



REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT
AT NAIROBI

ELC CASE NO. 704 OF 2011

EDCO AFRICA LIMITED.....1ST PLAINTIFF

DR. MWANIKI DINGURI NICK.....2ND PLAINTIFF

VERSUS

BONIFACE NDEGE KIRIGA.....1ST DEFENDANT

SPERENZA MUTHONI NDEGE.....2ND DEFENDANT

REGISTRAR OF TITLES.....3RD DEFENDANT

RULING

The Application

The 1st and 2nd Defendants filed an application by way of a Notice of Motion dated 7th June 2013 brought under Orders 11, 17 and 40 Rule 6 of the Civil Procedure Rules, and sections 1A and 1B of the Civil Procedure Act, seeking the following orders:

1. The suit herein be dismissed for want of prosecution.
2. The interlocutory injunction orders made by the Court on 30/5/2012 be set aside or discharged forthwith.
3. An inquiry be made as to the amount of loss incurred by the 1st and 2nd Defendants during the subsistence of the interlocutory injunction orders and the Plaintiff herein be ordered to pay the same before the suit is heard and determined.
4. The court be pleased to make such other or further orders as would meet the ends of justice.
5. Costs of the application be provided for.

The application is based on the grounds outlined on the face of the application and supported by an affidavit sworn by the 1st Defendant on 7/6/2013. The 1st Defendant deponed that since the Plaintiffs obtained the interlocutory injunction orders on 30/5/2012, they have not taken any steps to comply with the provisions of Order 11 of the Civil Procedure Rules, and that during the subsistence of the said orders,

the Defendants have continued to suffer loss and damage and particularly because the Plaintiffs did not give an undertaking as to damages.

The 1st Defendant outlined the loss suffered as their inability to undertake developments on the suit property thereby affecting the enjoyment of income as a result of delayed developments. He also alleged that the Plaintiffs misuse the said order by intimidating, harassing and taunting them in an attempt to alter the *status quo*.

It was his disposition that the Plaintiffs have lost interest in the suit as they no intention of prosecuting the same. The 1st Defendant also deponed that in accordance with the provisions of Order 40 Rule 6 of the Civil Procedure Rules, the injunction order which is the subject matter herein lapsed on 30/5/2013, and is thereby null and void. The 1st Defendant deponed that it would be in the interest of justice that the suit be dismissed with costs and the injunction be discharged.

The Response

The application was opposed by the 2nd Plaintiff who swore a Replying Affidavit on 27/9/2013. It was deponed by the 2nd Plaintiff that the Plaint was filed together with a bundle of documents, a list of witnesses and witness statements in full compliance with Order 11 of the rules. Further, that the Defence has also complied with the provisions of the said rules hence the suit is ripe for hearing. The 2nd Plaintiff deponed that he has been sick since his return from the United States of America, and was forced to seek further treatment abroad and was thereby unable to advise his counsel as to his availability to attend hearing. He further deponed that the suit having been filed in December 2011 was fairly new and thus ought to be heard on its merits.

Additionally, he deponed that the delay was neither inordinate nor prejudicial to the Defendants who, in any event, filed their pleadings more than seven months after service. The 2nd Plaintiff urged the court to dismiss the application deponing that it would be fair and in the interest of justice that the matter be heard and determined.

The Submissions

The application was canvassed by way of written submissions. L. M. Mbabu & Associates, counsel for the 1st and 2nd Defendants filed submissions dated 30/9/2014, wherein counsel submitted that this was a proper case of dismissal as the Plaintiffs are guilty of laches, having totally lost interest in the suit. Counsel urged the court to dismiss the suit submitting that the Defendants were subjected to untold expense, anxiety and suffering amounting to immeasurable injustice as a result of the delay.

Counsel submitted that the injunction orders issued on 30/5/2012 lapsed on 31/5/2013 by operation of the law, and invited the court to formally discharge the same. It was counsel's submission that Order 40 Rule 6 of the Civil Procedure Rules was intended to curb parties from sitting on injunction orders at the expense of the adverse party.

With respect to the Plaintiff's response to the instant application, counsel submitted that there was no evidence to show that the 2nd Plaintiff was out of the country for medical treatment in the years 2012/2013, thus the Plaintiffs had no excuse for failing to prosecute the suit. Counsel further submitted that whereas a litigant's indisposition may be an excuse for non-attendance at a court hearing, it cannot be an excuse for failing to hold a pre-trial conference or comply with Order 11 of the rules as such exercises do not require the personal presence of the litigant. Counsel urged the court to allow the application submitting that the Plaintiffs had no justification for failing to prosecute the suit.

Omulele & Tollo Advocates for the Plaintiffs filed submissions dated 14/10/2014 wherein counsel submitted that there being allegations of fraud, there was need for the matter to be determined on merit so

as to avoid a miscarriage of justice. It was counsel's submission that dismissal of a suit is draconian and ought to be exercised in the rarest of cases and where the delay is inexcusably inordinate. It was submitted that what amounted to inordinate delay depended on the circumstances of each case.

Counsel invited the court to consider the following factors in discerning whether the delay was excessive: whether the delay is intentional and contumelious; whether the delay is an abuse of the court process; whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant; what prejudice shall be caused by the Plaintiff due to the dismissal; whether the Plaintiff has offered a reasonable explanation for the delay; whether it is possible to do justice even where there has been delay.

Counsel submitted that the 2nd Plaintiff had established that the delay was as a result of his ill health hence excusable and did not amount to an abuse of the court process. Counsel submitted that where reasonable explanation has been offered, the court ought to be lenient. Further, that even where the explanation was unsatisfactory, the court should not dismiss the suit if it is satisfied that a fair trial of the action will still be possible. Counsel invited the court to weigh the prejudice claimed to be occasioned to the Defendants against that which would be occasioned to the Plaintiff in the event that the suit would be dismissed. In support of this submission, counsel referred to several authorities including **Ivita v Kyumbu (1984) KLR 441**.

