



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.799 OF 2015

CHARLES FREDRICK OCHOGO.....PLAINTIFF

VERSUS

BISHOP HABBAKUK O. ABONGO (ON BEHALF OF CHURCH OF CHRIST IN AFRICA)...1ST DEFENDANT

THE ARCH-BISHOP DR. ABEDNEGO MATHWEW AJUOGA...2ND DEFENDANT

RULING

1. The defendants filed the notice of motion dated 23rd July 2014 seeking to have the suit filed by the plaintiff dismissed for want of prosecution and costs. The application is based on the eight grounds which are as follows:

“1. This suit was filed on 21st December, 2006.

2. The Defendants’ statement of defence filed on 21/2/2007 and served upon the Plaintiff’s counsel on 23/02/2007.

3. That the Plaintiff’s reply to defence was filed on 6/3/2007 and served upon the Defendants counsel on 7/3/2007.

4. An application for injunction filed with that suit was allowed on 7/12/2009.

5. The Plaintiff has since the disposal of his application not listed the matter for hearing.

6. It is now 4 years and 6 months since then the Plaintiff has not taken any steps to prosecute or otherwise bring this matter to closure.

7. The continued pendency of this matter without any action is prejudicial to Defendant and inimical to the fair administration of justice.

8. It is in the interest of justice that this suit is dismissed for want of prosecution.”

The application is also supported by the affidavit sworn by Archbishop Dr. Habakkuk O. Abogno, 1st Defendant, on the 24th July 2014 whose depositions are summarized as follows:

a) That the pleadings in this suit closed 14 days (fourteen) days after 7th March 2007 when the

Defendants were served with a reply to the defence by the Plaintiff.

b) That the notice of motion dated 21st December 2006 filed simultaneously with the suit by the Plaintiff was disposed off on 7th December 2009 and that the Plaintiff has not taken any other steps after that to prosecute this case.

c) That the intention of the Plaintiff to file this suit was to obtain the injunction order against the Defendants which has been causing an inconvenience and embarrassment to the Defendants and church members.

2. The application is opposed by the Plaintiff through the replying affidavit sworn by Aloys Obunga Aboge, the counsel on record for the Plaintiff, sworn on unspecified date and filed in court on 18th May 2015. The deposition in the replying affidavit are summarized as follows:

a) That the Plaintiff has been largely responsible for the delay.

b) That the 2nd Defendant has since died and has not been substituted in accordance with **Order 24 Rule 4** of Civil Procedure Rules.

c) That the provisions of **Order 11** of Civil Procedure rules are yet to be complied with by both parties.

d) That the suit property is lawfully registered in the names of the Plaintiff and the suit should be allowed to be heard and determined on its merit.

3. The application come up for hearing on the 8th June 2016 when Mr.Otieno and Aboge, learned counsel for the Defendants and Plaintiff respectively, made their rival oral submissions.

4. The following are the issues for the court's determination:

a) Whether the pleadings in the suit have been closed and if so when.

b) Whether this suit has stayed for more than one year from last court appearance without any steps being taken by the Plaintiff to set the suit down for hearing by the time the application dated 23rd July 2014 was filed.

c) Whether the suit should be dismissed for want of prosecution.

d) Who pays the costs.

5. The court has considered carefully the grounds on the notice of motion, the affidavit evidence filed by both sides, the oral submissions by both counsel, the court record and concluded as follows:

a) That the Plaintiff has not contested the 1st Defendant's deposition that they served the Defendants with their reply to the defence on 7th March 2007 and it follows therefore that the pleadings closed 14 days thereafter on or about the 21st March 2007 as provided under **Order 2 Rule 13** of the Civil Procedure Rules.

b) That the Plaintiff has also not disputed the 1st Defendants deposition that the last court action before the filing of the application dated 23rd July 2014 was on the 7th December 2009 when the Plaintiff's application dated 21st December 2006 for temporary injunction orders was granted. That the court has perused the court record and confirmed that after the reading of the ruling dated 7th December 2009 on the same date, the next court action was actually on 24th July 2014 when the

