



**REPUBLIC OF KENYA**  
**IN THE LAND AND ENVIRONMENT COURT**

**AT MOMBASA**

**CIVIL CASE NO. 318 OF 2007**

**NANDAL JIVRAJ SHAH .....1ST PLAINTIFF**

**VIMAL NANDLAL SHAH ..... 2ND PLAINTIFF**

**MEHUL NANDLAL SHAH ..... 3RD PLAINTIFF**

**ALL TRADING AS JIVACO AGENCIES**

**- V E R S U S -**

**NYALI PLAZA LIMITED ..... 1ST DEFENDANT**

**NATIONAL ENVIRONMENT**

**MANAGEMENT AUTHORITY ..... 2ND DEFENDANT**

**RULING**

[1] The applicant applies for the suit herein to be dismissed under Order 17 rule 2<sup>1</sup> and Order 51 rule 1<sup>2</sup> of the Civil Procedure Rules for want of prosecution and all costs of the suit be awarded to the 1st defendant.

The applicant supports their application vide an application of Lilian A. Oluoch their advocate who says that the last time this suit came up in court was on 6th March 2009 when the Preliminary Objection was dismissed and the suit ordered to proceed to full trial.

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1 Order 17 rule 2 (1) - In an 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 Order 51 rule 1 - All applications to the court shall be by motion and shall be heard in open court unless the court directs the hearing to be conducted in chambers or unless the rules expressly provide.

Further that it is over four (4) years since the suit was instituted by the plaintiffs and well over 3 years since the suit came up in Court. That the delay is inordinate and has greatly prejudiced the defendants.

[2] The 2nd defendant supported the prayer of the 1st defendant. It said it has taken 3 years before taking any step in fixing this case for hearing.

The 2nd defendant annexed an application filed in court on 15th October 2009, but not served that they wanted the suit dismissed for want of prosecution under the old rules Order XV1 Rule 5(a)<sup>3</sup>

They argued that the plaintiffs have lost interest in this case. That the argument that the environment and land court was not operational has no basis since matters were proceeding all along.

[3] The plaintiffs /respondents on their part alleged that it was common knowledge that the environment and land Court was operationalized on January 2013. That the delay from 27th August 2010 to January 2013 cannot be taken into account. That the delay in appointing the Court and hence the delay in this case can only be blamed on the Government. They admitted that there was delay from 4th March 2009 to 27th August 2010 which the plaintiff said is only 1 year and 5 months which period according to the plaintiff is not inordinate.

They relied on Article 47, 50 and 159 of the Constitution and stressed that the case should be heard on merits. The Plaintiffs avered that the defendant has not demonstrated that they shall suffer prejudice if the case proceeds to full hearing.

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3 *Order XV1. r. 5 - If within three months after -*

*(a) the close of pleadings; or*

*(b) (Deleted by L.N. 36/00)*

*(c) the removal of the suit from the hearing list; or*

*(d) the adjournment of the suit generally, the plaintiff, or the court of its own motion on notice to the parties does not set down the suit for hearing, the defendant may either set the suit down for hearing or apply for its dismissal.*

[4] From the outset, let me say that the argument that this case could not proceed from 27th August 2010 to January 2013 because the environment court was not operational is erroneous. Firstly the Court was established in October 2012 and secondly the environment and land matters continued unabated upto the end of December 2012.

Indeed one only needs to look at the practice directions by the Chief Justice of 9th February 2012 and 9th September 2012. The practice directions were published in the Kenya Gazette and were available to all including the respondents herein. The delay is 3 years and cannot be said to be a procedural technicality. it is a serious flaw on the expeditious disposal of this case.

[5] The applicant request me to grant it orders under rule 17 (2)<sup>4</sup>

This rule requests the court to give notice in writing to the parties to show cause why the suit should not be dismissed. This court has not issued such notice. The section requires **either party** to take action. I presume in this case, it is for either of them to fix the case down for hearing. To my mind the section demands two things.

1. The Court to be seized of the proceedings and hence the issuing of notice after one year of inactivity.

2. That each party must be proactive and see to it that the suit is fixed for the next step as required by the Civil procedure Rules.

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4 Order 17 (2) - See note 1

5 Section 17 (2) (1) - See note 1

[6] The defendant cannot any longer remain idle and only wake up after a period the defendant thinks is inordinate and apply for the suit to be dismissed. The defendant must show the court the efforts it made to fix the application and/or suit for hearing. The danger the plaintiff will always be in is that when both the plaintiff and defendant are guilty of delay and the Court on its motion gives notice under Section 17 (2) (1) then, the suit will be dismissed.

The defendants in this case did not take steps to fix this case down for hearing. They cannot rely on their own indolence to reap advantage. This suit raised a fundamental environmental issue. It is in respect of development of a massive project. The suit must be heard on merits.

7] As the parties herein are all guilty of delay in fixing this suit for hearing, I do order that anyone of them to fix this case down for hearing within fourteen (14) days.. The notice for fixing a hearing date shall be served on the other parties.

The suit shall proceed to hearing on merit. If the suit is not fixed for hearing as required the defendant may apply for its dismissal.

Each party shall bear their own costs for this application.

**Dated and delivered in open court at Mombasa this 26th day of July, 2013.**

**S.N. MUKUNYA**

**JUDGE**

**26.7.2013**

Asige for Oluoch for 1st defendant - present

Kabebe for Gikandi & Co. for the plaintiff - present

Anthony Gikaria for 2nd defendant - absent