



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**ELC CASE NO.121 OF 2004**

PHILIP MUSYIMI KITUKU..... 1<sup>ST</sup> PLAINTIFF

BEATRICE NZILANI KING'OO ..... 2<sup>ND</sup> PLAINTIFF

MUNINI KING'OO ..... 3<sup>RD</sup> PLAINTIFF

**VERSUS**

WAMBUA KING'OO MUTWANYAA .....1<sup>ST</sup> DEFENDANT

SAMUEL NGUMI ITUMBO .....2<sup>ND</sup> DEFENDANT

**R U L I N G**

1. The Applicants/Defendants **Motion** dated **5.12.2012** was filed on 6.12.2012 seeking the dismissal of the suit for want of prosecution, eviction, removal of restriction and release of title of suit land and for the OCS Makueni to ensure compliance of the orders issued in the motion. The Application is based on the grounds that the Plaintiff has failed in the last over 18 years to take steps to expedite hearing of the suit.
2. Further the Respondent caused the District Land Registrar Makueni to enter restriction in the suit property register without any reasonable cause. The application is supported by affidavit of Wambua Kingoo Mutwanyaa 1<sup>st</sup> Defendant/Applicant sworn and filed on 6.12.2012. The Plaintiffs/Respondents were served via their advocates on record but have not filed any reply to oppose the motion nor attend court when matter came for hearing.
3. The motion is brought under Section 3A, Order 16 Rule 5(d) and 6 Civil Procedure Rules and Section 23 Registration of Titles Act and Section 4(1) of Limitation of Actions Act. The motion having been filed on 6.12.12 the provisions cited are not correct as Civil Procedure Act 2010 changed same provisions of order 16 rule 5 (d) and 6 to Order 17, 2 (3) for dismissal for want of prosecution and for removal of restrictions changed to Section 78(2) of Land Registration Act 2012.
4. Order 17 rule 2 sub-rule 3 is to the effect that if in the suit one year lapses without any party making application or taking any steps, any party can apply to dismiss the suit. Prior to the filing of this motion dated 6.12.2012, the suit was fixed for hearing on 15.2.06. That is a span of 8 years plus of delay in taking any steps. The Respondents have not even filed a reply to explain over 8 years of delay.
5. In **MOGAKA VS. NBK (K) LTD AND 2 OTHERS (2009) eKLR**, the court held that;

***“the order of dismissal is discretionary and should only be issued where the delay is inordinate, inexcusable and where it causes or is liable to cause prejudice to the parties. I find that a delay of 5 years going on to 6 years extremely inordinate. The plaintiff has not bothered to come and explain”.***

6. The circumstances in our case and in the cited authority are the same. However, in our case the delay is even more as it is over 8 years since the last time the suit was in court for hearing to the time the motion was filed to dismiss suit. The court finds that there is no justification to let the Plaintiffs to slumber on their right to prosecute the instant suit and holds that the same is for dismissal.
7. On prayer for eviction in the motion, the same is misconceived. The Defendant has not counterclaimed in their defence and thus they cannot short circuit the procedure and get eviction orders via this mode of application.
8. On the issue of removal of the restriction and release of the title, the court observes that the same was lodged on 6.6.01 by the land registrar before the suit was filed. Section 78 (2) Land Registration Act (2012) requires before restriction is removed the registrar has to be served with notice. The same has not been done in the instant application.
9. The court will therefore require the Applicants to file and serve the registrar with an application to remove restriction in terms of Section 78(2). The court therefore makes the following orders:
  1. The suit herein is dismissed with costs to the Defendants/Applicants.

**Signed and Delivered at Machakos, this 16<sup>th</sup> day of January, 2015.**

**CHARLES KARIUKI**

**JUDGE**