Procedure Rules**, the applicant’s application was really not opposed. However, since the respondent was represented by counsel, I allowed him audience to address me because, in my view, he had a right only to explain why there has been no compliance with the provisions of **Order 51 Rule 14 (1) of the Civil Procedure Rules**. However, all that **Mr. MWANGI advocate** told the Court is that **Mr. NGANGA advocate**, whose brief he was holding, required seven (7) days to file a replying affidavit. He also stated that allowing the application without hearing the respondent would be unfair. No single reason was given as to why **Mr. NGANGA advocate**, having been served with the application on 1st November 2016 had not even upto the time of hearing the application, filed and served any Preliminary Objection, replying affidavit or grounds of opposition to the said application. Mr. Mwangi advocate was content with stating that it would be unfair to allow the application without giving the respondent a chance to reply to the same.

It is of course now common knowledge that under the overriding objectives of the **Civil Procedure Rules** the **(Oxygen Principle)** or **O₂**, Courts should aim at the just, efficient and timely disposal of disputes before it. The spirit of the law is that as far as possible, cases be determined on merits. However, rules of procedure were designed for the proper control and management of the judicial process and parties must comply with them and if there is a default, the Court would expect an explanation for that so that it can exercise its discretion one way or the other. After all, the parties themselves have a role to play in achieving the overriding objectives of the Court. **Section 1A (3) of the Civil Procedure Act** provides as follows:-

“A party to civil proceedings or an advocate for such a party is under duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the process of the Court and to comply with the directions and orders of the Court” Emphasis added

It is clear from the above that even as the Courts exercise greater latitude and avoid technicalities so that a litigant with a genuine justifiable claim is not shut out from prosecuting it, rules and procedures must nonetheless be complied with because they are important for the integrity and certainty required of the judicial process. In the case of **HUNKER TRADING COMPANY LTD VS ELF OIL KENYA LIMITED 2010 e K.L.R** the Court of Appeal stated as follows:-

“It seems to us that in the exercise of our powers under the O₂ Principle, what we need to guard against is arbitrariness and uncertainties. For that reason, we must insist on full compliance with past rules and precedents which are ‘O₂’ Compliant so as to maintain consistency and certainty. We think that the exercise of the power has to be guided by sound judicial foundation in terms of the reasons for the exercise of the power. If improperly invoked, the ‘O₂’ Principle could easily become an unruly horse”

I am citing the ***Oxygen*** or ***O₂ Principle*** because **Mr. MWANGI advocate** tried to persuade me to give the respondent a chance to be heard. Counsel probably had those principles in mind although he did not refer to them. However, not only did the respondent not file any response to the application, a whole three weeks after being served, but most importantly, no explanation whatsoever has been advanced for that default. Even if this Court was minded to exercise its discretion in the respondent’s favour, there is no material upon which such discretion can be exercised. Judicial discretion is to be exercised on sound grounds and not whimsically. Clearly therefore, there is no reason why this suit should not be dismissed as prayed.

The up-shot of the above is that the application dated 4th October 2016 is allowed with the result that the plaintiff’s suit is dismissed with costs to the defendant.

B.N. OLAO

JUDGE

25TH NOVEMBER, 2016

Ruling delivered, dated and signed in open Court this 25th day of November 2016.

Mr. Mwai for the Defendant/Applicant present

Mr. Ngigi for Mr. Nganga for the Plaintiff/Respondent present

B.N. OLAO

JUDGE

25TH NOVEMBER, 2016