



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ELC. CASE NO. 1141 OF 2007**

**CHUMA FABRICATORS LIMITED..... PLAINTIFF**

**VERSUS**

**ALCON HOLDINGS LIMITED.....DEFENDANT**

**RULING**

Coming up before me for determination is the Notice of Motion application dated 14<sup>th</sup> October 2012, brought under Order 16 Rule 5 (c) and (d) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. It seeks for the following orders.

1. That the Suit be dismissed with costs to the Defendant for want of prosecution.
2. That the costs of this application be provided for.

The application is premised upon the grounds appearing on the face of the application and the Supporting Affidavit of Fred K. Athuok in which he averred that the Plaintiff filed this Suit on 8<sup>th</sup> October 2004 for an order *inter alia* that the Plaintiff is entitled to the Suit Property by way of adverse possession. He further averred that the Defendant through its advocates entered appearance and filed a Replying Affidavit on 15/2/05 and 15/3/05 respectively. He further swore that the Plaintiff had not made any attempt to set down this suit for hearing since the last hearing notice dated 9/2/07 which was served on the Defendant. He further averred that the inordinate delay by the Plaintiff in setting down the Suit for hearing is way beyond the 3 month period required by the Civil Procedure Rules and the same cannot be salvaged. He further stated that in view of the foregoing, it is manifest that the Plaintiff is no longer interested in prosecuting this suit and that the Defendant should be released from further obligations herein.

The Application is contested. The Plaintiff filed its Replying Affidavit sworn by Jarnail Singh Kallah sworn on 30/10/12 in which he averred that the Plaintiff instructed M/S Ahmednassir Abdikadir & Company Advocates to represent it from the onset of this suit. He further averred that the said Advocates filed the suit by way of Originating Summons, obtained directions from the Court and fixed the Suit for hearing from time to time. He further swore that by their letter dated 23/1/12, the said Advocates informed them that they had ceased to act for the Plaintiff and had filed an application to withdraw from acting. He further indicated that the failure to fix a hearing date in 2007 was beyond the Plaintiff's direct control as it was his advocate's mistake which should not be visited upon the Plaintiff. He also stated that the Plaintiff had engaged M/S Meshack Odero & Company Advocates to represent the Plaintiff in this matter. He further swore that the dispute relates to claim of ownership of land in Nairobi which should be heard and determined on merit without due regard to technicalities. He further pointed out that the Defendant's application has delayed the hearing of this suit since 2008, a period of 4 years, compared to the 1 year delay that the Plaintiff is blamed for.

Both the Plaintiff/Respondent and the Defendant/Applicant filed their respective written submissions which have been considered and taken into account.

It is true that this suit was filed on 8/10/04 by the Plaintiff through its advocates at that time Messrs Ahmednassir Abdikadir & Company Advocates. The Defendant entered appearance on 15/2/05 through its advocates at the time Messrs Ibrahim, Issack & Company Advocates. On 21/6/05, the Plaintiff filed a Supplementary Affidavit. On 30/6/05, which is one week later, the Plaintiff through its advocates invited the Defendant for a meeting to fix a hearing date for this suit. The Defendant did not appear and an *ex-parte* hearing date was taken by the Plaintiff. The date taken was 3/10/05. There is no indication as to why the hearing did not proceed on that date. Again, by their letter dated 31/1/06, the Plaintiff invited the Defendant to fix a hearing date. The Defendant did not attend. The Plaintiff took an *ex-parte* hearing date of 3<sup>rd</sup> and 4<sup>th</sup> July 2006. Again, the hearing did not proceed on the stipulated dates. Once again, the Plaintiff's advocates invited the Defendant to fix another hearing date by their letter dated 29/1/07. Again, the Defendant did not attend and the Plaintiff took an *ex-parte* hearing date of 5<sup>th</sup> and 6<sup>th</sup> June 2007. It is evident that again, the hearing was not conducted on those dates. Shortly thereafter, the file was transferred to the ELC Division. The next activity on the file was the filing of this application by the Defendant/Applicant on 20<sup>th</sup> November 2008 which is a period of about 1½ years of inactivity on the matter.

Since the filing of the said application, the burden to prosecute the same was upon the Defendant/Applicant. By their letter dated 3/10/11, they invited the Plaintiff/Respondent to fix a date for the hearing of the application. This is a period of about 3 years from the date of filing their application.

It is noteworthy also that Messrs Ahmednassir Abdikadir & Company Advocates withdrew from acting for the Plaintiff/Respondent "for lack of instructions occasioned by their failure to communicate with them"

Arising from the foregoing, I have formed the view that though the Plaintiff/Respondent did make efforts to fix this suit for hearing single handedly with no participation of the Defendant, they did fail to keep up the effort and indeed, since June 2007 all the way until the Defendant filed this application, a period of 1½ years, no steps were taken to set this suit down for hearing.

However, the Defendant was generally un-participative in efforts being made by the Plaintiff to have this suit heard. For all the instances that the Plaintiff invited the Defendant to fix a hearing date, the Defendant did not show up at all forcing the Plaintiff to take *ex-parte* dates and serve the Defendant with hearing notices. However, the conduct of the Defendant comes under further scrutiny when it filed this application on 20/11/08 only to invite the Plaintiff to fix a date for hearing on 3/10/11, a period in excess of 3 years later. The delay of the plaintiff was only 1 ½ years but that of the Defendant was a whole 3 years. It therefore comes as a surprise that the Defendant accuses the Plaintiff of delaying the prosecution of this suit.

It is true that this suit has been pending hearing for now almost 10 years and the Plaintiff is partly to blame for this delay. However, my overall finding is that the Defendant bears an even larger share of the blame for being un-cooperative and for failing to prosecute its application with the expected speed.

In light of the foregoing, I rule that the application is hereby dismissed. Not orders as to costs.

I also direct that this suit be set down for hearing at the earliest possible date.

**SIGNED AND DELIVERED AT NAIROBI**

**ON THE 28<sup>TH</sup> DAY OF JUNE 2013.**

**MARY M. GITUMBI**

**JUDGE**