

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 238 OF 2009

KAMULA KYATU MUTUKU..... PLAINTIFF/RESPONDENT

VERSUS

1. SALIM KAMULA
2. AGRICULTURAL FINANCE CORPORATION DEFENDANTS/APPLICANTS

R U L I N G

1. The application dated 4/12/2013 seeks orders that the suit herein be dismissed for want of prosecution for the Plaintiff's failure to prosecute the same for a period in excess of two years.
2. The affidavit sworn by the 1st Defendant/Applicant in support of the application states that the suit was filed on 30/7/2009 and the pleadings were closed on 18/2/2010. That the Plaintiff has failed and/or neglected to set the suit down for hearing for a period of more than two years.
3. The application is opposed. The Respondent filed a replying affidavit which states that steps have been taken to prosecute this matter. That the case was fixed for hearing on 21/10/2013 but the same was not cause listed. That this being a land case, the same was awaiting the **Constitution of the Environmental Land Court in Machakos**.
4. The 2nd Defendant did not file any response to the application.
5. The application was canvassed by way of oral submissions. I have duly considered the same.
6. The court record reflects that on 17/04/2013, the case was fixed for hearing on 21/10/2013. A Hearing Notice sent to the counsel for the 2nd Defendant is exhibited (Annexure "KKM1"). The said annexure is duly stamped by the 2nd Defendant as having been received by the 2nd Defendant on 15/5/2013. It is not clear why service was not effected through the 2nd Defendant's Advocates. It is also not clear whether the 1st Defendant/Applicant was served. It seems that there were no letters of invitation sent out to the Defendants to participate in the fixing of the hearing date.
7. Be as it may, the fixing of the case for hearing on 17/04/2013 constitutes taking of a step as envisaged under Order 17 rule 2 of the Civil Procedure Rules. From the date the case was fixed for hearing to the date the application was dismissed, one year had not lapsed.
8. With the foregoing, I dismiss the application with costs in cause. The suit to be given a hearing date on priority basis.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 24th day of **February** 2015.

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B. THURANIRA JADEN

JUDGE