



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**

**ENVIRONMENTAL & LAND CASE 387 OF 2007**

**ITE FARMERS CO-OPERATIVE SOCIETY LTD.....**  
**.....PLAINTIFF**

**VERSUS**

**COMMISSIONER OF LANDS.....1<sup>ST</sup>**  
**DEFENDANT**

**CITY COUNCIL OF NAIROBI.....2<sup>ND</sup>**  
**DEFENDANT**

**WAKAM ENTERPRISES CO. LTD.....3<sup>RD</sup>**  
**DEFENDANT**

**JANE WANGUI MAGONDU T/A**

**HIGH VIEW MERCHANTS.....4<sup>TH</sup>**  
**DEFENDANT**

**THE CO-OPERATIVE BANK OF KENYA LTD.....5<sup>TH</sup>**  
**DEFENDANT**

**RULING**

1. The 3<sup>rd</sup> Defendant herein **WAKAM ENTERPRISES CO. LTD** has taken out the Notice of Motion expressed to be brought under the provisions of Order 17 Rules 2 (1) and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and all other enabling provisions of the Law. He prays that the suit herein as against the 3<sup>rd</sup> Defendant be dismissed for want of prosecution and the costs for the application be provided for.

2. The Applicant bases its application on the grounds that the Plaintiff has taken no steps whatsoever to prosecute the suit since 18<sup>th</sup> May 2005 and it therefore is not serious keen or interested in the suit and so

the same should be dismissed with costs. That the continued pendency of the suit is prejudicial to the 3<sup>rd</sup> Defendant in terms of time and legal costs and that is unfair and not in the interest of justice that the 3<sup>rd</sup> Defendant, now Applicant, should be kept in the dark due to the laxity and disinterest of the Plaintiff in the case. The Applicant concludes that litigation must come to an end.

3. The affidavit in support of the Motion is sworn by the Applicant's counsel **Alex Ngatia Thangei** who avers that the suit in question was filed on 23<sup>rd</sup> July, 2001 under a certificate of urgency through the firm of Advocates of Ndungu Njoroge and Kwach Advocates who on 25<sup>th</sup> July 2001 obtained injunctive orders. The Plaintiff thereafter changed advocates and to that end there was filed a Notice of Change of Advocate on 12<sup>th</sup> November 2003. The Defendants filed their separate defences with the Applicant herein filing its defence on 14<sup>th</sup> August 2001. Counsel swears further that the Plaintiff's last action in court was on 18<sup>th</sup> May 2005 after which the Plaintiff has done nothing, five years later, towards prosecuting the suit and further that the Plaintiff is guilty of laches which places the Applicant under undue hardship and loss and as it cannot wait ad infinitum, the suit ought to be dismissed in the interest of justice.

4. In opposition to the application there was filed a Replying Affidavit sworn by **Alice Njoki Kamau** wherein the said advocate for the Plaintiff deponed that the 3<sup>rd</sup> Defendant now Applicant had the option of setting down the suit for hearing which option it did not exercise. It was added that the Applicant has suffered no hardship whatsoever as it has already disposed off the suit land to a third party giving rise to a suit in the subordinate court as against the Plaintiff herein who is a Defendant therein. That in any event the Plaintiff has a strong case herein and the same should be allowed to proceed.

5. The Honourable the Attorney General appearing through counsel **Mr Motari** representing the 1<sup>st</sup> Defendant/Respondent supported the Motion through a Replying Affidavit and Written Submissions.

There were also written submissions by the Applicant and a list of some seven authorities which have guided the court in reaching the outcome herein. All Counsel, in addition thereto made Oral Submissions which I have similarly considered.

It is admitted by all that suit was filed 23<sup>rd</sup> July 2001. It was not denied and the record shows that it could not possibly be denied that the Plaintiff last took action in the suit on 18<sup>th</sup> May 2005. At the hearing of this motion counsel for the Plaintiff/Respondent did not attempt to give any reasons for the delay satisfying herself with shifting the onus on the Applicant to set down the suit for hearing and contending that the Plaintiff has a strong case. The Plaintiff missed the point that the onus is his to show that there has not been prolonged or inordinate inexcusable delay on his part. Admittedly the applicant could have set the suit down for hearing but he had the option not to so proceed but instead bring this application as it did. That was the Applicant's prerogative which did not excuse or minimize the Plaintiff's primary duty to prosecute its case. As to the merit in the suit, none were shown as parties admitted that the substratum of the suit was lost a while back.

6. I am satisfied on the material on record that the Plaintiff has not shown any reason whatsoever for its inaction and I am further satisfied that such default is intentional and contumelious and the existence of the suit is actually an abuse of due process, that the delay herein is prolonged inordinate and inexcusable on the part of the Plaintiff and its advocates and finally I am further satisfied that such delay causes substantial/serious prejudice to the Applicant who has to remain in the suspense of an unending process with its attendant costs see **NJUKI GACHUGU –VS- GITHI (1977) KLR 108** and **ALLEN –VS- SIR ALFRED MCALPINE & SONS LTD (1968) 1 ALL ER 543**.

In these circumstances I am satisfied that judicial discretion must be exercised in favour of dismissing the suit herein as against the Applicant and the 1<sup>st</sup> Defendant which I hereby do. The Applicant and 1<sup>st</sup> Defendant will have the costs of the suit and of the application.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF MAY 2012.**

**P.M. MWILU  
JUDGE**

In the presence of:-

..... Advocate for 3<sup>rd</sup> Defendant/Applicant

..... Advocate for 1<sup>st</sup> Defendant

..... Advocate for Plaintiff/Respondent

..... Court Clerk

**P.M. MWILU  
JUDGE**