



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**ELC MISC. APPLICATION NO. 30 OF 2015**

**(FORMERLY CONSTITUTIONAL PETITION NO. 52 OF 2011)**

**IN THE MATTER OF : ENFORCEMENT OF THE BILL OF RIGHT'S UNDER ARTICLES  
22(4) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF : ALLEGED CONTRAVENTION FO THE BILL OF RIGHTS AND  
CONSTITUTION UNDER ARTICLE (22) (4) AND 40 OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**1. ABDULHAMID EBRAHIM AHMED.....PETITIONERS**

**-VERSUS-**

**1. AUSTION SALMOM KITOLOLO**

**2. THE RREGISTRAR OF TITLES**

**3. MIDDLE EAST BANK KENYA LIMITED.....RESPONDENTS**

**RULING**

1. The notice of motion dated 5<sup>th</sup> June 2015 is brought under Order 17 Rule 2 (3) of the Civil Procedure Rules and section 1A and 3A of the Civil Procedure Act seeks ;

**1. The petition be dismissed with cost for want of prosecution**

2. The application is supported by the several grounds on the face of it and the affidavit of Eng. Salmon Kitololo the 1<sup>st</sup> Respondent/Applicant. The gist of the motion is that the Petitioner has not taken any steps to prosecute this Petition since 21.11.2012. That this delay is inordinate and inexcusable therefore it is in the interest of justice that the Petition be dismissed.

3. The motion is supported by the 3<sup>rd</sup> Respondent. However it is opposed by the Petitioners. The Petitioners have filed a Replying Affidavit through the 1<sup>st</sup> Petitioner. In explaining the delay which they depose is not inordinate, the 1<sup>st</sup> Petitioner stated that the delay in obtaining a hearing date was occasioned by policy of allocation of dates per quota per law firm and a judicial review division manned by one Judge. He also deposed that there has been scarcity of Judges in

- Mombasa and lastly that they had awaited the outcome of H. Civil case No 40 of 2006 which touched on the same subject matter before setting this matter down for hearing.
4. The 1<sup>st</sup> Petitioner deposes that the delay in listing the matter was due to circumstances beyond their control. He contends that Courts are constitutionally required to hear matters on merit and not dismissal for want of prosecution. He asked the Court to dismiss the present motion.
  5. Both parties submitted for and against the motion. In brief the 1<sup>st</sup> Respondent/Applicant submits that over 3 years have lapsed without any steps taken to prosecute the matter. He quoted **Mukisa Biscuits vs West End Distributors (1969) E A 969** that puts the duty of bringing a suit to early trial upon the plaintiff. That such delay runs contrary to the provisions of section 1A of Civil Procedure Act. That plaintiffs are delaying intentionally to prosecute this matter because they are enjoying the interim orders of injunction. Further that the Applicant is prejudiced because having bought suit property, he has been denied its quite use and peaceful enjoyment. Last that no reasonable explanation has been given for the delay.
  6. The Petitioner on his part has submitted on the provisions of the Rules made under article 22 (3) of the Constitution more particularly article 22 (3) (d) on observance of the rules of natural justice. He submits they are ready and willing to prosecute the petition. He relied on the decisions of **Eastern Produce (K) Ltd vs Rongai Workshop & Transporters Ltd & Another (2013) eKLR** and **Moses Munira Maingi vs Maingi Kamuru & Another (2013) eKLR**. He urged the Court to have the Petition heard on merits.
  7. I have considered the pleadings relating to the application and the submissions rendered by both parties. Under Order 17 rule 2 of the Civil Procedure Rules allows Courts are mandated to issue show cause notice why a suit should not be dismissed if no step is taken within a year after it is filed. And where no cause is shown to the satisfaction of the Court, the suit is to be dismissed.
  8. In showing cause for not prosecuting this Petition, the Petitioner raises two main reasons i.e quota system policy and scarcity of Judges in Mombasa. In regard to the allocation of dates for each law firm per quota, the Petitioners advocates did not specify how many dates they were allocated during the three year period and how they utilized it. Neither did they have any evidence of attempts made to secure hearing dates for this petition.
  9. The second explanation on scarcity of Judges in Mombasa is neither here nor there. Currently we have single Judges in each of the divisions and cases are proceeding. I am not satisfied this is a genuine reason that would justify the Petitioners slumber. In any event such scarcity cannot affect only him.
  10. On the aspect of the subject matter in dispute being the same as the one in HCCC No 40 of 2006 and which the Petitioner decided to await its outcome, I fault this on two accounts. First the Petition was filed six years after the Civil Suit No 40 of 2006 had been filed. Nothing would have been easier for the Petitioner to wait for that matter to be concluded first before filing this petition. Instead they filed this Petition which clogged the Court system then sat back. Secondly, the suit HCCC No 40 of 2006 was concluded on 13.6.2014 and the Petitioners still did not move the Court within reasonable time to fix their petition for hearing. The applicant also did not state the impact of the decree in HCCC No 40 of 2006 as a way forward since they submitted they wanted that suit concluded first,
  11. I am alive to the jurisprudential principles that hold that dismissal of suits should be a last option exercised by Courts as the core mandate of the Court is to dispose of matters on merits (dispensing substantive justice). The hearing of matters on merits is only available to parties who are keen to prosecute their cases. The Petitioners' advocate submitted that no prejudice would be occasioned to the Respondent. Nothing can be further from the truth that the pendency of a suit is itself an inconvenience to parties bound by it.
  12. In conclusion, I am satisfied that there has been undue delay in prosecuting this petition and there has been no plausible reason for that delay and therefore I find this petition is a good candidate for dismissal for want of prosecution. The notice of motion dated 5<sup>th</sup> June 2015 is allowed. This petition is hereby dismissed for want of prosecution with costs to the Respondents.

**Ruling Dated and Delivered in Mombasa this 19<sup>th</sup> day of April, 2016**

**A. OMOLLO**

**JUDGE**