



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC CASE NO. 715 OF 2011

LYDIA MWIKALI SHEDRACK.....PLAINTIFF

VERSES

DENCY WANJA KAKUI.....1ST DEFENDANT

MBILI NGUNU MAITHYA.....2ND DEFENDANT

CHRISTOPHER MUTHINI MBATHA.....3RD DEFENDANT

RULING

The Application

The application before this Court for determination is a Notice of Motion dated 4th June 2013 brought by the 3rd Defendant under Order 17 Rule 2(1) and (3) of the Civil Procedure Rules. The 3rd Defendant is seeking orders that this suit be dismissed for want of prosecution. The application is supported by an affidavit sworn by the 3rd Defendant on 4th June 2013, and is premised on the grounds that the suit herein was filed on 15th December 2011, and that the pleadings herein have long closed. Further that the Plaintiff has for more than year not taken any positive steps towards the prosecution of this suit. The 3rd Defendant also stated that he continues to suffer prejudice as a result of the pendency of the suit, as the Plaintiff has lodged a prohibition against his title to the land that is the subject matter of this suit, hence impeding any dealings with the said land.

The above averments were reiterated in written submissions filed by the 3rd Defendant's Advocate on 14th October 2013. The Advocate stated that they had demonstrated the inexcusable delay in prosecuting the suit and prejudice caused as required under Order 17 Rule 2 of the Civil Procedure Rules. He relied on the decision in **Ivita vs. Kyumbu [1984] KLR 441** in this respect, and on various other judicial decisions where suits were dismissed for delay in prosecution.

He further argued that the last action in this matter was on 15th May 2012 when the Plaintiff's application was dismissed, and that since then the Plaintiff had not taken any steps towards the prosecution of this suit in terms of fixing a date for hearing, or complying with the provisions of Order 11 of the Civil Procedure Rules. The Defendants' Advocate further submitted that the Plaintiff had not explained the delay in prosecuting the suit.

The Response

The Plaintiff opposed the application in Grounds of Opposition dated 17th September 2013 and filed on

30th September 2013, wherein she stated that the 3rd Defendant's application is incompetent and amounts to an abuse of the court process as directions and pre-trial conference have not been done. Further, that the order for dismissal of the suit will be draconian as the issues raised in the suit are serious, and require a full hearing and determination thereby do justice to the parties.

The Plaintiff's advocate filed submissions dated 18th October 2013 and argued therein that there is a presumption in Order 17 of the Civil Procedure Rules that a suit is ready for hearing and that parties have therefore complied with Order 11 of the Civil Procedure Rules. Further, that dismissal of a suit for want of prosecution is a matter for exercise of discretion, and that the court should be guided by the principles of administering substantive justice as required by Article 159 2(d) of the Constitution, and natural justice as required by section 19(2) of the Environment and Land Court Act. However, the court notes that this provision of the Act relied upon has since been repealed. The Plaintiff's counsel also sought to distinguish the decisions cited by the 3rd Defendant on the ground that they were decided before the Constitution of 2010 came into effect.

The Issues and Determination

I have carefully considered the pleadings filed and submissions made by the Plaintiff and 3rd Defendant. 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. 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.”

There is no presumption suggested by the said rule that a suit must be ready for hearing as alleged by the Plaintiff, as what is envisaged is delay in undertaking any step in the prosecution of a suit, which may or may not be the hearing of the suit. This provision is also aimed at ensuring expeditious hearing of suits, which includes taking the necessary steps for pre-trial procedures. In the case of **Ivita vs Kyumbu [1984] KLR** the court cited with approval the case of **Mukisa Biscuit Manufacturing -vs- West End Distributors(1969)EA 969** where the court stated that it is the Plaintiff's duty to bring the suit to early trial and he cannot absolve himself of this primary duty.

The decision in the case of **Ivita vs. Kyumbu [1984] KLR 441** also 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. This decision is still applicable even after the coming into force of the Constitution of 2010, as the provisions of Order 17 Rule 2 of the Civil Procedure Rules have only been modified with regard to the threshold required for culpable delay to arise, which is now one year instead of three months as was previously the case.

A perusal of the court record in this suit shows that the last step taken herein before the filing of the Defendants' application was the delivery of a ruling by Kimondo J. on 15th May 2012, dismissing an application made by the Plaintiff for a temporary injunction. Therefore at the time of the filing of the Defendants' Notice of Motion on 4th June 2014 there had been a delay of more than one year in prosecuting this suit, which renders it amenable to dismissal under Order 17 Rule 2 of the Civil Procedure Rules.

Under Order 17 Rule 2(2) of the Civil Procedure Rules, if cause is shown to the satisfaction of the court, the court may make such orders as it thinks fit to obtain expeditious hearing of a suit which is liable to dismissal for want of prosecution. In the instant application the only cause offered by the Plaintiff is that this Court should endeavor to dispense substantive justice. While it is indeed the position that this court is obliged to dispense substantive justice and not to pay undue regard to procedural technicalities under Article 159(2)(d) of the Constitution, it needs to be appreciated that delay in prosecuting and hearing of a case is not a procedural technicality, but an integral factor in the dispensation of substantive justice as recognized by the overriding objectives set out in sections 1A and 1B of the Civil Procedure Act.

In addition the 3rd Defendant has also shown the prejudice that he is suffering as a result of the delay in prosecuting this suit in terms of the prohibition of dealings with the property that is the subject matter of this suit. However, I note that the Plaintiff and 3rd Defendant in this case had filed their witness statements and bundle of documents, and there has been partial compliance with the provisions of Order 11 of the Civil Procedure Rules in this respect.

In the premises, I find that the suit herein should in the interests of justice proceed to its logical conclusion. The 3rd Defendant's application is therefore denied. However, as the Plaintiff has been found to be culpable for delay in prosecuting this suit, she shall bear the costs of the 3rd Defendant's Notice of Motion dated 4th June 2013. I also order pursuant to the provisions of sections 1A, 1B, and 3A of the Civil Procedure Act and Order 11 of the Civil Procedure Rules that the Plaintiff sets this suit for pretrial conference within six (6) months of the date of this ruling. Upon default the suit herein shall stand dismissed for want of prosecution.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____7th ____ day of
____May____, 2014.

P. NYAMWEYA

JUDGE