REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

ELC CASE NO. 52 OF 2017 (OS)

JOHN NJUE NJAGI...1ST APPLICANT

BERNARD NDWIGA..2ND APPLICANT

LUCY KINA NJAGI...3rd APPLICANT

PETER MURIITHI NJAGI...4th APPLICANT

JEREVASIO NDWIGA NJAGI..5th APPLICANT

ANGELA NJOKI NJAGI..6th APPLICANT

ANN NDIA NJAGI...7TH APPLICANT

VERSUS

SPORTLIGHT INTERCEPTS AUCTIONEERS...................1st RESPONDENT

JOYCE KAGECI GITHUIYA..2ND RESPONDENT

NATIONAL BANK OF KENYA...3RD RESPONDENT

RULING

1. Before me is a notice of motion dated 1st December, 2020 filed by the Applicants on even date. The Application is expressed to be brought under Order 17 Rule 2(3), Sections 1A, 1B and 3A of the Civil Procedure Act and Order 51 Rule (1) of the Civil Procedure Rules, and all other enabling provisions of the law.

APPLICATION

2. The Applicant is NATIONAL BANK OF KENYA who is the 3rd Defendant in the suit while the Respondents are JOHN NJUE NJAGI, BERNARD NDWIGA, LUCY KINA NJAGI, PETER MURIITHI NJAGI, JEREVASIO NDWIGA NJAGI, ANGELA NJOKI NJAGI and ANN NDIA NJAGI, the Plaintiffs in the suit. The 1st and 2nd defendants have never entered appearance in the suit.

The motion came with two (2) prayers which are as follows:

*i) **THAT** this suit be dismissed for want of prosecution.*

*iii) **THAT** the costs be in the application.*

3. The application was supported by grounds interalia, that the plaintiffs/respondents filed the suit by way of originating summons on 9th March, 2017 and the 3rd applicant filed their replying affidavit on 10th May, 2017. The matter is said to have been last in court on 22nd November 2018 and that no further steps have been taken to have it listed for hearing. According to the applicants the delay in fixing the matter is indicative of the plaintiff's lost interest in prosecuting the suit.

4. The delay has been said to be inordinate and inexcusable. It is further pleaded that the continued pendency of the suit is causing unwarranted anxiety to the applicant and is therefore prejudicial.

5. With the application is filed a supporting filed on 1.12.2020, sworn by Philip Nyoro advocate for the applicant, which reiterates the grounds in the application in support of the case.

RESPONSE

6. The application has been responded to by way of replying affidavit filed on 12.2.2021 and dated 9.2.2021. The replying affidavit is sworn by the 1st respondent, John Njue Njagi who averred that the suit could not be fixed for hearing as there was a directive by the previous judge to give priority to fix hearing dates only in matters filed before 2016.

7. According to the respondents, the applicant also has a duty to set down for the matter hearing. Despite stating this, they expressed their willingness and readiness to set down the matter for hearing if dates were available and averred that dismissing the suit would occasion injustice to them as they would be evicted from land they have resided on for over 60 years. Ultimately it was said that no prejudice would be occasioned to the applicant if the suit is not dismissed.

SUBMISSIONS

8. The application was canvassed by way of written submissions. The applicants filed their submissions on 13.9.2021. They correctly traced the threshold for dismissal of suit to Order 17 rule 2(3) and further relied on the cases of **Rajesh Rughani V Fift Investments Limited & another** which cited with approval the case of **Ivita Vs Kyumbu** and the case of **Allan Vs Sir Alfred MC Alphine and sons Ltd [1968] I ALL ER 543,** which cases stipulate the grounds to be considered for dismissal of a suit for want of prosecution.

9. On whether there was delay in prosecuting the matter. According to the applicant, it is the respondents who are in pursuit of a remedy and they should therefore take necessary steps to dispose the suit to achieve an expeditious determination. To support this, reliance was made on the case of **Mobile Kitale Service Station Vs Mobil Oil Kenya Limited & another [2004] eKLR** which cited with approval the case of **Nilani Vs Patel (1969).**

10. It was argued that the delay for 24 months was inordinate and the respondents were accused of being guilty of laches as their explanation on failing to fix the matter for hearing was unproven and baseless. It was said that there had been no evidence of effort made towards fixing the matter for mention. According to the applicant the respondents were woken up from their slumber with the filing of the present application.

11. On whether the applicant will be prejudiced by the delay. It was submitted that the pendency of the suit has denied the applicant's their constitutional right to a fair trial as they suffer the risk of unavailability of witnesses and loss of documents. According to the applicant the respondents will not suffer any prejudice and the application should therefore be allowed.

12. The respondent's submissions were filed on 29.10.2021. They relied on the averments on the replying affidavit and urged the court to dismiss the application and allow the matter to proceed for hearing.

ANALYSIS AND DETERMINATION

13. I have considered the application, the response made, and the rival submissions. I have also looked at the court record. The sole issue for determination, is whether the suit herein should dismissed for want of prosecution.

