

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 348 OF 2013

SUMAC DEVELOPMENT CO. LIMITED.....PLAINTIFF

VERSUS

GEORGE MUNYUI KIGATHI

JENNIFER NGINA KIGATHI.....DEFENDANTS

RULING

1. There are two applications for this court's determination. The first one is the Defendants' application dated 24th December, 2014 seeking the dismissal of this suit for want of prosecution. In support of the application Stephen Gitonga Mureithi Learned Counsel for the Defendants stated that since the filing of this suit on 27th August, 2013, the Plaintiff has taken no steps to prosecute the same and that it was therefore apparent that the Plaintiff is not interested in prosecuting this suit. He alleged that the delay in prosecuting the suit is unreasonable, inexcusable and has occasioned the Defendants severe financial losses.
2. Duncan Mwaniki, the Managing Director of the Plaintiff swore a Replying Affidavit in response to the application. He explained that by the time the Defendants filed their defence on 24th October, 2013, the court's diary for the year 2013 had already been closed. That the Defendants gave notice of intention to enjoin the Government as a 3rd Defendant and before they could make their intended application, the court's diary for the year 2014 was closed in early 2014. He contended that the Defendants' application has not been made in good faith since the parties herein have not complied with the provisions of Order 11 of the Civil Procedure Rules owing to the notice to enjoin more parties.
3. The 2nd application is the Plaintiff's notice of motion dated 2nd February, 2015. The Plaintiff seeks leave to enjoin the Attorney General as the Defendants in this suit. The application is premised on the grounds set out on the body of the application and the supporting affidavit of Duncan Mwaniki. It is the Plaintiff's contention that it entered into an agreement for the purchase of L.R. No. Nairobi/Block 209/13310(**the property**) with the Defendants for a consideration of KShs. 6.7 Million. That the Plaintiff carried due diligence and lodged documents and obtained transfer upon payment of the requisite fees to the Government. The Plaintiff laments that despite so doing, it has not been given vacant possession of the property as the Government has laid claim over the property that it is public land. That the Plaintiff has been unable to develop the property as it has been marked for demolition by the government. It is averred that the Chief Land Registrar is intended to be joined to the suit for failure to inform and/or restrict transactions over the suit property if indeed the property was public land.
4. These applications were heard together. Ms. Mungai Learned Counsel for the Defendants submitted that there has been over one year's delay in prosecuting this suit and that the delay was inordinate. She argued further that the Plaintiff only woke from slumber to file the application dated 2nd February, 2015 after it was served with the application dated 24th December, 2014.
5. In contention thereto, Mr. Ngari learned counsel for the Plaintiff reiterated the averments in Mr. Mwaniki's affidavits. He stated that the delay in prosecuting this matter was occasioned by the Plaintiff's wait for the Defendants to enjoin the Attorney General as expressed in their statement of defence at paragraph 13. He stated that the Plaintiff now seeks to enjoin the Attorney General as per the Defendants' expression in their defence. Counsel also sought to amend the application to read Kenya National Highway Authority as the body which marked the property for demolition. In response Ms. Mungai stated that she is not opposed to the application dated 2nd February, 2015.

6. I have considered the two applications. In my view, since the Defendant was not opposed to the Plaintiff's application for joinder of the Attorney General, the Defendants' application for dismissal for want of prosecution cannot succeed. The Plaintiff's delay was explained as having been occasioned by the Defendant's intimation that they will enjoin the Government into the proceedings. Land matters are very emotive and close to the hearts of many Kenyans. This is one such case. In view of the foregoing and for the fact that the Plaintiff's application is not opposed I find that the suit should be heard on merit. Accordingly, the Plaintiff's application dated 2nd February, 2015 is allowed and the party to be joined is Kenya National Highway Authority. The Defendant's application dated 24/12/2014 is dismissed. There will be no order as to costs.

Dated, Signed and Delivered at Nairobi this 22nd day of **May, 2015.**

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A. MABEYA

JUDGE