



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT
AT MALINDI
LAND CASE NO. 36 OF 2008 (OS)

1. THOYA KITI THOYA

2. DAMA THOYA KITI.....PLAINTIFFS

=VERSUS=

1. SILAS MZUNGU MZUNGU CHITIMBWI

2. ALBERT CHAUREMBO MUMBA

3. SHERNELL EMMANUEL

4. DENIS MAKAU NGEWA

5. JACINTA MUENDI MAKAU.....DEFENDANTS

R U L I N G

Introduction

1. The 1st Defendant has filed an Application dated 13th September 2013 seeking for the following reliefs:

(a) That the suit herein be struck out for want of prosecution or for not taking action for a period of one (1) year.

(b) That the costs of suit be awarded to the 1st Respondent.

2. The Application is premised on the grounds that the 2nd Plaintiff has not served the summons upon the 3rd, 4th and 5th Defendants; that the 1st Plaintiff passed on on the 28th July 2011 and that the 2nd Plaintiff has not taken any action in the matter for a period of one year.

1st Defendant's/Applicant's case:

3. The 1st Defendant's Application is supported by the affidavit of his advocate who has deponed that

although the suit was filed on 5th June 2008, the 2nd Plaintiff has not taken any action in this case. The 1st Defendant's case is that he cannot use his parcel of land being Kilifi/Mtondia/400 and Kilifi/Mtondia 406 due to the present suit.

4. The 1st Defendant's advocate finally deponed that the 1st Plaintiff passed on on 28th July 2011 and that the 2nd Plaintiff is no longer interested in this case.

The 2nd Plaintiff's/Respondent's case:

5. The 2nd Plaintiff's Advocate filed a Replying Affidavit on 31st October 2013. The 2nd Plaintiff's Advocate deponed that it is true that the Originating Summons has not been fixed for hearing for a long time because of the set back the Plaintiff suffered when the suit against the 2nd Respondent was struck out.
6. The 2nd Plaintiff's advocate finally stated that it is only the 4th Defendant who has not been served with the summons and the suit against the Defendants is strong and has chances of success.
7. The parties agreed to dispose of the Application by way of written submissions which I have considered.

Analysis and findings:

8. The 1st Defendant's Application is brought pursuant to the provisions of Order 5 Rule 2(7) and Order 17 Rules 2(3) of the Civil Procedure Rules.
9. Order 5 Rule 2(7) of the Civil Procedure Rules provides that summons shall remain valid in the first instance for twelve months while Order 17 Rule 2(3) provides that in any suit in which no application has been made or step taken for one year, any party may apply for its dismissal
10. This suit was commenced by way of Originating Summons on 5th June 2008. The Summons to Enter Appearance to all the Defendants were signed by the Deputy Registrar of this court on 9th June 2008.
11. The firm of Odhiambo S.E entered appearance for the 1st and 2nd Defendants on 26th June 2008.
12. On 31st October 2008, the 1st and 2nd Defendants filed an Application to have the suit struck out as against them because the same did not disclose a reasonable cause of action. The Application was partly allowed and partly dismissed by Omondi J on 5th October 2009. In a nutshell, the court disallowed the prayer to dismiss the entire suit but instead dismissed the suit as against the 2nd Defendant alone.
13. The record shows that the firm of Anyango Ogutu & Co. Advocates entered appearance for the 3rd Defendant on 21st August 2009. There is no evidence on record to show that the 4th, 5th and 6th Defendants were served with Summons to Enter Appearance.
14. The Plaintiffs did not fix the Originating Summons for hearing after the Ruling of Omondi J of 5th October 2009. On 14th July 2011, the 1st Defendant's advocate informed the court that the Plaintiffs had not prosecuted the suit for over two years. The court directed the Plaintiffs' Advocate to effect service upon the 3rd, 4th and 5th Defendants within 30 days.
15. On 27th June 2012, the 1st Defendant's Advocate filed an Application dated 21st June 2012 seeking to dismiss the suit for want of prosecution. The said Application was withdrawn by the consent of both parties on 13th March 2013. In the said consent, the Plaintiff's advocate consented to serve the Originating Summons upon the 3rd, 4th and 5th Defendants within 2 months with effect from 13th March 2013.
16. The Plaintiffs' Advocate has admitted that he has not been able to trace the 4th Defendant for the purpose of serving him with the Summons. There is also no evidence that the 5th Defendant was ever served with the Summons.
17. Although the Plaintiffs were given two chances to prosecute and serve the Summons to Enter Appearance on the Defendants and fix the suit for hearing, they have never done so. The inaction on the part of the Plaintiffs is a clear indication of parties who are not willing to prosecute their claim expeditiously and within the requisite period. They cannot be allowed to continue holding

- the Defendants at a ransom viz-a-viz the usage of the suit property.
- 18.Indeed, the Plaintiffs or their advocate have not offered any plausible explanation as to why this matter has never been set down for hearing since 5th October 2009 when Omondi J delivered her Ruling.
- 19.In the circumstances, and for the reasons I have given above, I allow the 1st Defendant's Application dated 13th September 2013 as prayed.

Dated and Delivered in Malindi this **14th** Day of **February**, 2014.

O. A. Angote

Judge