



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**ENVIRONMENTAL AND LAND DIVISION**  
**ELC CASE NO. 237 OF 2012**

**MARY WAMBUI KAMAU.....1<sup>ST</sup> PLAINTIFF**

**JOSEPHINE WACEKE NJOROGE.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**WANGUI KANUGU.....DEFENDANT**

**RULING**

The Notice of Motion before the court for determination is dated 1<sup>st</sup> November 2012, and is brought by the Defendant under Order 17 Rule 1 and Order 51 Rule 1 of Civil Procedure Rules. The Defendant is seeking orders that the suit herein be dismissed for want of prosecution, and that the costs of the application be provided for. The grounds for the application are that since the suit was commenced on 7<sup>th</sup> May 2012, the Plaintiffs have not taken any action to prosecute the suit.

In a supporting affidavit sworn on 1<sup>st</sup> November 2013, the Defendant has averred that upon commencement of the suit on 7<sup>th</sup> May 2012, she entered appearance and filed defence together with other pertinent documents on 16<sup>th</sup> August 2012. The Defendant avers that she served the Defendant's advocates on 16<sup>th</sup> August 2012 and that since the suit was commenced, the Plaintiffs have not taken any step to have the same prosecuted. According to the Defendant, the non-prosecution of this suit has denied him the right to user and enjoyment of his land reference No. **Kiambaa/Thimbigua/446** and the Defendant has urged that since the Plaintiffs have taken more than 1 year to prosecute this suit, that the same be dismissed with costs to him.

The application is opposed by the Plaintiffs who in a replying affidavit sworn on 3<sup>rd</sup> February 2013 contended that the Defendant had filed an application in Kiambu Law Courts Miscellaneous Application 18 of 2012 seeking orders for removal of the caution which application was dismissed. Further, the Plaintiffs have contended that on 10<sup>th</sup> July 2012, the Defendant filed another Miscellaneous Application in 58 of 2012 seeking similar orders as were sought in application number 18 of 2012 which was again dismissed.

It is the Plaintiffs averment that the Defendant occasioned the removal of a caution by using forged documents pursuant to which the Defendant was charged in Criminal Case no. 898 of 2013. According to the Plaintiffs, the Defendant negotiated with the office of the Director of Public Prosecution to have the

case withdrawn on conditions set out in a letter dated 7<sup>th</sup> August 2013 addressed to the Officer in Charge of prosecution Kiambu which was annexed as evidence. It is the Plaintiffs' case that the County Criminal Investigations Officer advised them to hold all matters in abeyance pending negotiations between the Defendant, the Director of Public Prosecution as well as the County Criminal Investigations Officer.

The Plaintiffs have further averred that whereas they have been waiting for the Defendant and the District Land Registrar to comply with the conditions so that they may proceed with this case, the Defendant has failed to comply as title has not reverted back to the name of the deceased Simon Kanugu as ordered. The Plaintiffs have also contended that the Defendant who filed a counterclaim to the suit has also not prosecuted the same and further, have averred that this matter has not been ready for hearing as the provisions of Order 11 have not been complied with. According to the Plaintiffs, the delay in fixing a hearing date was occasioned by the investigations, trial and negotiation in the criminal case in addition to failure by the Defendant and the registrar to comply with the order issued in the criminal case and the Plaintiffs have contended that the delay is not inordinate.

The application was canvassed by way of written submissions and the Defendant in submissions dated 12<sup>th</sup> February 2014 argued that Miscellaneous Application numbers 18 of 2012 and 58 of 2012 as well as Kiambu Criminal Case number 898 of 2013 were all before the subordinate court and should have been stayed and the High Court case proceeded with. Counsel for the Defendant argued that the Plaintiffs have not demonstrated that there was an order in the High Court from the subordinate court stopping and/or staying this proceedings and therefore, that the Plaintiffs' contentions were neither cogent nor valid.

The Defendant referred the court to the case of **James Muriithi Ngotho & others -vs- Judicial Service Commission Miscellaneous Application number 316 of 2012** for the proposition that rules of procedure requiring the Plaintiff to expedite a hearing do not constitute a technicality within the meaning of Article 159(2) of the Constitution.

On their part, the Plaintiffs filed submissions dated 19<sup>th</sup> March 2014 where they contended that the Defendant filed his application under Order 17 Rule 1 instead of Rule 2. Counsel argued that one of the reasons why the instant suit could not be set down for hearing was that they discovered that the Defendant had caused removal of a caution lodged against the suit property using forged documents. It was argued for the Plaintiff that criminal proceedings taken against the Defendant for the alleged forgery formed crucial facts and evidence that would be adduced in the instant case.

It was submitted for the Plaintiffs that the Defendant also failed to take steps to prosecute his counterclaim. Counsel urged the court to take judicial notice of the fact that the diary for the Environment and Land Court gets closed very early in the year requiring parties to wait for the next year to set a matter down for hearing.

While stating that Order 11 of the Civil Procedure Rules has not been complied with, Counsel for the Plaintiffs argued that the suit has not been ready for hearing. It was also contended that the Defendant who was also at liberty to fix the suit for pretrial conference was also guilty of not taking any action. Reliance was placed on Article 159(2) of the Constitution for the submission that delay in fixing a matter for hearing does not go to the root of the matter and is a procedural technicality which should not be used to deny the Plaintiff a chance to be heard on merit. Counsel sought to distinguish the authority cited by the Defendant by stating that the case was clear that procedural matters do not go to the root of a matter.

The issue for determination is whether there has been inordinate delay for which no reasonable explanation has been offered to render the suit liable for dismissal. This suit has not been set down for hearing since pleadings closed 14 days after service of reply to defence and defence to counterclaim on 29<sup>th</sup> August 2012. The delay for a period of over one and a half years renders a suit liable for dismissal under Order 17 Rule 2 of the current Civil Procedure Rules which provide as follows:

**“2. (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.”**

The test to be applied by courts in applications for dismissal of suit for want of prosecution was set in the case of Ivita -vs- Kyumbu[1984] KLR 441. In addition to there being prolonged and inexcusable delay, the court must determine whether justice can still be done to the parties despite the delay.

The Plaintiffs have attributed delay in prosecuting this suit to criminal proceedings taken out against the Defendant for allegedly removing a caveat placed on the suit property using forged documents. Plaintiffs' annexure dated 10<sup>th</sup> July 2013 and 7<sup>th</sup> August 2013 reveal that negotiations to have the criminal case against the defendant withdrawn took place. In my view, the Plaintiffs have offered a reasonable explanation for the delay in prosecuting the suit and the delay in my view cannot be said to be inordinate so as to prejudice the defendant.

Any delay given the attendant circumstances cannot be described as inordinanate and/or inexcusable. Under order 11 of the Civil Procedure Rules either party to the suit can initiate and take the necessary steps to get the suit ready for hearing. Indeed in this suit both parties had specific claims and prayers. The plaintiff vide the plaint and the Defendant vide the counter claim. In the interest of justice, the suit should proceed for hearing on merit and the Parties are directed to comply with Order 11 of the Civil Procedure Rules within the next **sixty (60) days** from the date of this ruling whereafter a date for a pretrial conference should be taken at the court registry. I therefore disallow the application by the plaintiff and direct that the costs of the application shall be in the cause.

Orders accordingly.

Ruling dated, signed and deliver this 30th day of June 2014.

**J.M. MUTUNGI**

**JUDGE**

**In the presence of:**

..... For the Plaintiff

..... For the Defendants