



REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT
AT NAIROBI

ELC CASE NO. 477 OF 2007

DANIEL NZIOKA MAKAU.....PLAINTIFF

VERSUS

SYOKIMAU FARM LIMITED.....1ST DEFENDANT

JANE NDUTA NDUNGU.....2ND DEFENDANT

H. MUSYOKI KILONZI alias

HENRY MUSYOKA KILONZO.....3RD DEFENDANT

EDWARD MBUGUA KAMAU.....4TH DEFENDANT

SABINA NJERI MBUGUA.....5TH DEFENDANT

RULING

The Application

The application before this Court for determination is a Notice of Motion dated 15th June 2011, brought by the 4th and 5th Defendants pursuant to sections 1A, 1B and 3A of the Civil Procedure Act and Orders 51 and 17 Rule 2 of the Civil Procedure Rules. The said Defendants are seeking an order that this suit be dismissed for want of prosecution and that the costs of the suit be borne by the Plaintiffs.

The grounds for the application are that it is more than one year since any step was taken in this matter, and the Plaintiff has lost interest on the matter. The 4th Defendant in his supporting affidavit dated 15th June 2011 stated that this suit was filed on 27th July, 2007 together with an interlocutory application dated the same day, and he gave an account of the actions that were taken after the filing of the suit. The deponent further stated that on 21st April 2010, his Advocates were served with a hearing notice dated 20th April 2010 for the hearing of the Suit on 22nd September 2010. However, that the matter was not listed on the cause list of 22nd September 2010 and since then, the Plaintiff has not made any efforts to have the same listed.

The deponent attached copies of the hearing notice and cause list for 22nd September 2010. The 4th and 5th Defendants averred that it had been 2 years and 9 months since the pleadings were closed, and the Plaintiff had failed to set this matter down for hearing. The said Defendants also detailed out the

respective claims of the Plaintiff and Defendants in this suit, and contended that the delay in prosecuting this suit is causing them unnecessary loss and damage in their old age.

The Response

The Plaintiff opposed the application in a replying affidavit he swore on 14th May 2014, wherein he stated that he instructed M/S A. F. Kisebu & Company Advocates to institute this suit on his behalf, but that the proprietor of the said firm was taken ill and passed on before he could take my matter to the next level as prescribed by the Civil Procedure Rules. Further that it was challenging to retrieve his documents from M/s A. F. Kisebu's office since there was no Counsel appointed by the Law Society of Kenya to take over the briefs that the late A.F. Kisebu handled.

The Plaintiff stated that he later instructed M/S Nzioka Mutua & Associates who failed to respond to the Notice of Motion hereof and instead gave him his documents. The Plaintiff further stated that to demonstrate interest in the suit, he has instructed M/S L. N. Ngolya & Company Advocates to act for him in this matter, and that he has never lost interest in the suit as claimed by the 4th and 5th Defendants.

The Issues and Determination

The parties were directed by the court to canvass the 4th and 5th Defendants' application by way of written submissions. The 4th and 5th Defendants' advocate filed submissions dated 10th June 2014, while the Plaintiff's advocate filed submissions dated 4th June 2014. Both parties reiterated the arguments made in their pleadings in the submissions, and the Plaintiff in addition submitted that as at 15th June 2011 when the 4th and 5th Defendants filed the instant application, one year had not lapsed since the last steps taken in this suit as alleged. Further, that it would only be fair that this suit be heard and decided on its merits as provided by Article 50 of the Constitution.

I have carefully considered the pleadings filed and submissions made by the Plaintiff and 4th and 5th Defendants. The issue for determination is 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. This Court notes that Order 17 Rule 2 of the Civil Procedure Rules provides for dismissal of a suit for want of prosecution 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 decision in the case of **Ivita vs. Kyumbu [1984] KLR 441** sets out the test to be applied by the courts in an application for the dismissal of a suit for want of prosecution. This is firstly, whether the delay is prolonged and inexcusable, and, secondly if the delay is excusable, whether justice can still be done to the parties despite the delay.

A perusal of the court record in this suit shows that the last step taken in this suit before the filing of the 4th and 5th Defendant's application was the filing of documents by the Plaintiff's Advocate on 2nd February 2009. Therefore, at the time of the filing of the 4th and 5th Defendant's Notice of Motion on 15th June 2011, 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.

I have considered the reasons for the delay in prosecuting this suit given by the Plaintiff. I note that he has not provided any supporting evidence of the averments he makes, particularly as to the death of his previous advocate or of the efforts made or steps taken to ensure that the subsequent advocates proceeded with the hearing of this suit. This Court will therefore allow the 4th and 5th Defendants' Notice of Motion dated 3rd February 2014 for the foregoing reasons, and accordingly dismisses the suit filed herein for want of prosecution. The Plaintiff shall bear the costs of this suit.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____20th____ day of ____March____, 2015.

P. NYAMWEYA

JUDGE