



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 121 OF 2018

LIMUTTI HOLDINGS LIMITED.....PLAINTIFF

-VERSUS-

1. KAHINDI CHARO

2. JACKSON KLACHU

3. MWANASOMO SAID

4. KILIFI PLANTATIONS LIMITED

5. THE DIRECTOR OF SURVEY

6. LILIAN MARY MUTTIMOS

7. JOSEPH BENEAH MUTIMOS

8. ROSEMARY NG'ONGA

9. NARAN KUNVERJI LAJI VEKARIA

10. HARISHCHANDRA RANJI GAJIPRIA

11. THE REGISTRAR OF LANDS MOMBASA

12. THE ATTORNEY GENERAL.....DEFENDANTS

RULING

This ruling is in respect of a Notice of Motion dated 7th September, 2021 by the 1st to 4th Defendants seeking the following orders: -

1. THAT the suit against the Defendants herein be dismissed with costs for want of prosecution.

2. THAT the defence to the counterclaim filed by the Plaintiff be struck out on the grounds that it is frivolous, vexatious, may embarrass or delay the fair of this case and is otherwise a total abuse of the process of this Honourable Court.

3. THAT the costs of this application and the entire suit be awarded to the 4th Defendant.

4. THAT the 4th Defendant be granted leave to prosecute the counterclaim *against the Plaintiff and the 5th to 12th Defendants.*

Counsel agreed to canvas the Application vide written submissions which were duly filed.

1ST TO 4TH DEFENDANTS' SUBMISSIONS

The Applicant relied on the supporting affidavit of Christopher Denis Wilson who gave a brief background to the case and the application. The applicant deponed that the Plaintiff filed this suit vide a Plaint dated 31st May 2018 contemporaneously with an application seeking orders of injunction restraining the Defendants from erecting any structures or carrying out any construction of any nature or otherwise howsoever or entering upon or dealing with the suit premises. The Honourable Court granted the Plaintiffs an interim order of injunction.

The Applicant further deponed that the 1st to 3rd Defendants entered appearance through their advocates on record and the 4th Defendants were joined in these proceedings whereby they filed a counterclaim against the Plaintiffs and the 5th to 12th Defendants in the Counterclaim with leave of the Honourable court.

It was the Applicant's averment that the Plaintiff's application for injunction was heard alongside the 4th Defendants' application dated 25th July 2018 and a ruling delivered on 5th December 2019 whereby the Honourable Court ordered that the status quo be maintained That the only action that was taken in the case was on 4th February 2020 by the 4th Defendant who filed a Notice to Produce served upon the Plaintiffs' advocate.

It was the Applicant's case that the Plaintiff has neglected or refused to set down the matter for hearing as the last time this matter was in court was 5th December, 2019 which has made it difficult for the Defendants to prosecute their counterclaim. That this has caused tremendous prejudice as the Defendants were in the process of developing the land in accordance with their plans before the interlocutory injunction and order of status quo were issued.

The Applicant therefore urged the court to dismiss the Plaintiff's case and the Defendants be allowed to prosecute their counterclaim.

Counsel filed submissions and relied on Order 17 rule 2(3) as read with sub-rule (1) of the Civil Procedure Rules, which provides that any party to a suit may apply for its dismissal where no steps have been taken for one year to prosecute the same.

Mr. Ole Kina submitted that the Plaintiff has not taken any steps to prosecute the case for more than one year and that the inaction is prejudicial to the Defendants whose development plans have been stopped by a court order. That the 4th Defendant though in possession of the suit property, is unable to enjoy all the benefits of an owner as enshrined under Article 40 of the Constitution and Section 26 of the Registration of Land Act.

Counsel also submitted that the Plaintiff has not offered any plausible explanation or justification as to why they have not taken any steps to prosecute the suit since it was last in court in 5th December, 2019. Further that the Plaintiff has not shown how COVID 19 pandemic affected the prosecution of the case and similarly he noted that the court has conducted numerous hearings online since then and the submission that the Plaintiff was unable to prosecute the case on account of Covid 19 is a hollow excuse and the Honourable court should ignore and or reject that explanation.

Counsel relied on the case of *Ivita vs Kyumbu (1975) eKLR* where the court held that it is the duty of the Plaintiff to prosecute his case and if he fails to do so, the case may be dismissed for want of prosecution.

Mr. Ole Kina took issue with the Replying Affidavit of Mr. Omollo counsel and stated that there is nothing in opposition to the 4th Defendants application for striking out of the Plaintiffs defence to the 4th Defendant's counterclaim. Counsel urged the court to strike out the Replying Affidavit sworn by Mr. Omollo as the advocate should not have sworn an affidavit that raises contentious issues and cited the case of [*Magnolia PVT Limited vs Synermed Pharmaceuticals \(K\) Ltd \(2018\) eKLR*](#). In this case court held that whereas there is nothing barring an advocate from swearing an affidavit in appropriate cases, where the matters deposed to are agreed or on purely legal positions and that advocates should refrain from the temptation of being the avenue through which disputed facts are proclaimed.

Counsel submitted extensively of the case citing several authorities and urged the court to allow the application, strike out the defence to counterclaim and dismiss the Plaintiff's suit against the Defendants for want of prosecution.

