



**REPUBLIC OF KENYA**  
**ENVIRONMENT AND LAND COURT**  
**AT MALINDI**  
**LAND CASE NO. 45 OF 2011**

**MICHAEL CARNELL.....PLAINTIFF/RESPONDENT**

**=VERSUS=**

**1.WORBURN MANAGEMENT LTD**

**2. WORBURN ESTATE LTD.....DEFENDANTS/APPLICANTS**

**R U L I N G**

**Introduction**

1. Before me is the Defendants' Application dated 18<sup>th</sup> September 2013 and filed pursuant to the provisions of Order 17 Rule 2 (3) of the Civil Procedure Rules.
2. The Application is seeking for the following reliefs:
  - (a) **THAT this Honourable Court be pleased to give the Applicants herein a date on priority basis for the disposal of this Application.**
  - (b) **THAT this suit be dismissed for want of prosecution.**
  - (c) **THAT costs of this Application be provided for.**
3. The Application is premised on the grounds that since this matter was last in court on 8<sup>th</sup> June 2012, the Plaintiff has not taken any step towards prosecuting the matter and that the Defendant is unable to enforce the service charge payable as the Plaintiff has always indicated that the matter is in court.
4. The Plaintiff's advocate filed his Replying Affidavit on 28<sup>th</sup> November 2013 and stated that the Plaintiff had instructed him to commence out of court discussions; that he proceeded to have meetings with the Defendants' advocate and that the said negotiations did not proceed because the Defendants' director was said to be out of the country.
5. The Plaintiff's advocate finally deponed that he proceeded to fix the matter for hearing; that he also requested for an earlier pre-trial date in compliance with Order 11 of the Civil Procedure Rules and that he subsequently served the Defendants' advocated with the questionnaire.
6. Consequently, it was deponed, the Plaintiff has not gone to sleep and or lacked interest in the matter. The parties filed their respective submissions which I have considered.

### **Analysis and findings:**

7. It is true, as deponed by the Defendants' advocate that since this matter was last in court on 8<sup>th</sup> June 2012, the Plaintiff did not take any step to have the suit prosecuted expeditiously. The Plaintiff only fixed the matter for hearing when he was served with the current application.
8. The court has the discretion to grant an Application for dismissal of a suit for want of prosecution. However, for such an Application to succeed, the Applicant must show that the delay is inordinate, the inordinate delay is inexcusable and the Defendant is likely to be prejudiced by the delay (**see Allen Vs Sir Alfred Mcelpine & Sons (1968) I ALLER 543**).
9. In **Ngwambu Ivita Vs Akton Mutua Kyumbu HCCC No. 340 of 1971**, the court noted that the test is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. The Defendant has to show that he will be prejudiced by the delay.
10. The Plaintiff's claim is for injunction to restrain the Defendant from collecting the excess service charge pending the appointment of an independent auditor.
11. The Defendant has not shown the prejudice it is suffering with the delay of slightly over one year since the matter was last in court considering that the Plaintiff's Application for injunction was dismissed by the court. In any event, the Defendants will still be able to recover any service charge arrears from the Plaintiff in the event the matter is determined in their favour.
12. The Plaintiff has since filed a questionnaire in compliance with Order 11 of the Civil Procedure Rules, thus putting the mechanism of prosecuting this suit in motion. The suit should therefore be allowed to proceed to its logical conclusion.
13. Consequently, I find that the delay of slightly over one year to set down the matter for hearing, although in ordinate, is excusable in the circumstances of this case. The reasons given by the Plaintiff's advocate for the delay are plausible. Indeed, the Defendants' advocate has not denied that the Plaintiff attempted to have the matter settled out of court.
14. For the reasons I have given above I shall, which I hereby do, dismiss the Defendants' Application dated 18<sup>th</sup> September 2013, on condition that this suit is fixed for hearing and prosecuted within 90 days from the date of this Ruling. Each party shall bear its own costs.

Dated and Delivered in Malindi this **28<sup>th</sup>** Day of **February**, 2014.

**O. A. Angote**

**Judge**