



**CIVIL**

- ***Dismissal of suit for want of prosecution.***

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**HIGH COURT CIVIL CASE NO. 6 OF 2008 (O.S)**

**IN THE MATTER OF LAND PARCELS NOS. NJIA/CIA-MWENDWA/3088 NJIA/CIA-MWENDWA/3089 AND NJIA/CIA-MWENDWA/1545**

**GEOFFREY MBAABU .....1<sup>ST</sup> APPLICANT**  
**SOLOMON M'ETAYA .....2<sup>ND</sup> APPLICANT**

**VERSUS**

**M'MAINGI M'LAARU ..... 1<sup>ST</sup> RESPONDENT**  
**JACOB MIORO M'LAARU ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

The plaintiff filed this action by way of originating summons on 21<sup>st</sup> February 2008. By that action the plaintiffs seek declaration that they have acquired by adverse possession the suit properties. The suit properties are:-

- a) *Njia/cia-Mwendwa/3088***
- b) *Njia/cia-Mwendwa/3089***
- c) *Njia/cia-Mwendwa/1545***

By a ruling dated 23<sup>rd</sup> January 2008 this court amongst other orders granted temporary injunction restraining the defendants from entering, disposing possessing or interfering with the plaintiff's possession of the suit properties. The court is now considering the Notice of Motion dated 7<sup>th</sup> September 2010 where the defendants seek the dismissal of this suit for want of prosecution. By their supporting affidavit, the defendants stated that they filed their replying affidavit to the originating summons on 25<sup>th</sup> February 2008. They were granted leave to file further affidavits in reply in February 2010. They deponed that the plaintiff has failed to fix this suit for hearing for more than six months since it was last in court. The defendants in their affidavits in support outlined the history of the dispute relation to the suit property. It seems that it begun in 1981 between the father of the plaintiffs and the defendants. The father of the plaintiffs died. The plaintiffs filed Meru HCC No. 77 of 2005 which action was struck out when the defendants raised a preliminary objection. The plaintiffs by their replying affidavit denied that they had inordinately failed to fix this case for hearing. They proceeded in their replying affidavit to set out the back ground of this case. They deponed that on 6<sup>th</sup> October 2009, the court gave directions on the hearing

of this originating summons whereby the court ordered that it be heard by way of *viva voce* evidence. The plaintiffs then obtained a hearing date for 9<sup>th</sup> February 2010. When the matter came for hearing on that day, the defendant sought and obtained an adjournment. The plaintiff then stated that after that adjournment no hearing dates were available for the remainder of the year 2010. The plaintiffs finally stated that their suit is not vexatious and that they are ready to fix the same for hearing. As correctly stated by the plaintiffs, this court on 6<sup>th</sup> October 2009 gave directions on the hearing of this case. When the case was fixed for hearing on 10<sup>th</sup> February 2010, the defendant's counsel successfully applied for an adjournment and requested for leave to file further replying affidavit. Since there was no objection from the plaintiff, the court granted the defendant an adjournment and ordered the defendant to pay court adjournment fees. The only receipt that is seen in this file dated 4<sup>th</sup> July 2011 indicates that Kshs. 600/= was paid by the firm of advocates representing the defendants as court adjournment fees. If that payment is intended to represent the order of 10<sup>th</sup> February 2010 for the payment of adjournment fees, it is in error because the correct adjournment fees for a full hearing is Kshs. 1,000/=. The defendants having sought an adjournment in February 2010 and having failed to pay the adjournment fees as ordered cannot seek to be heard in the application for this suit to be dismissed for want of prosecution. I have had occasion to decide in a previous case where an application for dismissal for want of prosecution was sought. The decision that I reached in that case is pertinent to the present case and I can do no better than quote extensively from that case as follows:

*“The court in the case **Agip (Kenya) Limited vs. Highlands Tyres Ltd** [2001] KLR page 630 held that a court should be guided by the following principles in considering an application for dismissal of a suit for want of prosecution.*

- a) the delay is inordinate.*
- b) the inordinate delay is inexcusable; or*
- c) the defendant is likely to be prejudiced by the delay.*

**4. Delay is a matter of fact to be decided on the circumstances of each case. Where a reason for the delay is offered, the Court should be lenient and allow the plaintiff an opportunity to have his case determined on merit. The Court must also consider whether the defendant has been prejudiced by the delay.”**

*The court set out those principles that should guide the court in considering an application such as this one. The failure of the plaintiff to fix this case for hearing cannot be considered in isolation. It should be considered bearing in mind what is on the ground at Meru High Court station. For quite sometimes now, the Meru High Court station has been plagued by enormous backlog of cases and shortage of manpower to clear it. It is not a surprise for parties to obtain a hearing date from the court registry but when the date of hearing arrives, the case is removed from the hearing list in preference to an older one. The age of this case by the standards of Meru High Court is not old. It is with that background in mind that I find that the plaintiff's delay in fixing this case for hearing is not inordinate and is excusable.”*

In my view, the conditions that I found to pertain to that previous case still persist to date. That being the case, I find that this is not a suitable case where the court will grant the orders that are sought by the defendant. For that reason the Notice of Motion dated 7<sup>th</sup> September 2010 is dismissed. The costs thereof shall be paid by the defendants because they failed to pay court adjournment fees as ordered before.

**Dated, signed and delivered at Meru this 10<sup>th</sup> day of August 2011.**

**MARY KASANGO**  
**JUDGE**