PLAINTIFF'S SUBMISSIONS

The Plaintiff/Respondent filed a Replying Affidavit sworn by advocate Vincent Omollo on the 19th day of October, 2021 where he deposed that the 4th Defendant in its defence and counterclaim joined various other parties to the suit as Defendants. That having joined various parties to suit as Defendants it was the duty of the 4th Defendant (as the Plaintiff in counterclaim) to serve court process on those parties that it sued. That the Defendant has failed to serve the court process initiated by it upon at least some of those Defendants to its claim with the result that the pleadings in this suit are still open.

Counsel submitted that the delay in prosecuting the suit has been caused by failure on the part of the 4th Defendant to serve all the parties with its claim papers and that the delay was also caused by COVID 19 pandemic which paralyzed work in all the courts.

It was counsel's submission that the 4th Defendant has not stated that the delay has prejudiced it and that the 4th Defendant is in the same position as a Plaintiff in the counterclaim hence also under a duty to prosecute the case without delay.

Counsel relied on the case of *George Gatere Kibata vs George Kuria Mwaura & Anoter (2017) eKLR* where the court set out the criteria to be applied in considering whether or not a suit should be dismissed for want of prosecution.

Counsel submitted that if the Plaintiff's suit were to be dismissed for want of prosecution then the Defendant's counterclaim cannot proceed as there would be no existing suit to make a counterclaim against therefore making their pleadings defective and this would be a waste of court's time.

On whether the defence filed by the Plaintiff against the counterclaim should be struck out Counsel relied on the case of *County Council of Nandi vs Ezekiel Kibet Rutto & 6 others (2013) eKLR*, Order 2 rule 4 of the Civil Procedure Rules and the case of *Evans Kidero vs Speaker of Nairobi City County Assembly & another (2015) eKLR* where the court stated that the burden where fraud has been pleaded is on the claimant to prove and that allegations of fraud must strictly be proved and that great care needs to be taken in pleading allegations of fraud or dishonesty

Counsel therefore urged the court to dismiss the application and set down the case for hearing.

The 7th Defendant, **JOSEPH BENEAH MUTTIMOS** filed an Affidavit sworn on the 21st October, 2021 where he deposed that the 4th Defendant filed a suit against him and has not served him with the pleadings. He further deposed that that he was informed by the Plaintiff's advocate about the 4th Defendant's suit against him and he is in the process of instructing counsel to appear on his behalf. That the 6th Defendant who is his wife has equally not been served by the 4th Defendant.

ANALYSIS AND DETERMINATION.

This is an application by the 1st to 4th Defendants which urges the court to dismiss the Plaintiff's suit for want of prosecution and that the defence to counterclaim filed by the Plaintiff be struck out.

Order 17 Rule 2(1), governs dismissal of suits for want of prosecution, 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”

The Defendants have opted to file this application as provided for under the rules which states that any party can apply for the dismissal of the suit. Counsel gave a comprehensive background to the case and what had transpired leading to the filing of this application.

The 1st to 4th Defendants filed a counterclaim which has triggered the filing of this application. The Plaintiff has explained that the 4th Defendant introduced other Defendants to the suit whereby the 6th and 7th Defendants have stated that they have never been served with the pleadings to the case. That they were just informed by the Plaintiff about the case.

When a matter is filed in court, all the parties are under a duty to ensure that the matter is prosecuted expeditiously regardless of whether a party is a Plaintiff or Defendant. Procedures are in place where a party fixes a hearing date ex parte, such party is under a duty to serve and show proof of service by filing and affidavit of service and if the court is satisfied with the service can proceed or dismiss the suit for non-attendance. I have brought this angle of argument because the Defendants claimed that they have not been able to prosecute their counterclaim due to the fact that the Plaintiff has not prosecuted the case. The Defendant has two options, either to fix the case for hearing or file an application for dismissal for want of prosecution and meet the threshold for such dismissal as was held in the case of *Ivita vs Kyumbu (1975) eKLR (supra)*.

The test is whether the delay is prolonged and inexcusable. The court should also be slow in dismissing suits for want of prosecution as these are draconian orders. The court can order that the matter be fixed within a specified period of even penalize the offending party with payment of costs.

In the case of *Naftali Opondo Onyango vs National Bank of Kenya Ltd [2005] eKLR* the court held that

“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.”

The Plaintiff put up a spirited fight in opposition to this application, blamed Covid -19 and the fact that the Defendant introduced other Defendants to the suit who also confirmed that they had not been served with the pleadings. The Plaintiff is not blameless even though the explanation can pass as an attempt to give an explanation.

The court has discretion to allow the Plaintiff to prosecute its case but give conditions that the matter be fixed for hearing within a certain period. This would be in the interest of justice that a party is not locked out of the seat of justice. The court should also balance the rights of the litigants taking into account that justice delayed is justice denied.

The upshot is that the Application dated 7th September 2021 is hereby dismissed with each party bearing their own costs. Parties to comply with Order 11 within 30 days and fix the case for hearing.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 24TH DAY OF MARCH, 2022

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.



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