



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

E.L.C. NO. 26 OF 2015

MUNICIPAL COUNCIL OF NYERI APPLICANT/DEFENDANT

VERSUS

DAVID NGUNJIRI MURIITHI

ERASTUS KIAMA GICHUKI

EPHRAIM MWANGI WACHIRA

(AS TRUSTEES OF UNITED SOCIAL CLUB)
RESPONDENTS/PLAINTIFFS

RULING

1. The defendant filed this application by way of Notice of Motion dated **16th December, 2014** brought under **Order 17 Rule 2** of the Civil Procedure Rules, seeking that the suit be dismissed for want of prosecution as well as costs.
2. The application is supported by an affidavit sworn by Charles Wahome Gikonyo, the advocate for the defendant/applicant on **16th December, 2014**. He deposes that it has been more than 3 years since the suit was last set down for hearing (15th November, 2011) and it is fairly obvious that the plaintiffs have no interest in prosecuting the suit. In his affidavit of service sworn on **27th March, 2015** he deposes that the application was served and received by the plaintiff's advocates on 25th March, 2015.
3. The application is opposed. In their Grounds of Opposition dated **22nd May, 2015** the plaintiffs state that the application is frivolous, incompetent, not tenable in law and an abuse of the court process. It is further contended that a court cannot dismiss a matter that is part heard.
4. The application was heard on 25th May, 2015 with Mr. Wahome appearing for the applicant and Mr. Gori for the respondents.
5. Mr. Wahome associated himself with the application and his affidavit and reiterated that the suit last came up for hearing on 15th November, 2011. In addition, he stated that the plaintiffs went to sleep once their application for injunction was denied and this could only mean that the plaintiffs had lost interest in the matter. Mr. Wahome noted that under **Order 17 Rule 2** of the Civil Procedure Rules, a suit ought to be dismissed if no action has been taken after one year of filing the suit.

6. In reply, Mr. Gori stated that the suit was not ripe for dismissal as none of the parties had complied with the provisions of Order 11 of the Civil Procedure Rules; that the file had been missing in the registry denying them an opportunity to file correspondence. Further, the suit was not hopeless and the plaintiffs presence in court was an indication of their willingness to proceed with the suit.

7. Mr. Wahome by way of rejoinder, stated that no evidence had been adduced to show that the file had been missing from the registry.

8. I have perused the court record and noted that this matter was last in court on 19th December, 2011 before **Wakiaga J** for hearing of the application dated 21st October, 2011 seeking an order of injunction by the plaintiffs. **Wakiaga J** declined to grant the prayers sought in his ruling dated 10th February, 2012. Since then, only the firm of Wahome Gikonyo & Co. Advocates attempted to take a date for hearing for this application on 29th January, 2015 and 19th March, 2015 respectively. It is also noted that there is no correspondence in the court record to support the plaintiffs assertions that the file had gone missing.

9. **Order 17 Rule 2 (1)** of the Civil Procedure Rules, provides that if any step is not taken by either party for one year, the court may on its own motion, give notice in writing to ask the parties to show cause why the suit should not be dismissed. Under **Rule 2(3)(1)**, any party to a suit is at liberty to apply for the suit's dismissal.

10. So, taking into consideration the circumstances of this case, has there being such inordinate delay by the plaintiff to warrant dismissal of the suit?

11. I have considered the submissions made by counsel for the plaintiffs and although the reasons given for not setting down the matter for hearing are not satisfactory, the plaintiffs having come to court in person and their counsel having put up a spirited fight during the hearing of this application demonstrates that they are still interested in prosecuting the suit. For that reason, I will grant them an opportunity to prosecute their suit but within strict time lines as follows:

The plaintiffs are granted 30 days within which to file and serve their list of documents and witness statements. The defendant is granted equal period after receipt to file and serve his list of documents and witness summons. Pretrial questionnaire and

joint set of issues to be filed within the same period. Further, the plaintiff is directed to fix this matter for mention within 60 days failure of which the suit shall stand dismissed.

12. Costs of this application are awarded to the defendant.

Dated, signed and delivered at Nyeri this 29th day of June, 2015

L N WAITHAKA

JUDGE

In the presence of:

Mr. Wahome for the defendants/applicants

N/A for the plaintiffs/respondents

Court Assistant - Lydia