



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 195 OF 2018**

**RUTH KABIBI KOMBE.....PLAINTIFF**

**VERSUS**

**WHITE UNICORN LIMITED**

**KILIFI COUNTY LAND REGISTRAR.....DEFENDANTS**

**RULING**

1. By this Notice of Motion dated 6<sup>th</sup> November 2019, White Unicorn Limited (the 1st Defendant) prays for an order that the Plaintiff's suit be dismissed with costs for want of prosecution. The application which is supported by an affidavit sworn by the 1<sup>st</sup> Defendant's director Samson Charo Lewa is premised on the grounds; -

**i. That the continued existence of suit indefinitely without prosecution is becoming oppressive and a denial of justice to the 1<sup>st</sup> Defendant;**

**ii. That there has been inordinate and inexcusable delay; and**

**iii. That the Plaintiff has no desire to have the suit prosecuted.**

2. The application is however opposed. In her Replying affidavit sworn and filed herein on 10<sup>th</sup> March 2020, Ruth Kabibi Kombe (the Plaintiff) avers that this matter was filed on 17<sup>th</sup> October 2018 after which the Defendant entered appearance on 9<sup>th</sup> November 2018.

3. The Plaintiff therefore asserts that the suit is not ripe for dismissal under Order 17 Rule 2(1) of the Civil Procedure Rules as the matter is yet to be set down for pre-trial. The Plaintiff denies that she has lost interest in prosecuting the suit and avers that the application before the Court is premature and misconceived.

4. I have perused and considered the 1<sup>st</sup> Defendant's application and the response thereto by the Plaintiff. I have also taken into account the submissions and authorities filed herein by the Learned Advocates for the parties.

5. Order 17 Rule 2 of the Civil Procedure Rules pursuant to which the application has been brought provides as follows:

**“2(1) In any suit in which no application has been made or a 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).....

6. A perusal of the record herein reveals that this suit was filed on 17<sup>th</sup> October 2018 and that the 1<sup>st</sup> Defendant's Written Statement of Defence was filed herein on 9<sup>th</sup> November 2018. The Land Registrar Kilifi (the 2<sup>nd</sup> Defendant) on its part filed a Statement of Defence on 10<sup>th</sup> December 2018.

7. Filed contemporaneously with the suit was the Plaintiff's Notice of Motion application dated the same 17<sup>th</sup> day of October 2018 seeking an order of injunction to issue restraining the Defendants from entering, sub-dividing or transferring the suit property-Chembe Kibabamshe/386. The 1<sup>st</sup> Defendant responded to the application on 22<sup>nd</sup> November 2018. That application came up for hearing on 5<sup>th</sup> December 2018 when the parties were given time to file and serve submissions after which the parties were to come and highlight the submissions on 11<sup>th</sup> February 2019.

8. For some unclear reason the matter does not appear to have gone to Court on the said 11<sup>th</sup> February, 2019. Some nine months later on 7<sup>th</sup> November 2019, the 1<sup>st</sup> Defendant filed the application presently before me.

9. Looking at the record and the time when the application was filed, I cannot but agree with the Plaintiff that the application is premature and totally misconceived. As at the time the application was filed, the 1<sup>st</sup> Defendant's own pleadings herein were barely a year old. There was an application pending on record for hearing and the 1<sup>st</sup> Defendant has not shown that it took any steps on its own to have the application and/or the suit prosecuted.

10. As was stated in *Aly Enterprises Ltd & 3 Others –vs- Barclays Bank Ltd (2017) eKLR*: -

“.....in weighing the pros and cons of each party's case, the Court is under an obligation to bear in mind that each litigant that approaches the seat of justice is entitled to a hearing and a decision on merit and therefore that it should strive, where possible to sustain rather than prematurely terminate a suit.”

11. In the circumstances herein it could not be said by any stretch of imagination that there had been inordinate delay in the prosecution of this suit. Accordingly, I find no basis for the 1<sup>st</sup> Defendant's application dated 6<sup>th</sup> November 2019. It is dismissed with costs to the Plaintiff.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 15<sup>TH</sup> DAY OF SEPTEMBER, 2021**

**J.O. OLOLA**

**JUDGE**



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