Defendants counsel fixed the notice of motion dated 23rd July 2014 for hearing on the 16th September 2014. That the foregoing shows that the matter had stayed without any action being taken to prosecute it for about four(4) years five (5) months and seventeen (17) days.

c. That the provision of **Order 17 Rule 2** of Civil Procedure Rules allows any party to a suit which has stayed for over one year without any steps being taken to prosecute it to apply to have it dismissed if no sufficient cause is shown by the other party. That the Plaintiff has conceded through the replying affidavit that he is largely responsible for the delay. That the explanation by the Plaintiff that the parties are yet to comply with **Order 11** of the Civil Procedure Rules is not sufficient reason why no action was taken to prosecute the suit for over four years. That this suit was filed before the amendments of the Civil Procedure Rules in 2010 through which **Order 11** was introduced. That the provision of **Order 3 Rule 2** of the Civil Procedure Rules sets out the documents to be filed with the suit to include the verifying affidavit, list of witnesses to be called, written witnesses statements signed by the witnesses excluding expert witnesses and copies of documents, including demand letter to be relied on. That there is no pending application filed herein by the Plaintiff or the Defendant to be allowed to file and serve written statements or documents and noting that the last court action was over four (4) years ago, the 1st Defendant was justified to move the court as he did. That the 1st Defendant could also have opted to have the suit fixed for hearing after the Plaintiff failed to do so but he instead opted to file the current application for dismissal orders and the Plaintiff cannot cry foul now.

d. That unlike the situation in the case of **Siso Tuta Mwamba –V- Kabansora Company Limited & another** [2014} eKLR, and **Mwangi S. Kamenyi –V- Attorney General & Another** [2014] eKLR, the court finds that the Plaintiff in this suit has by his inaction lost interest with the suit and the delay herein has been inordinate and inexcusable. That whereas dismissing a suit without hearing it on merit would appear draconian, the court has a duty under **Article 159 (b)** of the constitution 2010 and **Section 1A (1), 1B, and 3A** of Civil Procedure Act **Chapter 21** of Laws of Kenya to ensure that justice is expeditiously done without undue delay and to prevent abuse of the courts process. That the Plaintiff appear to have been satisfied ones the injunction orders of 7th December 2009 was issued. That the continued stay of the injunction orders without any action being taken to prosecute the main suit affects the timely disposal of the case and increases the costs of litigations. That it could also be taken to be an abuse of the courts process as the Plaintiff continues enjoying the temporary injunction orders without talking any further action to prosecute his case.

e. That the death of the 2nd Defendant and the failure to substitute him is not enough to explain the plaintiff's failure to take steps to prosecute his case for over four years. That is because a reading of the provisions of **Order 24 Rule 4(3)** of Civil Procedure Rules shows that the suit against the 2nd Defendant abated after the lapse of one year from the date of his death with no application having been made to substitute him. That the court record shows that the Defendant's counsel had informed the court on 24h September 2009 that the 2nd Defendant had died on the 22nd May 2009. That from the date of death of the 2nd Defendant, the period of one year ended on or about 21st May 2010 which is the date that the Plaintiff's case against him abated by operations of **Order 24 Rule 4 (3)** of Civil Procedure Rules.

6. That flowing from the foregoing, the notice of motion dated 23rd July 2014 has merit and is allowed as prayed and the Plaintiff's suit is hereby dismissed with costs to the 1st Defendant.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 16TH DAY OF NOVEMBER 2016

In presence of;

Plaintiff Absent

Defendants Absent

Counsel Mr. Kiufeo Otieno for Defendants

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

16/11/2016

16/11/2016

S.M. Kibunja Judge

Oyugi court assistant

Parties absent

Mr. Kiufeo Otieno for the Defendants.

Court: ruling dated and delivered in open court in presence of Mr. Kiufeo Otieno for Defendants.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

16/11/2016