



John Muriithi the Secretary of the plaintiffs/respondents swore an affidavit dated the 11<sup>th</sup> of October 2010. He deposes that they are desirous to resolve the suit, that they did attend court severally but every time the defendant applied for an adjournment, that the defendants decided to stop subdivision and sale and development of the suit premises as they continue with the suit and for the sake of good neighborliness they halted the court process to avoid further acrimony amongst the residents. That they are ready to continue with the suit as the defendants have decided to continue with the subdivisions, development and sale of the plots.

In a supplementary affidavit Mr. Njoroge Kibatia challenges Mr. John Muriithi authority to depose the affidavit on behalf of the members of the plaintiffs/respondents; and deposes further that the allegations on the sub-divisions have not been supported by anything, that the failure by the plaintiffs to prosecute the present suit is not attributable to any representation on conduct by the defendants.

I have read the affidavits filed together with the submissions ,I have also gone through the court record. The applicant relied on the following cases; **Ivita Vs Kyumbu (1984) KLR 44** where Chesoni J held that.

***“The test applied by the courts in an application for the dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus even if the delay is prolonged, if the court is satisfied with the plaintiff’s excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed”***

The plaintiff also relied on the case of **Fitzpatrick Vs. Batger &Co. Ltd (1967) 2 ALL ER 657** at page 658 where Lord Denning held,

***“ it is impossible to have a fair trial after a long time. The delay is far beyond anything which can excuse. The action has gone to sleep for nearly two years. It should now be dismissed for want of prosecution”***

The applicant further relied on the following cases; **Nilani Vs. Patel 1969(E.A), Paxton Vs. Allsopp (1971) 3 ALL ER 370** and **Allen Vs. Sir Alfred Mc Alpine & Sons Ltd (1968) 1 ALL ER 657**. In this latter case Lord Denning held that; ***“ the delay of justice is denial of justice”***.

The respondent argues in his submission that the application is defective as the applicant has based the application on the revoked Civil Procedure Rules. This in my view is cured the provisions of Article 159 2(d) of the Constitution that states that ***“ Justice shall be administered without undue regard to procedural technicalities”***. Counsel for the respondent reiterates what is deposed in the affidavit of Mr. John Muriithi.

The test to be applied that I have to consider are laid in the case of **Ivita V. Kymbu (Supra)**. From the Court record the suit was filed on 2004. The one application that was filed with the plaintiff was adjourned severally between 23/11/04 to 23/11/07 when the Court gave the last adjournment. On the 5/7/07 parties appeared before Justice Rawal, and took directions on the hearing of the suit. The suit was thereafter fixed for hearing on the 23/7/08 when it was adjourned on the plaintiff counsels application. Thereafter the present application was filed in Court. The suit was not heard on the 29/3/2011 when it was fixed for hearing. It was listed before me on the 24/11/11 when I gave orders that parties take a date to highlight their submissions as the applicant was not in court then. The matter came before me on the 2011. Who then is to blame for the delay? As was held in the case of **Nilani Vs. Petal (Supra)**,

***“it is only too trite to say that as in every civil suit, it is the plaintiff who is in pursuit of a remedy that he should take all necessary steps at his disposal to achieve an expeditious determination of his claim should not be guilty of laches”***

I do agree that the delay of justice is a denial of justice. However it is apparent that although there has been a delay in prosecuting the suit, the plaintiff at one time decided to take no action in order to promote good neighborliness. The subject matter of the suit is a piece of land the plaintiffs claim that defendants

have subdivided in smaller units and offered for sale without the necessary consents. They have sought an injunction to stop the defendants subdividing the plots. It is apparent that the parties are neighbors. Would dismissing this suit now be of any help to the parties? Land is an emotive issue in this country. Good neighborliness is also very important if we are to stay as united Nation. Efforts must be made to ensure that good neighborliness is promoted. The plaintiff has tried to do so. Although it has taken time to prosecute the suit I will give the plaintiff a chance to prosecute their suit. The plaintiff's delay in prosecuting the suit can be excused. Justice needs to be done for all the parties.

I therefore order that the suit will not be dismissed. Let the suit be set down for hearing at the earliest available time in the ELC division. Costs shall be in the cause.

Orders accordingly.

Dated, signed and delivered this 15<sup>th</sup> day of April 2014.

**R. E. OUGO**

**JUDGE**

**In the presence of:**

.....**PLAINTIFFS/RESPONDENTS**

.....**1<sup>ST</sup> DEFENDANT/APPLICANT**

.....**2<sup>ND</sup> DEFENDANT/APPLICANT**

.....**COURT CLERK**