



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 30 OF 2012

Formerly HCC 196 OF 1999

KIPTABUT ARAP BOEN.....PLAINTIFF

VS

BENJAMIN K. CHEMOGOS.....DEFENDANT

RULING

Mr. Kiptabut Arap Boen (*hereinafter referred to as the plaintiff*) moved this court against Mr. Benjamin Chemogos (*hereinafter referred to as the defendant*) by way of plaint dated 22/9/1999 and filed on 28/9/1999 claiming that sometimes in 1964 the plaintiff bought a piece of land measuring 18 acres from ***kiplelei Chepkwony and Kobot Kiplelei Tanui*** who were co-owners thereof and had the same consolidated with his other pieces of land, processed and issued title thereof in his name as the sole registered owner and proprietor of Land Parcel NO. NANDI/ITIGO/226, now measuring approximately 9.71 Hectares after the said consolidation.

The plaintiff claimed that sometimes in 1998 the Defendant who happens to be a son to ***Kobot Kiplelei Tanui*** unlawfully and without any reasonable cause and/or excuse trespassed upon the plaintiff's Parcel of Land No. NANDI/ITIGO/226 and excised a part therefrom and took illegal possession thereof. The defendant has since continued his illegal possession of the plaintiff's parcel of land without any colour of right whatsoever. In the premises, the plaintiff's claim is for an order of eviction against the defendant from the said land parcel number NADI/ITIGO/226. The plaintiff further prays for an order against the defendant for mesne profits which have accrued on the property inhabited by the defendant from the institution of this suit until the relinquishment of possession and delivery thereof to the plaintiff.

Consequent to paragraphs 6 and 7 above, the plaintiff prayed for a permanent injunction restraining the defendant, his agent and/or servants from further trespassing on the plaintiffs parcel of Land and/or in any other way interfering with the plaintiff's quiet possession of the same and an order of eviction from the said land parcel number NANDI/ITIGO/226. He further prayed for mesne profits from the institution of this suit until the relinquishment of possession and delivery of land parcel number NANDI/ITIGO/226 to the plaintiff. Lastly, he prayed for a permanent injunction restraining the Defendant, his agent and/or servants from trespassing and/or in any other way interfering with the plaintiff's quiet possession of the said land parcel number NANDI/ITIGO/226.

The defendant entered appearance through Birech & Company Advocates on 11/11/1999 and filed defence on the 3/12/1999. The reply to defence was filed on 16/12/1999. The statement of agreed issues was filed on the 6th of April 2000.

The matter was listed before Justice Nambuye on 21/9/2000 when Kalya for plaintiff appeared but the

defendant's counsel did not appear and the same was stood over to 18/11/2001 for hearing with an order that the plaintiff issues notice.

The plaintiff appeared eager to have the matter heard and determined because he went to the Registry on the 21/3/2001 in the absence of the defendant and was given 11/4/2001 as the date for the hearing of the suit. There are no records for the happenings of the said date. However it is on record that again the plaintiff went back to the registry on the 18/4/2001 and took 01/10/2001 for hearing. On the said date the plaintiff was represented by Gicheru whereas the defendant did not appear in court. The matter was adjourned due to the time factor to 1/3/2003 however, there are no records for what happened on 1/3/2002 but there are records for what happened on 6/3/2002. The plaintiff again took a hearing date in the absence of the defendant hence the matter was scheduled for hearing on 11/12/2002. The parties appeared before Justice Etyang on 6/11/2002 and by consent took the 1/02/2003 for hearing however on the scheduled date, the defendant was sick hence the matter was adjourned to 19/6/2003.

On the 19/6/2003 the plaintiff appeared but the defendant was absent the case was listed for hearing on 29/7/2003 on which date the matter was stood over generally due to the absence of parties despite the presence of their advocates.

Mr Kalya for plaintiff went to the civil registry on the 4/12/2003 in the absence of the defendant and fixed the case for hearing on 23/3/2004. On the scheduled date, Kalya for plaintiff was ready to proceed whilst Mr. Machio for defendant was not because his client was absent. The court stood over the matter generally.

Again, ON 25TH March 2004, one David for Kalya went to the registry and took a date for hearing thus the 4/10/2006. The matter however came up for hearing on 3/10/2006 before Justice Gacheche when Mr. Owinyi appeared for plaintiff and Mr. Shivachi came later and informed the court that Mr. Machio was unwell hence the matter was taken out of the cause list.

The parties later agreed to allow the defendant amend the defence and file a counterclaim while the defendant was to file a defence to the counterclaim. Thereafter on 30/1/2009, Birgen for Kalya & Co advocates for the plaintiff went to the registry for a hearing date in the absence of the defendant and was given 18/11/2009. The events of the said date are not properly captured in the typed proceedings. It appears that Kalya and Company advocates did not get tired as they went to the court registry again on 20/11/2009 and took a hearing date thus the 1/12/2010. On which date both parties agreed adjourn the matter generally.

