



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI LAW COURTS
ENVIRONMENTAL & LAND DIVISION
ELC NO. 7 OF 2007

JOSEPH WARARI GATHOGA.....PLAINTIFF

-VERSUS-

CHARLES OKONDO OTEKI.....1ST DEFENDANT

JACKSON GITHUA NGUNJIRI.....2ND DEFENDANT

RULING

1. By an application brought under Order 17 Rule 2(3) of the Civil Procedure Rules, the 1st Defendant seeks to have the Plaintiff's suit dismissed for want of prosecution.
2. The grounds upon which the application is predicated are that the Plaintiff has since the filing of this suit in 2007 not actually prosecuted the same. Secondly and in particular the 1st Defendant contends that it is now 3 years and counting since the suit was last set down for hearing and adjourned indefinitely yet the Plaintiff has not taken any further steps to prosecute the same. The 1st Defendant finally contends that he continued pendency of the suit is onerous and harming the 1st Defendant in terms of legal fees. An affidavit in support of the application by the 1st Defendant's counsel basically reiterated the grounds outlined on the face of the application.
3. The Application was opposed vide a Replying Affidavit sworn by the Plaintiff's Counsel. The Replying affidavit is to the effect that the delay was occasioned by the demise of the 2nd Defendant who passed on in March, 2009. The Plaintiff has been seeking to substitute the legal administrator of the estate of the 2nd defendant to no avail. The Plaintiff further states that it is untrue that no action has been taken since 2010 and further that he is still interested in pursuing the claim.
4. I have read through both affidavits in support of and in opposition to the application. I have also considered the oral submissions made by the parties.
5. The application seeks to have the suit dismissed for want of prosecution. In the unreported case of **Maina Karanja vs. Maina Karanja [NBI ELC No. 509 of 2010]**, I stated as follows:

“The law on dismissal for want of prosecution is founded under the inherent powers of the court. Thus if a plaintiff in ordinary litigation is guilty of inexcusable and inordinate delay in prosecuting his claim and the effect of the delay is such as to prejudice a fair trial of the claim or cause a risk of serious prejudice to the defendant then the court may even in the absence of contumacious conduct dismiss the plaintiff’s suit. That briefly put is the upshot of not only the provisions of Order 17 of the Civil Procedure Rules but also of various authorities both locally and outside jurisdiction”

Later in the same case, I proceed as follows:

“It is all about the courts discretion which is exercised on the basis that it is in the public interest that once on action is commenced in court it ought to be brought to trial and concluded as soon as possible”

6. I would most ardently re-state the same views on this matter. The power to dismiss a suit for want of prosecution is discretionary. It is for the court to consider all factors relevant in each particular case. The factors relevant will include the length of delay, the reasons for delay if any and the prejudice not just to the Defendant but to the trial of the case itself.

7. The delay in this case is said to span over three years. That is submitted by the 1st Defendant to be inordinate. The 1st Defendant states that no steps have been taken by the Plaintiff since October, 2010. I have looked at the record. I cannot uphold the Defendant’s contentions in this respect. Whilst it is true that this matter was last in court in October, 2010, the Plaintiff did in June 2012 undertake some acts towards the prosecution of the case.

8. Ordinarily an attempt or invitation to list a case for hearing should not be deemed as active prosecution of a case but the assemblage of witness lists and accompanying witnesses’ statements would certainly rank as prosecution of a case especially when the same are actually filed and served. The Plaintiff did exactly that. Any period of delay can therefore only be commuted after June, 2012.

9. It is to be noted that under the Civil Procedure Rules, a plaintiff has a right to delay its suit for a period of at least 1 year before the plaintiff can be accused of inaction and or indolence. The application herein was filed in May, 2014 just under two years after the Plaintiff last took action. It can therefore be safely said that the Plaintiff is guilty of a delay of one year.

10. In my view the period of 1 year in the circumstances of this case is not so inordinate as to imperil the trial of the case especially taking into consideration the reasons advanced by the Plaintiff. The Plaintiff has been toiling to ensure a substitution of the deceased 2nd Defendant with his legal representative. The Plaintiff has not been successful. The claim involves and seeks relief for the cancellation of titles registered in the names of the 1st and 2nd Defendants. The Plaintiff certainly believed that the 2nd Defendant and consequently his personal representatives are not only necessary but proper parties to the suit. I would concur. The attempts consequently to ensure the legal representative was substituted were thus justified.

11. Certainly the Plaintiff has not been completely brisk as an expectant litigant ought to be but likewise the Plaintiff cannot be accused of being completely indolent to the point of being held disinterested in the claim.

12. Taking into account the overriding objective of the Civil Procedure Act and the rules thereunder which inter alia is to ensure a just and fair resolution of disputes, I would give the Plaintiff a chance to prosecute the suit.

13. The upshot is that the application by the 1st Defendant is dismissed with the following consequential orders:

a) The Plaintiff to take the necessary steps to actively prosecute the suit herein within the next six months and in default the suit will stand dismissed with costs to the 1st Defendant.

b) The costs of the application will abide the outcome of the main suit.

14. Orders accordingly.

Dated, signed and delivered at Nairobi this 28th day of November, 2014.

J. L. ONGUTO

JUDGE

In the presence of:-

..... for the Applicant

..... for the Respondent