



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CASE NO. 56 OF 2017**

FRANCIS KYENGO KALOKI.....1<sup>ST</sup> PLAINTIFF  
HARRISON MUTHOKA KALOKI.....2<sup>ND</sup> PLAINTIFF  
PHILOMENA KAMIA.....3<sup>RD</sup> PLAINTIFF  
FIDELIS NZOMO KALOKI.....4<sup>TH</sup> PLAINTIFF  
DAVID KALOKI.....5<sup>TH</sup> PLAINTIFF

**VERSUS**

CHRISTINE NZULA MAKENZIE.....1<sup>ST</sup> DEFENDANT  
TITUS NDILO KINGESI (Both sued as the legal representatives of the Estate of the late  
PETER MAKENZIE KALOKI-deceased).....2<sup>ND</sup> DEFENDANT  
HOMEWARD AGENCIES LIMITED.....3<sup>RD</sup> DEFENDANT

**RULING**

What is before Court for determination is the 3<sup>rd</sup> Defendant's Notice of Motion Application dated the 25<sup>th</sup> August, 2021 brought pursuant to Order 17 Rule 2(3) of the Civil Procedure Rules where it seeks the following orders:

- a. That this Honourable Court do dismiss the Plaintiffs/Respondents suit herein for want of prosecution.**
- b. That the cost of this Application be borne by the Plaintiffs/ Respondents.**

The Application is premised on the grounds on the face of it and the supporting affidavit of ANDREW MASILA MBALUTO its Director where he deposes that no steps has been taken by the Plaintiffs for more than one year, in this suit. Further, the last time the matter was in court was on 15<sup>th</sup> May, 2020 when a Ruling was delivered. He contends that the Plaintiffs inaction and indolence have unnecessarily prevented the 3<sup>rd</sup> Defendant from enjoying its proprietary right in land parcel number MAVOKO TOWN BLOCK 2/143 hereinafter referred to as the 'suit land'. He reiterates that that there must be an end to litigation and it appears the Plaintiffs have lost interest in this matter.

The Plaintiffs opposed the application by filing a replying affidavit sworn by one of them FRANCIS KYENGO KALOKI where he deposes that the said application is unmeritorious, incompetent and an abuse of the court process. He explains that following the court's ruling dated the 15<sup>th</sup> May, 2020, the Plaintiffs filed an amended Plaintiff and service was effected upon the Defendants. He contends that the Defendant/Applicant has since failed to make any reply to the Amended Plaintiff dated 8<sup>th</sup> February, 2021. He reiterates that it is the Defendant/Applicant laxity and inaction that is causing unnecessary delay to the suit. He states that the Defendant/ Applicant's application is premised on the ground that it owns the proprietary rights over the suit land yet the Plaintiffs also have an interest in the said suit land. Further, determination over the true ownership is yet to be concluded. He reiterates that Machakos ELC has not been giving dates for hearing of matters hence they have not been able to get a hearing date. He insists they are keen to have the matter finalized. He reaffirms that each party has a right to move the court if they feel the other party is not doing so.

The application was canvassed by way of written submissions.

### **Analysis and Determination**

Upon consideration of the instant Notice of Motion application including the respective affidavits and rivaling submissions, the only issue for determination is whether this suit should be dismissed for want of prosecution.

The 3<sup>rd</sup> Defendant/Applicant in its submissions insists the instant application is merited as for over one year the Plaintiffs have failed to take substantive steps to prosecute this suit. It reiterates that it lawfully acquired the suit land, subdivided it, and disposed of the resultant subdivisions to third parties who have settled thereon. It claims the Plaintiffs' indolence has injured the 3<sup>rd</sup> Defendant's proprietary rights. It further submits that the Plaintiffs have not provided any plausible reasons why they have failed to take steps to prosecute their purported claim.