On the 31/11/2013 the court on its own motion ordered that the matter be listed for mention on the 22/02/2013 **for parties to show cause why the same should not be dismissed for want of prosecution.**

On the scheduled date, the plaintiff and defendant were absent but counsel for the plaintiff, Mr. Martim appeared for plaintiff whilst Mr. Machio was absent. Mr. Machio explained the delay, thus that they had been writing to their client for invitation but they were using the wrong address. Mr. Kalya physically visited the plaintiff at his home and discovered that he was sick. He informed the court that the plaintiff was willing to proceed. The court was satisfied with the explanation and therefore ordered the plaintiff to file his bundle of documents, witness statement and issues by the 11/4/2013.

On the said date, the honourable Judge observed that the plaintiff had not complied with the direction of the court and asked for an explanation from the counsel for the plaintiff who said ***"I leave it to court"***. The court dismissed the suit for want of prosecution.

On the 14/1/2015, one and half years thereafter, the plaintiff moved the court by an application dated 13/1/2013 under certificate of urgency by way of Notice of Motion based on sections 3, 3A and 63 of the Civil Procedure Act and order 51 rule 1 of the Civil Procedure Rules 2010 for an order that the court order of 11/4/2013 dismissing the plaintiffs suit for want of prosecution be reviewed and set aside and the plaintiffs suit be reinstated and be fixed for hearing on priority basis.

The application is based on grounds that the honourable Court on the 11th April, 2013 dismissed the plaintiff's suit for want of prosecution under order 17 Rule 2 of the Civil Procedure Rules without the knowledge of the plaintiff until when he came to inquire from his previous Advocates M/s Kalya & Company Advocate about the progress of the matter. It was the duty of the plaintiff's advocate to fix the matter for hearing and that the mistake of the plaintiff's advocate should not be visited upon the plaintiff. He claims that the case is sensitive as it involves land and that no prejudice will be suffered by the defendant as they have filed a counter claim which ought to be determined alongside this suit. The suit herein touches on land and the parties ought not to be condemned unheard. There is an error on record as the Advocate for the defendant passed on and the Notice of dismissal should have been served upon the defendant directly.

In the supporting affidavit, the plaintiff states that he instructed the firm of Kalya & Company Advocates to pursue this matter on his behalf and gave them his postal address as P.O. Box 105 Mosoriot. That upon visiting their offices he discovered that they were communicating to him through P.O. Box 105 Eldoret which is not his address. Upon not getting any communication from his lawyers on the hearing date he visited the firm of Kalya & Co Advocates on 6th January, 2015 to inquire about the status of his matter and to his dismay he was advised that the suit has been dismissed by the honourable court on the 11th April 2013 for want of prosecution. His lawyers on record did not advise him on the Notice to have the suit dismissed for want of prosecution.

He believes that it was the duty of his Advocate then to fix the matter for hearing of the suit but no such prerequisite steps were taken to fix the matter for hearing. He was condemned unheard and the mistake of his advocate in failing to schedule the matter for hearing should not be visited upon him and that this case is sensitive touching on land and the same should not be dismissed without his input. No prejudice will be suffered by the defendant as he has filed a counterclaim which ought to be determined alongside this suit. The defendant's advocate passed away and technically the notice ought to have been served upon the defendant directly.

Mr. Benjamin Chemogos filed a replying affidavit stating that the suit was dismissed upon due notice given to both parties on 31st January 2013. Though his advocate passed on he had been following the matter on his own while still looking for another advocate. That the suit was filed in 1999 that is over 16 years ago and has never been prosecuted. It was the duty and or responsibility of the plaintiff to prosecute the suit which the plaintiff failed to and yet had full knowledge on the status of the case but he chose to ignore and failed to give instructions to his counsel. He believes that the plaintiff should have always been visiting the firm of his advocates to check on the status of his case instead of waiting for letters.

According to the defendant, even if the applicants advocates, the firm of Kalya had been using the wrong address, on 22/02/2013 the court was informed by his counsel that Mr. Kalya, that an advocate in the firm of Kalya physically visited the plaintiff at his home and he indicated that he was still willing to prosecute the matter and therefore as at this date, the applicant knew the status of his case and should have taken steps to contact his advocate and have the matter prosecuted. That there is no mistake committed by the applicants previous Advocates but it the applicant's mistake not to give his counsel further instructions. The applicant's previous Advocates did all they could and fixed the matter for hearing but could not proceed for lack of further instruction. He concludes by stating that the reason offered by the applicant to have the suit reinstated does not meet judicial scrutiny as they are flimsy and inexcusable and that the inordinate and gross inexcusable delay is insufficient to warrant the exercise of judicial discretion to reinstate the case and that the plaintiff is clearly disinterested in the suit since the same was filed 16 years ago yet it has never been heard.

In a nutshell, **Mr. Aseo learned counsel for applicant** argues that the advocates for the plaintiff at the time of dismissal used a wrong address to send the letters. Instead of P.O. Box 105 Mosoriot, they used P.O. Box 105 Eldoret. Moreover, that this being a land matter, the court should be compassionate and allow the suit be heard on merit and that the defendant has a counter claim hence he will suffer no prejudice and that a mistake of the advocate should not be visited on this client.

Mr. Birech learned Counsel for the respondent argues that the last time the matter was in court was on

1/12/2010 when it was Stood Over Generally. When the matter was listed by the court for dismissal for want of prosecution Mr. Maritim appeared before the Judge and showed cause that they had been using the wrong address hence the matter was not dismissed, instead it was to be mentioned for compliance with the directions issued by the court.

On 11/4/2014, there was no compliance hence the court dismissed the matter.

Mr. Birech finally, but most importantly argues that the suit was dismissed on 11/4/2013 and that this application is made on 14/1/2015, what was the plaintiff doing for all this period of more than one year.?

The issues to be determined herein are as follows:-

- 1) Whether there has been inordinate delay on the part of the Plaintiffs in prosecuting the case;
- 2) Whether the delay is intentional and inexcusable;
- 3) Whether the delay is an abuse of the court process;
- 4) Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant;
- 5) What prejudice will the dismissal occasion to the plaintiff?
- 6) Whether the plaintiff has offered a reasonable explanation for the delay;
- 7) Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the court?

To begin with Mr Aseo explains the delay in bringing the application to court by stating that the plaintiff became aware of the dismissal on the 6/1/2015 whereas the suit was dismissed on the 11/4/2013 a period of approximately 20 Months before he became aware. Before the dismissal the last activity had been on the 1/12/2010 approximately 30 months before dismissal. This brings the aggregate delay to approximately 50 Months. This court finds that this is inordinate delay that demonstrates that the plaintiff lost interest in his case at some time otherwise this suit could not have been dormant for more than one year. Moreover, the applicant can not use the issue of the wrong address twice because when his counsel appeared before the Judge on 22/2/2013, he convinced the judge that he had been attempting to communicate to his client using the wrong address and therefore the suit was not dismissed for want of prosecution. He was directed to file the documents and witness statements and the court held onto the issue of dismissal for that moment, thus the court was in control of the proceedings and therefore any failure to take action by the plaintiff would call for a dismissal of the suit by the court. This happened on the 11/4/2013 when the plaintiff's Counsel failed to comply with clear and simple directions of the court thus to file the plaintiffs documents.

This court finds that the reasons given by the applicant's advocates that the previous advocate had been using the wrong address cannot hold water as the previous counsel had visited the plaintiff at home where the applicant agreed to proceed with the matter. On the date of showing cause, the previous Advocate appeared in court and informed the said court that he had realized that he was using the wrong address and had actually visited the applicant who agreed to proceed with the matter. The applicant cannot now argue that his previous advocate was using the wrong address at the time of the dismissal as his previous counsel had settled the issue.

The applicant argues that land matters are sensitive and therefore this suit should be reinstated. I do find this argument misplaced as litigation in land cases just like other civil cases should come to an end. If indeed land matters are sensitive as the applicant wants this court to believe then parties should be more vigilant but not as indolent as the plaintiff was from the time the matter was stood over generally.

Judicial authority

(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles-

- a. **justice shall be done to all, irrespective of status;**
- b. **justice shall not be delayed;**
- c. **alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);**
- d. **justice shall be administered without undue regard to procedural technicalities; and**
- e. **the purpose and principles of this constitution shall be protected and promoted.**

The plaintiff came to court for a remedy but slept on his rights for a period of 30 months and delayed the hearing of the suit contrary to the provisions of Article 159(2) b of the Constitution.

Lastly, the applicant argues that mistakes of counsel which I find plenty in this matter, should not be visited on the party. This is all too true, however the fact that the plaintiff took more than one year to move the court in this application indicates that he was indolent and the court cannot use its discretion to aid an indolent party. The opportunity given to the applicant by justice Munyao on 22/2/2013 was squandered.

The The law governing dismissal of suit for want of prosecution is well settled and that each case has to be determined in accordance to its peculiar facts. In Phoebe Nduda & others vs Mwakini Ranch Co Ltd & Kitui Town Council, Civil Application No. NRB 448 of 2001 CA KENYA Justice Waki stated that

“The opportunity given to applicants was squandered and if it is their case that the advocate was to blame they are at liberty to seek recompense from their advocate. As it is the applicants appeal to sympathy rather than sound factual- legal basis in seeking the orders above. I would be surrendering my discretion to whim and caprice if I acceded to the application on that basis.....”

CONCLUSION

This court finds that the applicant's Counsel was initially very diligent in this matter in ensuring that the matter proceeds until when the application was stood over generally. Counsel would come to the court's registry pick dates serve the defendant only for the matter to be adjourned by the court on application by the respondent. However after the 1st of December 2010 the plaintiff counsel went to sleep until he was woken up with the Notice to show cause that was scheduled for hearing on the 22nd of February 2013. The applicant blames all that befell him on counsel but has not demonstrated to this court that he attempted to jolt his advocate into action by writing a letter to the said counsel for information in respect of this matter. The plaintiff has not said that he visited his counsel's chambers to seek information on the position of the case. He simply went into **slumber-land** and might have been the main cause of non prosecution of the suit. This court finds the application not merited and the same is dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 5TH DAY OF MARCH 2015

ANTONY OMBWAYO

JUDGE

