



REPUBLIC OF KENYA
IN THE HGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENTAL & LAND DIVISION
ELC NO. 509 OF 2010

MAINA KARANJA.....PLAINTIFF

-VERSUS-

MAINA KARANJA.....DEFENDANT

RULING

1. May the court exercise the power conferred by Order 17 Rule 2(3) of the Civil Procedure Rules to dismiss a suit for want of prosecution on the grounds of the Plaintiff's extravagant and intolerable delay when the Defendant himself has a counterclaim which has not been prosecuted during the period of delay? That is the issue presented by the Notice of Motion filed in this suit on 29th October, 2013.

The Facts

2. The Plaintiff filed this suit on 26th October, 2010 seeking vacant possession of the premises known as title Number Nairobi Block 116/535 and also injunctive orders to restraint he Defendant from having possession of the suit land as well as damages for trespass to land. The Defendant entered appearance on 4th March, 2011 and filed a Defence together with a counterclaim on the same day. A reply to defence and defence to counterclaim was filed on 9th June, 2011. Pursuant to the provisions of Order 2 Rule 13 as read together with Order 7 Rule 17 of the Civil Procedure Rules, the pleadings closed on or about 24th June, 2011. Thereafter both parties went mute save for a feeble and lackadaisical attempt by the Plaintiff to list the case for trial on 7th March, 2012. The attempt was indifferent because notwithstanding the fact that the parties had not complied with all pre-trial preliminaries including compliance with provisions of Order 11 of the Civil Procedure Rules, the Plaintiff still invited the Defendant to the fixing of a hearing date. The Plaintiff then, and most conscientiously, failed to attend to the invite himself.

The Law & Discussion

3. 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. Of relevance are the cases of **Ivita –v- Kyumba [1984] KLR 441, Birkett –v- James [1977] 2 All ER 801, Grovit –v- Doctor &**

others [1997] 2 All ER 417 as well as **Mukisa Biscuit Manufacturing Co. Ltd –v- West End Distributors Ltd [1969] E.A. 696.**

4. It is all about the court's discretion which is exercised on the basis that it is in public interest that once action is commenced in court it ought to be brought to trial and concluded as soon as possible. Consequently, once the dismissal motion by the court or a party meets the test the action should be dismissed. The test will be met where the default in prosecuting the suit is intentional and or contumelious (outright breach of court rules, directions or orders) or where the inaction is so inordinate and lengthy as to be deemed that the plaintiff has not only self-prejudiced, in the sense that he is deemed to have abandoned his claim, but has also prejudiced the defendant and the trial generally. In the latter case of prejudice, it is perceived the the evidence including documents and memories have faded away.

5. In short, the effect of the delay which is justified must be considered. If the Defendant justifies the delay the court must find out the consequences. Where the delay is not explained or justified then the suit will be dismissed as "no suit should simply be allowed to hang like the sword of Damocles over another person's head " per **Lord Denning in Biss –v- Lambeth [1978] 2 All ER 125 at page 131.** Put simply, dilatory conduct is not to be entertained.

6. Order 17 of the Civil Procedure Rules basically gives the Plaintiff a right to delay his action for a period of one year only. Thereafter, unless he explains that delay the court can *suo moto* move to dismiss the claim or the Defendant may move the court for dismissal. My view, is that perhaps the one year window is too short and indeed it may not be wise to dismiss a suit after just a delay of one year if the Plaintiff can commence the same action again and again. The Plaintiff ought to be locked out once and for all.

7. Where however there is a counterclaim then the court must balance the scales of justice. The starting point in my view is the acceptance of the liberal interpretation of the rules of Civil Procedure to the effect that a counterclaim is equivalent to an independent action: see Order 7 and Order 11 of the Civil Procedure Rules. The better argument would then to be that the rules which apply to a plaintiff in prosecuting or not prosecuting its claim would apply with equal measure to a defendant with a counterclaim. A defendant with a counterclaim must prosecute his counterclaim independently and with expedition. Where he does not do so then the plaintiff would be entitled to apply to have the counterclaim dismissed for want of prosecution, especially when the defendant is in breach of the rules of the court. But can a defendant apply to have the suit dismissed and still leave the counterclaim alive? Certainly, in my view, if the defendant is also able to explain his inaction. If a Defendant cannot explain his inaction and since he is under a corresponding duty to pursue his claim, he may be deemed to have also acquiesced to the plaintiff's delay and this will or should prompt the court to dismiss the counterclaim too.

Determination & Conclusion

8. In the instant case the Defendant who also has a counterclaim has applied to have the suit dismissed for want of prosecution. The Defendant expects the counterclaim to survive. Placing reliance on the case of **Nilani –v- Patel 1969 EA 340**, Mr. Mokaya for the Defendant submitted that there has been inordinate delay on the part of the Plaintiff. That the Plaintiff has indeed lost interest in the case and that the suit is causing unnecessary anxiety to the Defendant. I would agree that there has been an inordinate and unexplained delay on the part of the Plaintiff. It is over three years since the suit was filed. There has been no prosecution of the same save the feeble attempt on 15th March, 2012. That was over two years ago. There has been no compliance with all the various rules for preparing the case for trial. I also agree that the Plaintiff has lost interest in the case. The fact that the Plaintiff did not even turn up for the hearing of the instant application is telling in these respects. The Plaintiff's action accrued in 1997, going by the averments in the plaint. It is now over 17 years since the action accrued. The suit would certainly be time-barred by the provisions of the statute of laches. I would not hesitate to have the suit dismissed for want of prosecution and I hereby do so.

9. What of the counterclaim? Does it survive? The power to dismiss suits and for that matter

counterclaims are derived from the inherent powers of the court. Like the plaintiff, a defendant with a counterclaim is also obliged to be vigilant. It certainly is not open to a defendant with a counterclaim to sit back and find reason in the delay on the part of the Plaintiff to ask the court to dismiss the suit. Survival of the counterclaim in such cases is likely to prejudice the plaintiff the same way the dormant suit would have prejudiced the defendant, unless the defendant shows that it had attempted to prosecute the counterclaim for example by preparing documents for trial. In the instant case, the Defendant has not shown any such attempt. I hold the view that it would be an erroneous exercise of discretion if the counterclaim is also not dismissed vide the inherent powers of the court.

10. In the result, I dismiss the suit as well as the counterclaim for want of prosecution. Each party will bear their respective costs.

11. Orders accordingly.

Dated, signed and delivered at Nairobi this 6th day of November, 2014.

J. L. ONGUTO

JUDGE

In the presence of:-

..... for the Plaintiff/Applicant

..... for the Defendant/Respondent