14. The law on dismissal of suit for want of prosecution is provided under Order 17 Rule 2(1), which provides as follows:

"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." Further Order 17 Rule 2(3) states thus: *"Any party to the suit may apply for its dismissal as provided in sub-rule 1"*

15. In the case of **Argan Wekesa Okumu v Dima College Limited & 2 others [2015] eKLR** the court held that "*The Principles governing applications for want of prosecution are well settled and have been established by a long line of authorities. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the Defendant is likely to be prejudiced by such delay. As such the 3rd Defendant in this case must meet the burden of proof in seeking the dismissal of the Plaintiff's case for want of prosecution. The said case further cited with approval the case of* **Ivita –vs-Kyumbu (1984) KLR 441** *where it was stated... the decision of whether or not to dismiss a suit is discretionary and this Court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same.*

16. On whether there was delay in prosecuting the matter and the reason for such delay. The suit herein is said to have been last in court on 22nd November 2018. This is close to two years from time of filing the suit until the time the present application was filed. There is indeed delay in prosecuting the matter. The delay is however said to be attributed to a directive by the previous judge for the registry to give priority to matters for years 2016 and before when it came to fixing the matter for hearing.

17. I have carefully considered the explanation given by the respondents and even if there was a directive for the registry to not fix matters for hearing for the year 2016 and before, I agree with the applicant that respondents have not shown any attempt or effort in fixing the matter for hearing from the year 2018 to date. There is no evidence of attempt to even confirm whether such directive has been lifted or the progress the courts have made in issuing dates for hearing. I therefore find that the explanation is not satisfactory and the delay for a period of two years is therefore inordinate.

18. The applicants have further been said to also have an equal duty to prosecute the matter. It is indeed proper that both parties play a role in ensuring prosecution of a matter to it's conclusion. However courts have held that such duty is on the plaintiff. In the case of **James Mwangi Gatundu v Mastermind Tobacco (K) Ltd [2018] eKLR** the court observed that **"***It was the Plaintiff who instituted the suit and it was his duty to prosecute it to its logical conclusion"*. The applicant though having a duty to prosecute the suit, it is only fair for the party that dragged it to court to have the greater burden in ensuring the matter is prosecuted to the very end.

19. On whether justice can be done despite the delay. The applicant has on it's part argued that they will suffer prejudice as the continued delay in prosecuting the suit impinges on their right to fair hearing. They have stated that they suffer the risk of unavailability of witnesses and loss of documents due to the constant change of staff in the organization. The respondents on their part filed this suit seeking orders of adverse possession on the subject suit of land. It is their argument that if the application is granted they will be evicted from land they have resided on for over 60 years.

20. I note that this suit had been active until November 2018 and that the only thing pending before the court, is hearing of the applicant's application. The applicant has a right to a fair hearing, one that is not delayed to ensure that the ends of justice are met. However, the respondents too have a right to be heard and not to be thrown from the seat of justice. In the circumstances the respondents will suffer greater prejudice of the suit is dismissed at this juncture. To me, the orders for dismissal of suit are to be applied as a last resort and courts should always strive to save a suit.

21. In the case of ***Serve in Love Trust Africa v Abraham Kiptarus Kiptoo & 2 others; Ambrose Kiprop & 2 others (3rd Parties/Respondents) [2020] eKLR*** it was observed that *"striking out of suits is a draconian measure which should be used sparingly in the interest of justice. If a matter is hopeless and an abuse of the court process, then the court will not hesitate but*

apply the draconian measure to ensure that the dignity of the court is not taken away by such cases which are purely an abuse of the court process.

22. Further in discussing the principles of right to be heard and the right to administer justice in an application for dismissal of a suit, the court in the case of ***John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation) [2015] eKLR*** stated as follows:

"*The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 159 of the Constitution. Article 50 coupled with article 159 of the Constitution on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such matter of reinstatement of a suit which has been dismissed by the court. These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that; courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such acts are comparable only to the proverbial ''Sword of the Damocles'' which should only draw blood where it is absolutely necessary.*

In placing reliance on the above case laws I am inclined to dismiss this application and allow the matter to proceed for hearing. I do this on condition that the respondents shall set it down for hearing within the next 90 days otherwise the suit shall stand dismissed. Further, the respondents have occasioned delay in prosecuting the suit and shall therefore bear the cost of this application.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 16TH DAY OF DECEMBER 2021.

In the presence of M/s Mutegi for Mugambi Njeru for applicants and Kibicho for the respondents.

Court Assistant: Leadys

A.K. KANIARU

JUDGE

16.12.2021

While the design, structure and metadata of the Case Search database are licensed by Kenya Law under a Creative Commons Attribution-ShareAlike 4.0 International, the texts of the judicial opinions contained in it are in the public domain and are free from any copyright restrictions. Read our Privacy Policy | Disclaimer