

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT 1 OF 2001

SHEIKH KHALIFA MOHAMED ALI.....PLAINTIFF

VERSUS

DANIEL M. KILELA.....1ST DEFENDANT

MUNICIPAL COUNCIL OF MOMBASA.....2ND DEFENDANT

RULING

Through a Notice of Motion dated 15th April 2008 the 2nd defendant seeks orders that the suit herein be dismissed with costs for want of prosecution. It is founded on the grounds that it has been five years since the suit was last stood over generally. That the prolonged delay is inexcusable and an abuse of the court process. The plaintiff filed a replying affidavit sworn on 2nd July 2009. His main contention is that the subject matter of the suit has been overtaken by events. That the management of the flat in dispute was taken over by National Housing Corporation and that he has since entered into a lease with National Housing Corporation. That it was futile to proceed with suit against the 2nd defendant because the court does not issue orders in vain. He deponed that his counsel had written letter to the defendants asking that this matter be marked as settled. The letter is still to be marked as exhibit "SK3". However, it was not attached to the Replying Affidavit.

I have considered the written submissions of the parties. It is no doubt that this is an old matter. Both the plaintiff and the 2nd defendant wish to have the matter terminated. The plaintiff on the basis that the subject matter has been overtaken by events and the 2nd defendant on the basis of want of prosecution.

It is in my view that the Plaintiff ought to have withdrawn or discontinued the suit once the situation had changed as it is his suit. However, it is noted that the 2nd Defendant did not take action either after the property was taken over by National Housing Corporation which fact it does not deny. Both parties knew that the subject matter of the suit was no longer the same and the only issue is that of costs.

This suit is hereby dismissed for want of prosecution with one half of the taxed costs to be paid to the 2nd Defendant. Parties may also agree on such costs. Orders accordingly.

DATED AND SIGNED AT NAIROBI ON THIS 17TH DAY OF JULY 2012.

M.K IBRAHIM
JUDGE

DATED AND DELIVERED AT MOMBASA ON THIS 27TH DAY OF JULY 2012.

R.M. MWONGO
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JUDGE

Delivered in the presence of: