



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC CASE NO. 1270 OF 2007

HUMPHREY WAINANA MBOGO..... PLAINTIFF

VERSUS

THIKA MUNICIPAL COUNCIL.....1ST DEFENDANT

GEORGE MWANGI.....2ND DEFENDANT

COUNCILLOR ROSEMARY KAHURI.....3RD DEFENDANT

FRANCIS MWANGI KARENGE.....4TH DEFENDANT

BENSON MAINA MUGI.....5TH DEFENDANT

CHIEF LAND REGISTRAR.....6TH DEFENDANT

RULING

The Application

The application before this Court for determination is a Notice of Motion dated 3rd February 2014 brought by the 4th and 5th Defendants, seeking an order that this suit be dismissed for want of prosecution and that the costs be borne by the Plaintiffs. The grounds for the application are that the Plaintiff has failed to prosecute this suit since the same was filed in court in the year 2003, and that this matter was last in court on 17th July 2007 when the Court dispensed with an interlocutory application.

The 4th and 5th Defendants in a supporting affidavit sworn on 3rd February 2014 stated that the Plaintiff filed this matter together with an application brought under Certificate of Urgency on 9th December 2003 seeking interlocutory orders against the Defendants, and that though the court record indicates that the Plaintiff has had this matter fixed for hearing on 13th February 2007, 6th May 2010, 23rd November 2010, 5th July 2011 and 24th October 2012, there is no record on what transpired in court on any of the above dates.

The 4th and 5th Defendants averred that it is manifestly clear from the Plaintiff’s conduct that he has no interest in having this matter concluded and he appears to have lost interest in the suit. Further, that it is in the interest of justice that there be an end of litigation.

The Response

The Plaintiff opposed the application in a replying affidavit he swore on 10th October 2014 and stated that this suit was filed by the firm of M/S Wachira Nderitu, Ngugi & Company Advocates on his behalf, which firm continued so acting up to January 2014. Further, that he has been following with the said law firm to have the suit fixed for a hearing who advised him that that the hearing of cases in the High Court is slow due to tedious procedures and congestion in its diary.

The Plaintiff further stated that the said law firm on several occasions took action to have the suit set down for hearing, and that on 26th March 2013 they were advised by the Court registry that the 2013 diary was closed and were duly advised that they could only take dates once the 2014 diary was opened. The Plaintiff annexed a bundle of letters in support of his averments.

The Plaintiff also gave an account of the changes effected of the various advocates that were representing him in this matter between January and May 2014, and he contended that that he has actively taken action with a view to have the suit prosecuted.

The Issues and Determination

The parties were directed by the court to canvass the Defendant's application by way of written submissions. The 4th and 5th Defendant's advocate filed submissions dated 5th November 2014, while the Plaintiffs' advocate filed submissions dated 16th December 2014. I have carefully considered the pleadings filed and submissions made by the Plaintiffs 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, as to render the suit liable for dismissal.

The Plaintiff submitted in this regard that he had actively pursued his former Advocates to set the matter for the hearing, and that the change of Advocates in this matter was due to irreconcilable differences between the said Advocates and the Plaintiff, and was not a deliberate tactic to delay the prosecution of this suit. The Plaintiff urged the Court to consider the reasons for delay, and relied on the decision in **Agip (Kenya) Ltd vs Highlands Tyres Ltd, (2001) KLR 630**. The Plaintiff also cited the decision in **James K. Horeria T/A Horeria & Company ve Corporate Insurance Co. Ltd, Nairobi HCCC No. 1053 of 2002** for the position that the Defendants will not suffer any prejudice if the suit is allowed to proceed to full hearing as they will have the opportunity to defend themselves, yet the Plaintiff will suffer prejudice as he risks to lose his land which has been developed by illegal allottees who continue to enjoy it at his expense.

The 4th and 5th Defendants on the other hand urged the Court to find that the differences between the Plaintiff and his Advocates should not be visited on other parties, and that they have had to endure great mental anguish and prejudice occasioned by the pendency of this suit. The 4th and 5th Defendants further submitted that the tests set out in the decision in **Utalii Transport Company Ltd & 3 Others vs NIC Bank Limited & Another, (2014) e KLR** and proceeded to illustrate how the delay in prosecuting this suit was inexcusable, an abuse of the process of court and would cause them prejudice in terms of legal costs, inability to further develop the suit property, and the risk of unavailability of witnesses.

The 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** set 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 herein before the filing of the 4th and 5th Defendants’ application on 3rd February 2014 were directions given on 1st July 2009 directing parties to file and serve their submissions to a pending Notice of Motion and the setting of a date for highlighting of the submissions. Therefore, at the time of the filing of the said Defendants’ Notice of Motion, 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 from the Court record and from the annexures provided by the Plaintiff that there were indeed attempts to set the matter herein for hearing, and that hearing dates were taken, but it appears the matter was not listed for hearing during the said dates. This Court will therefore give the Plaintiff the benefit of doubt as it appears that there were circumstances beyond his control that led to this matter not proceeding to hearing. In addition, it would be unfair to visit upon the Plaintiff any shortcomings and/or lapses on the part of his Advocates.

However, this indulgence will be extended by the Court to the Plaintiff only the condition that the Plaintiff shows his commitment to the expeditious disposal of this suit, and particularly in light of the prejudice the 4th and 5th Defendants have illustrated they have suffered or are likely to suffer as a result of the delay in prosecuting this suit. This Court accordingly orders as follows:

1. The Plaintiff shall file and serve a consolidated and paginated bundle of the pleadings, documents and witness statements to be relied upon during the hearing of this suit within 60 days of the date of this ruling.
2. Upon, and/or in the event of non-compliance by the Plaintiff with Order 1 hereinabove, the suit herein shall stand dismissed for want of prosecution.
3. The Plaintiff shall bear the costs of the 4th and 5th Defendants Notice of Motion dated 3rd February 2014.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____23rd____ day of ____April____, 2015.

P. NYAMWEYA

JUDGE