



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MIGORI

ELC CASE NO. 757 OF 2017 (O.S)

MWITA TARURU.....PLAINTIFF/RESPONDENT

VERSUS

JOSEPH MARWA MUNIKO.....1ST DEFENDANT/ RESPONDENT

WILLIAM OLE MATA MUKUT....2ND DEFENDANT/ APPLICANT

RULING

INTRODUCTION

1. By Notice of Motion dated 7th May, 2021 the 2nd Defendant/ Applicant sought for the following orders: -

a. THAT this Honourable Court be pleased to issue an order dismissing the instant suit for want of prosecution.

b. THAT costs of this Application be provided for.

2. The application is based on the 18 grounds thereof and the Supporting Affidavit sworn by WILLIAM OLE MATA MUKUT on 07.05.2021. The applicant avers that the Plaintiff has made no effort to have the matter set down for hearing from the 26.11.2019 which period is over 12 months, thus showing no interest in prosecuting his case.

3. The Applicant went further to outline the various dates that the matter has been before the court since 2014 having been instituted vide an Originating Summons filed on 07.05.2014 and registered as Kisii OS No. 177 of 2014; the suit was subsequently transferred to Migori ELC court sometimes in 2017. On 04.07.2019 when the matter was coming up for hearing, the plaintiff's counsel informed the court that the plaintiff had passed on and requested for time for purposes of substitution. The Application for substitution was allowed on 21.11.2019 and the Plaintiff was to file an amended Originating Summons.

4. On 26.11.2019, when the matter came up for mention before the court, the plaintiff's counsel prayed for a further mention date to confirm the filing of an Amended Originating Summons. The amended O.S. was filed on 13.02.2020 but has never been served upon the Defendants to date.

5. On 04.11.2020, the court fixed a mention date on its own motion for the 29.04.2021 but on the said date, the plaintiff did not attend court. It is therefore the Applicant's contention that justice delayed is justice denied and thus urged the court to grant the orders sought in the interest of justice.

6. The 1st Defendant/ Respondent filed a response to the Application dated 23.09.2021 in support of the same while the Plaintiff/ Respondent filed a Replying Affidavit dated 28.09.2021 opposing the said Application.

7. The 1st Defendant averred that the suit which began formally as ELC No. 177 of 2014 at Kisii High Court failed to proceed from 2014 to 2018 before the same was transferred to Migori ELC court. Further, it is his position that in Migori, the Plaintiff has failed to proceed with the case from 2018 to 2021 thus making it a total of 8years without the plaintiff proceeding with his case. Consequently, he supported the Application dated 07.05.2021 for dismissal of the plaintiff's claim for want of prosecution; which according to him has taken more than 12months from the date of filing without proceeding.

8. The Plaintiff/ Respondent's contention on the other hand was that the family of the deceased have always been willing and ready to proceed with the matter to finality. He posited that averments contained in the application confirmed the various steps that had been taken by the plaintiff in the matter and thus it cannot be said that he lost interest.

9. He further stated that it is in the interest of justice that all parties in the matter be heard on merit and a determination made thereafter. He maintained that the last time the matter was before the court was on 29.04.2021 and that the 2nd defendant was also at liberty to fix the matter for hearing.

10. On 29.09.2021, this court issued directions that the Application herein be disposed by way of written submissions. The 2nd Defendant/ Applicant, through the firm of M/S Apondi & Co. Advocates filed their submissions dated 27.10.2021, the 1st Defendant/ Respondent through the firm of M/S S.M Sagwe & Co. Advocates filed their submissions dated 12.10.21 while the Plaintiff/ Respondent through the firm of Kerario Marwa & Co. Advocates filed their submissions on 15.12.2021. I have read and considered the rival submissions, the authorities cited therein and I have taken the same into account in arriving at my decision.

ISSUES FOR DETERMINATION

11. Consequently, it is my considered view that the sole issue arising for determination therefrom is;

A. Whether the Plaintiff's suit should be dismissed for want of prosecution.

ANALYSIS AND DISPOSITION

A. Whether the Plaintiff's suit should be dismissed for want of prosecution.

12. The law relating to dismissals for want of prosecution is provided under Order 17 Rule 2(1) and (2) of the Civil Procedure Rule which provides as follows:

2 “(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 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.

13. The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. In **Ivita vs Kyumba [1984] KLR 441** the court held as follows: -

“The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court.” (emphasis mine)

14. Further, the court in the case of Mwangi S. Kimenyi -vs- Attorney General and Another, Civil Suit Misc. No. 720 of 2009, restated the test and set out the guiding principles in an application for dismissal for want of prosecution as follows: -

“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.”

