REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND DIVISION

ELC. CASE NO. 287 OF 2010

CECILIA GAKUI KINYUA……1ST PLAINTIFF/ RESPONDENT

ANNE MUTHONI KANYEKI……..……2ND PLAINTIFF/RESPONDENT

VERSUS

NYAGA GICHENGE ……1ST DEFENDANT/APPLICANT

VIRGINIAH NJOKI NYAGA……2ND DEFENDANT/APPLICANT

ANN M. WAMAITHA MURIITHI……3RD DEFENDANT/APPLICANT

REGISTRAR OF TITLES, KIRINYAGA…....4TH DEFENDANT/APPLICANT

RULING

Before me for determination is the Notice of Motion dated 30th January 2013 in which the Defendants/Applicants seek for this court to issue orders dismissing this suit for want of prosecution and that this court do declare this suit as having abated in respect of the 1st Plaintiff who died on 9th September 2011. They also request that costs of this Application be provided for.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of Nyaga Gichenge sworn on 30th January 2013 wherein he stated that the last time this suit was before the court was on 19th January 2012 when a ruling was delivered in respect to the application dated 10th June 2010 and orders given therein. He further stated that since the above said orders were granted to the Plaintiffs, they went to sleep and have not taken any step to progress this matter. He further stated that the Plaintiffs have all along been enjoying the above said orders to the detriment of the 1st, 2nd and 3rd Defendants/Applicants who are unable to deal with the subject matter of this suit namely the land parcel known as Inoi/Kariko/930 due to the above said orders. He further stated that in addition, the 1st Plaintiff died on 9th September 2011 and no legal representation has been appointed on her behalf therefore the suit should be declared as having abated in respect of the 1st Plaintiff.

The Application is contested. The Plaintiffs filed their Grounds of Opposition dated 8th May 2013 wherein they stated that the Application violates mandatory provisions of the law, is incompetent and a

nullity, the prayers sought are incapable of being granted, is prejudicial to the Plaintiffs and is meant to deny the Plaintiffs justice in this suit whose subject matter is the Plaintiff's family land and that the Application is based on technicalities which should not be used to deny the Plaintiffs a fair and just trial based on the merits of the case.

On the question of dismissal of a suit for want of prosecution, the applicable law is **Order 17 Rule 2(1)** which provides as follows:

> ***"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."***

Order 17 Rule 2(3) provides as follows:

> ***"Any party to the suit may apply for its dismissal as provided in sub-rule 1"***

In addition, the leading case is **Ivita vs. Kyumbu [1984] KLR 441**, where Chesoni, J. (as he then was) held as follows:

> ***"The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."***

Having regard to this case, I do note that it is true that since the court delivered its ruling on 19th January 2012, no step has been taken by the Plaintiffs to progress this suit to its conclusion. It is only when the Defendants/Applicants brought this Application that this suit has come back to court. It is noteworthy that the Plaintiffs did obtain orders by this court on 19th January 2012 prohibiting any further dealings with the suit property which orders were to remain in force until the full and final determination of this suit or until further orders. It would seem that after obtaining those orders, the Plaintiffs went to sleep. The inaction of the Plaintiffs could further be explained by the demise of the 1st Plaintiff, who has not been substituted in this suit.

If I may be guided by the case cited above, the question I would ask is whether the delay by the Plaintiffs to prosecute this suit has been prolonged and inexcusable. By the time the Defendants/Applicants filed this Application, this suit had lain dormant for a period of about 12 months. While delay of anything above 12 months qualifies for purposes of dismissing a suit for want of prosecution, I am not fully convinced that that delay is prolonged. It is also noteworthy that the Plaintiffs have not given any reason at all why they have not taken any step to prosecute this case. However, in regard to the totality of circumstances, I consider that this is a suit in which the Plaintiffs should be given a last chance to put their house in order before I can exercise the powers of this court to dismiss this suit for want of prosecution. I therefore direct the Plaintiffs to set this suit down for hearing within the next 60 days failing which this suit shall stand dismissed. Further, the court directs that the 1st Plaintiff herein be substituted with a legal representative without any further delay. It is so ordered.

SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2013

MARY M. GITUMBI

JUDGE