



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO 447 OF 2017

(Formerly Machakos ELC No. 117 of 2015)

NICHOLAS LETOYA LESHINKA.....PLAINTIFF

VERSUS

ROSE NJAMBI NYAGA.....1ST DEFENDANT

THE REGISTRAR OF LANDS KAJIADO.....2ND DEFENDANT

RULING

What is before Court for determination is the 1st Defendant's Notice of Motion application dated the 2nd July, 2020, brought pursuant to Article 159 of the Constitution, Section 3A of the Civil Procedure Act and Order 17 Rule (2) of the Civil Procedure Rules. The Applicant 1st Defendant be granted leave to file her Defence out of time. The Application is premised on the grounds on the face of it and the supporting affidavit of ROSE NYAGA NJAMBI where the deponent avers that she is the 1st Defendant herein. She explains that this suit was instituted in 2015 vide Machakos ELC 117 of 2015 and has never been prosecuted to date. Further, that the Court vide its Ruling dated the 11th May, 2020 effectively found that she had never been served with summons or copies of the Plaintiff. She explains that the Plaintiff unprocedurally attempted to cite her for contempt vide his application dated the 28th June, 2019 which was dismissed on 11th May, 2020. She insists this suit is in violation of Order 17 of the Civil Procedure Rules. She avers that having never been served with Summons or Copies of the Plaintiff, she is desirous of filing her defence in this suit.

The Plaintiff NICHOLAS LETOYA LESHINKA opposed the application and filed a replying affidavit where he confirms that this suit which was filed on 14th April, 2015 has been ongoing in court and the Applicant has participated in court since then. Further, the Applicant participated in the Application dated the 28th June, 2019 which Ruling was delivered on 11th May, 2020. He contends that the Applicant has correctly stated in her supporting affidavit that she was aware of the suit when she was served with the Application dated the 28th June, 2019. He insists the suit is not in violation of Order 17 of the Civil Procedure Rules. He reiterates that the Applicant is not entitled to the Orders sought.

On 28th July, 2020, the Court directed that this application be canvassed by way of written submissions. The 2nd Defendant opted not to participate in the application. It is only the 1st Defendant who filed her written submissions.

Analysis and Determination

Upon consideration of the Notice of Motion dated the 2nd July, 2020 including the rivalling affidavits and submissions, the following are the issues for determination:

- Whether this suit should be dismissed for want of prosecution.

· Whether the 1st Defendant should be granted leave to file her Defence out of time.

As to whether this suit should be dismissed for want of prosecution.

The 1st Defendant in her submissions reiterated her claim and averred that the delay in prosecuting this case has been prolonged and inexcusable. Further, this has caused her unnecessary hardships since she became unprocedurally aware of the existence of the suit having been accused of contempt. She relied on the cases of **Skyview Properties Limited & Another V Kennedy Amos Njoroge & 3 Others (2017) eKLR** and **Mwangi S. Kimenyi Vs Attorney General & Another (2014) eKLR** to buttress her averments.

Order 17, rule 2 of the Civil Procedure Rules provide that: ' (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.**'

From the court records, it is evident that this suit has never been set down for hearing; In the case of **IVITA –VS- KYUMBU [1984] KLR 441 at 451**, Chesoni J. (as he then was) held as follows;

"The instant case is now 4½ years less two months. It has been left to go to sleep for 14 months and in my opinion where an action has been dormant for twelve months or more the defendants are entitled to apply to the court for its dismissal, and, unless the plaintiff shows sufficient reason for reviving it, the suit may be dismissed. Each case must be decided on its own facts and the matter is one of the discretion of the court, but his court will frown at any inexcusable delay, and it will do everything possible to enforce expedition of trial."

Further, in the case of **Mwangi S. Kimenyi v Attorney General & another [2014] eKLR** it was held that '**Consequently, upon the analysis of all legal considerations, it is clear the direction the court is taking on this matter. But before I close, I will re-state; the acceptable test is that; 1) When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the Defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties. 2) Invariably, what should matter to the court, is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and 5) what prejudice will the dismissal cause to the plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.**'

In the current scenario and from the court records, I note even though the suit has not been set down for hearing, the parties had been engaged in various interlocutory applications. Looking at the materials before me I find that the delay in prosecuting the suit is not inexcusable nor inordinate as claimed by the 1st Defendant. Further, I do not find any prejudice the 1st Defendant suffered since she confirmed having not been aware of the suit. In associating myself with the decisions cited above as well as the legal provisions which I have quoted, I find there was no intention by the Plaintiff to delay the matter and further that there is no substantial risk to fair trial or prejudice that will be suffered if this matter is set down for hearing. I further, note from the Plaintiff, that there are triable issues raised therein. In the circumstance, I will decline to dismiss this suit for want of prosecution.

As to whether the 1st Defendant should be granted leave to file her Defence out of time.

The 1st Defendant claims she became aware of this suit in the month of June, 2019. Further, that she was never served with Plaintiff nor summons to enter appearance but is desirous of defending the suit. Order 7, rule 1 of the Civil Procedure Rules provides that: '**Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.**'

I note the 1st Defendant's Counsel filed their Notice of Appointment of Advocate on 24th July, 2019 but is yet to file a Statement of Defence. Since the Plaintiff has not controverted the 1st Defendant's averments that she was not served with Summons to Enter Appearance and in the interests of justice, noting that the Plaintiff has sought of orders for cancellation of the 1st Defendant's title to Land Parcel Number Kajiado/ Oloolotikoshi/ Kitengela/89, I will grant the 1st Defendant leave of twenty (21) days to file and serve her Statement of Defence, after which the Plaintiff will be at liberty to file his Reply to Defence if need be.

It is against the foregoing that I find the application dated 2nd July, 2020, partially merited and will allow it in terms of prayer No. 3 only.

Dated Signed and Delivered at Kajiado this 30th Day of November 2020.

CHRISTINE OCHIENG

JUDGE



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