The Plaintiffs in their submissions insist the delay has not been intentional and contumelious. They proceeded to explain that the delay was occasioned by the death of the 1<sup>st</sup> Defendant on 28<sup>th</sup> July, 2013 and the movement of the court file between Nairobi, Makeni and Machakos Courts. Further, that the Court file even disappeared as noted in court on 15<sup>th</sup> May, 2020 and this led in the delay in prosecuting the Application for substitution. They further submit that it is the Applicant that has failed to file an amended Defence. They reiterate that the Applicant has not demonstrated the prejudice it will suffer if the matter proceeds for full trial. Further, that it is in the interest of justice if the matter was allowed to proceed to full trial. To support their arguments, they relied on the following decisions: *Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium V. M. D. Popat and Others & Another (2016) eKLR*; *Argan Wekesa Okumu V Dima College Limited & 2 others (2015) eKLR*; *Mwangi S. Kimenyi Vs Attorney General & Another, Civil Suit Misc. No. 720 of 2009*; *Skyview Properties Limited & Another V Kennedy Amos Njoroge & 3 Others (2017) eKLR*; *Cheruiyot Edwin Mutai V Cyrus Ngaruiya (2020) eKLR* and *Sospeter Omariba Mogere V Mex Logistics Africa Limited (2021) eKLR*.

The legal provisions governing dismissal of a suit for want of prosecution is contained in Order 17 Rule 2 of the Civil Procedure Rules which stipulates thus:

**“(1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit. (2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit. (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1. (4) The court may dismiss the suit for non-compliance with any direction given under this Order.”**

From the court records and explanation in the Replying Affidavit, it is evident that the last time the matter was in court was on 15<sup>th</sup> May, 2020 when the Learned Judge delivered a Ruling in respect to the Plaintiffs' Application dated 17<sup>th</sup> June, 2019 seeking to revive the suit and substitute the deceased 1<sup>st</sup> Defendant, which Application was allowed. I note the Plaintiffs proceeded to file an Amended Plaint dated the 10<sup>th</sup> February, 2021 which they claimed was served upon the Applicant that is yet to file an amended Defence. I note the Applicant has not indicated in its Supporting Affidavit whether it intends to file an amended Defence or not. I have glimpsed through the proceedings herein and I note from May, 2020 the Plaintiffs have not set the suit down for hearing. In the case of *Ivita vs Kyumbu [1984] KLR 441 at 451*, Chesoni J. (*as he then was*) held as follows:

**“The instant case is now 4½ years less two months. It has been left to go to sleep for 14 months and in my opinion where an action has been dormant for twelve months or more the defendants are entitled to apply to the court for its dismissal, and, unless the plaintiff shows sufficient reason for reviving it, the suit may be dismissed. Each case must be decided on its own facts and the matter is one of the discretion of the court, but this court will frown at any inexcusable delay, and it will do everything possible to enforce expedition of trial.”**

Further, in the case of *Mwangi S. Kimenyi v Attorney General & another [2014] eKLR* it was held that:

**“Consequently, upon the analysis of all legal considerations, it is clear the direction the court is taking on this matter. But before I close, I will re-state; the acceptable test is that; 1) When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the Defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties. 2) Invariably, what should matter to the court, is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and 5) what prejudice will the dismissal cause to the plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.”**

In the current scenario and from the court records, I note even though the suit has not been set down for hearing from May, 2020, the Defendant were actually served with an Amended Plaint dated 8<sup>th</sup> February, 2021 but is yet to file an Amended Defence. Further, the 3<sup>rd</sup> Defendant has not indicated whether it intends to file an Amended Defence or not. Be that as it may, looking at the materials presented by the respective parties in their rivaling affidavits including arguments and submissions, I find that the delay in prosecuting the suit is not inexcusable nor inordinate as claimed by the Defendants. Further, I find the Plaintiffs' explanations actually plausible. In associating myself with the decisions cited above as well as the legal provisions which I have quoted, I find there was no intention by the Plaintiffs to delay the matter as there are triable issues raised in the Amended Plaint which parties should be allowed to ventilate upon. Further, Article 50 of the

Constitution grants a party a right to be heard. In the circumstance, I will decline to dismiss this suit for want of prosecution.

It is against the foregoing that I find the 3<sup>rd</sup> Defendant's Notice of Motion Application dated the 25<sup>th</sup> August, 2021 unmerited and will disallow it. Costs will be in the cause.

I direct that this suit be set down for hearing within sixty (60) days from the date hereof, failure of which it will be dismissed for want of prosecution.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 21<sup>ST</sup> DAY OF MARCH, 2022**

**CHRISTINE OCHIENG**

**JUDGE**