The Issues and Determination

I have carefully considered the pleadings filed and submissions made by the Plaintiffs and 1st and 2nd Defendants. The issues for determination are firstly, whether there has been inordinate delay in prosecuting the suit herein for which no reasonable explanation has been offered, to render the suit liable for dismissal. Secondly, if this suit is dismissed whether the 1st and 2nd Defendants are entitled to the consequential orders they seek.

The provisions of Order 17 Rule 2(3) which provides an avenue for the dismissal of a suit where no steps have been taken by either party for one year 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.”

The power of the court to dismiss a suit for want of prosecution is a discretionary power. The principles applicable in determining an application of this nature were established in the English Cases of outlined in the cases of **Nagle v Fielden [1966] 2 QBD 633 at p 648**, **Birket v James [1978] A.C. 297** and **Allen -v- Sir Alfred McAlpine & Sons Limited [1968] 1 ALL ER 543** which have been adopted by our courts including **Ivita v Kyumbu (1984) KLR 441** where Chesoni J. held:

The test applied by the Courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the Court is satisfied with the Plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter in the discretion of the court.”

It is not in contention that this suit has been dormant for a year since the grant of interlocutory injunction

orders. A perusal of the court record in this suit shows that the last substantive step taken herein before the filing of the Defendant's application for dismissal of the suit was the ruling by Mwilu J. (as she then was) on 30th May 2012. Therefore, at the time of the filing of the Defendant's Notice of Motion on 11th June 2013 the threshold of a delay of more than one year in prosecuting the suit had been met to render this suit amenable to dismissal under Order 17 Rule 2 of the Civil Procedure Rules.

The Plaintiffs admit that they have not taken any steps to cause the matter to be heard. The 2nd Plaintiff, however, avers that the delay has been occasioned due to his failing health which has necessitated that he travels abroad for treatments and therefore his inability to get in touch with counsel to give instructions. In support of his disposition, the 2nd Plaintiff annexed copies of appointment cards and a medical summary to his affidavit marked "MDN 1". On perusal of the annexures, it is discernable that the 2nd Plaintiff was in the USA in 2012 in the months of March, May, June and September.

In response, the Defendants contend that the fulfilment of Order 11 of the Civil Procedure Rules does not require the presence of a litigant and consequently, whether the 2nd Plaintiff was in or out of the country does not justify the delay. The Defendants contend further that the delay is prejudicial as they would have otherwise undertaken developments on the property from where they would derive an income.

I am called to exercise my discretion judicially which involves evaluating whether reasonable cause has been shown by the Plaintiffs to excuse the delay in prosecuting this suit, and whether justice can still be done to the parties despite the delay. It is my view in this regard that illness, and particularly one that takes a litigant out of the country and out of the reach of his counsel is a reasonable excuse. In this regard it is also notable that the 2nd Plaintiff is a director and the chairman of the 1st Plaintiff and therefore his participation would have been crucial in terms of giving of instructions. I associate myself in this regard with the sentiments of **Githinji, JA**. In **Wasike v Khisa & Another [2004] 1 KLR 197**, where he observed that:

"It is not every delay in taking any appropriate step required that would disentitle a party to any relief. It is only the unreasonable delay which is culpable. And whether or not delay is unreasonable will largely depend on the circumstances of each case."

The circumstances of this suit also dictate that this court be lenient since the Plaintiffs stands to suffer great injustice for the reasons that the delay in prosecuting this suit was caused by circumstances beyond the Plaintiffs' control, and since the substratum of their case is an allegation of fraudulent transfer of their property to the 1st and 2nd Defendants.

As regards of the lapse of the injunction order, Order 40 Rule 6 of the Civil Procedure Rules which provides for lapse of an injunction after a period of twelve months from the date of the grant also provides that this court has powers to extend the life of the injunction orders where there is sufficient reason to do so. It would in my view be counterproductive to discharge the orders whilst the matter pends determination, and given that the main reason in the first instance for granting the said orders was the preservation of the suit property pending the hearing of the suit herein.

These findings notwithstanding, this Court is alive to the requirements under section 1A and 1B of the Civil Procedure Act on the expeditious disposal of suits. Therefore even though the Defendant's Motion has essentially failed, this Court orders as follows pursuant to the provisions of sections 1A, 1B and 3A of the Civil Procedure Act, Order 11 of the Civil Procedure Rules and Order 40 Rule 6 of the Civil Procedure Rules:

1. The prayers sought in the 1st and 2nd Defendants' Notice of Motion dated 7th June 2013 are hereby denied.
2. The injunction orders granted herein by Mwilu J. (as she then was) on 30th May 2012 be and are hereby extended for a period of twelve more months.

3. The Plaintiffs shall file a bound, consolidated, indexed and paginated bundle of the pleadings, list and bundle of documents and witness statements to be relied upon during the full hearing of this suit within 60 days of service by the 1st Defendant of the orders herein.

4. The Defendant shall file a bound, consolidated, indexed and paginated bundle of the list and bundle of documents and witness statements to be relied upon during the full hearing within 60 days of service of the Plaintiff's bundle.

5. The Plaintiffs shall thereafter set this suit for pre-trial conference within 6 months of the date of this ruling. Upon default the suit herein shall stand dismissed for want of prosecution.

6. Parties shall be at liberty to apply.

7. The Plaintiffs shall bear the costs of the 1st and 2nd Defendants' Notice of Motion dated 7th June 2013.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____30th____ day of____January____, 2015.

P. NYAMWEYA

JUDGE