15. The legal implication of the threshold set out in Order 17 Rule 2 above is that a suit qualifies to be dismissed for want of prosecution if;

a. no step/action has been taken in the suit by either party for at least one year (12months) preceding the presentation of the application;

b. that there has been inordinate and inexcusable delay on the part of the Plaintiff;

c. whether the said delay would cause grave injustice to the defendants if the case were to be allowed to proceed to trial notwithstanding any preceding delay on the part of the plaintiff;

d. whether owing to the said delay, a fair trial can still be achieved.

16. In determining an Application of this nature, this court is called upon to carefully examine and evaluate the court record, the grounds put forth by the applicant in advancing the view that he would be exposed to grave injustice if the suit were to proceed to trial after the delay, the explanation tendered by the respondent and the general prevailing circumstances within the judicial system at the time of the alleged inaction.

19. The 1st ground to be established is whether the inaction in question is for a period of 12months as statutorily required. The Applicant contends that the Plaintiff/Respondent has not taken any step in prosecuting his claim since 13th February, 2020 when he filed an Amended Originating Summons. The Application herein was filed on 07.05.2021. The period between the filing of the present Application and the last step taken by the Plaintiff/Respondent is around 14 months, it is therefore true that the period in question is more than the 12months as envisaged in the civil procedure rules.

19. The second element to be considered is whether the said delay is inordinate and inexcusable and in determining this, I will take into account the allegations made by the Applicant vis-à-vis the explanation/ reasons given by the Plaintiff/ Respondent for the delay. I have looked at the Replying Affidavit sworn by the plaintiff in response to the allegations made by the applicant and I have noted that no plausible explanation has been given for the over 12 months delay. However, in an attempt to salvage the situation, the plaintiff in his submission has given an explanation for the delay. I need to point out that submissions are not pleadings and the plaintiff cannot be seen adducing evidence in his submissions, the same amounts to filing a further affidavit without leave and adducing evidence disguised as submissions.

19. Be that as it may, looking at court record and the general prevailing circumstances within the judicial system at the time of the alleged inaction; I find that the period majorly fell within the covid-19 pandemic period. Thus, this court takes judicial notice of the Covid-19 pandemic and the resultant disruptions of the normal court operation in the year 2020. These were factors beyond the control of the either parties and the plaintiff should not be punished for the same.

20. In **Naftali Opondo Onyango vs National Bank of Kenya Ltd [2005] eKLR**, the court noted that a court should be slow to dismiss a suit for want of prosecution if it is satisfied that the suit can proceed without further delay. The court stated as follows: -

“However, in deciding whether or not to dismiss a suit under rule 6 it is my view that a Court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay, that the Defendant will suffer no hardship and that there has been no flagrant and culpable inactivity on the part of the Plaintiff.”

21. This court has taken cognizance of the various activities that have been taking place and involved in the suit; this suit was transferred from Kisii sometimes in 2017, the plaintiff died hence necessitating his substitution and the process involved in the same from the chief’s letter, institution of the succession proceedings and the limited grant ad litem thereof to the family agreeing on a particular administrator and the subsequent substitution process. Though the delay has been prolonged, I find that the inaction was due to factors beyond the control of the plaintiff in the circumstances and hence the same is excusable.

22. Further, I find that no grave injustice will be occasioned to the defendants if the matter were to be allowed to proceed to full trial, the preceding delay on the part of the plaintiff notwithstanding. The plaintiff’s claim raises issues of ownership of the suit property and capacity of the 1st Defendant to sell the suit land as well as the proprietary rights and interests held by the 2nd Defendant over the suit property. I thus find that determining the matter on merit after a full trial will deal with those issues with finality.

23. In view of the circumstances and guided by the jurisprudential principles above; I find that the reason for the delay is justified and/or sufficient in the circumstances and consequently the delay is excusable and the matter can still proceed for trial without further delay. I am further guided by the provisions of Article 159 (2)(d) of the Constitution, in finding that it is in the interest of justice to allow the plaintiff prosecute his claim and to have the matter determined on merits.

CONCLUSION

24. The Upshot of the foregoing is that the Application dated 7th May, 2021 is **not merited** and I accordingly proceed to dismiss the same with no order as to costs. In addition, I have noted that this is a 2014 matter and I hereby direct the Plaintiff to fix the matter for Hearing of the main suit within 30 days and Parties to fully comply with Order 11 and regularize their respective positions within 14days from the date of this ruling to avoid unnecessary adjournments.

It is so Ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MIGORI ON 22ND DAY OF FEBRUARY, 2022

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of:-

Ms. Apondi for the Applicant

Nonappearance for the Respondent

Tom Maurice - Court Assistant



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