



**Abubakar & another v Mohamed & 3 others (Environment & Land Case 151 of 2021) [2022] KEELC 14867 (KLR) (14 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14867 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 151 OF 2021  
LL NAIKUNI, J  
NOVEMBER 14, 2022**

**BETWEEN**

**HASSAN ABUBAKAR ..... 1<sup>ST</sup> PLAINTIFF**

**ALI SAIDI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**SALIM S. MOHAMED ..... 1<sup>ST</sup> DEFENDANT**

**SCRAPT OF PROPERTIES LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**MARY KAI ..... 3<sup>RD</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

**I. Introduction**

1. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants herein, Mr. Hassan Abubakar and Mr. Ali Saidi respectively moved this Honorable Court through filing a Notice of Motion application dated 30<sup>th</sup> August 2021 for its determination. The application was brought under the provision of Sections 1A, 1B and 3A and 63 (e) of the *Civil Procedure Act*, Cap. 21 and Order 12 Rule 7, Order 50 Rule 6 and Order 51 of the *Civil Procedure Rules* 2010.

**II. The 1st & 2nd Plaintiffs/Applicants' Case**

2. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants herein sought for the following orders.
  - a. Spent.
  - b. That this Honorable Court be pleased to set aside orders issued by this Honorable Court on 19<sup>th</sup> November 2015 dismissing the Plaintiff/Applicant's suit and the same be reinstated.



- c. Costs of this application be provided for.
3. The application is premised on the ground, testimonial facts and averments contained in the 17 Paragraphed Supporting Affidavit of Hassan Abubakar, the 1<sup>st</sup> Plaintiff deposed that he was well conversant with the matters in issue, duly authorized and competent to swear this Affidavit. He noted and from Court's records that this case was filed in Court on 11<sup>th</sup> August, 2006. He averred that on 29<sup>th</sup> November, 2011 the Plaintiffs were fully in compliance with the pre – trial conditions by filing all the pleadings – the List of documents and witness statements and hence ready for the hearing of the case. Unfortunately he stated that the matter came up before the Court but kept on being adjourned to enable the Defendants comply with the Pre – Trial Directions of filing their documents. He posed that the suit that was originally filed before High Court but following a Court order, on 24<sup>th</sup> October, 2012 was transferred to the Environment and Land Court. He held that despite this, there was no usual communication by the High Court Registry Executive/In Charge forwarding the file to the Environment & Land Court and hence there was no new case number communicated to the parties. He asserted that the delay in prosecuting the matter was occasioned by the displacement of the court file by Registry of the Court for years.
  4. He stated that on many occasion their Advocates wrote numerous letters to Court seeking its intervention to have the file produced so as to enable them take steps on listing it for hearing. The deponent further deposed that his advocate was informed by the high court registry on 26<sup>th</sup> August 2021 that the misplaced file had been traced on 6<sup>th</sup> August 2021 from where it had been misfiled at the archives and transferred to the ELC registry and allocated a case number ELC 151 of 2021. Upon perusal of the file on 26<sup>th</sup> August 2021, Counsel for the plaintiffs noted that the same had been placed before Justice Angote on 19<sup>th</sup> November 2015 and in the absence of the parties was dismissed for nonattendance. The deponent also contended that neither he nor his advocate were served with the hearing notice of 19<sup>th</sup> November 2015 and added that the dismissal without notification of the hearing date to his counsel was erroneous and a mistake on the part of the registry and court. He argued that his right to fair trial and the rules of natural justice were violated and urged court to rectify the mistake, set aside the orders and pave way for interparty hearing. He further argued that it is in the interest of justice for the orders dismissing the suit for want of prosecution be set aside and allow the matter to proceed on merit. He produced some of those letters dated to 21<sup>st</sup> June, 2018, 27<sup>th</sup> March, 2019 and 21<sup>st</sup> May, 2019 all annexed and marked as “HA – 1”. It has been claimed that, on 19<sup>th</sup> November, 2015 the matter was placed before a Judge and in the absence of the parties consequently was dismissed during the court's service week despite the court not having served the parties with the notice to show cause. The deponent, argued that the failure of the High Court Registry to trace the court file on diverse dates caused the Plaintiffs to keep pursuing the court file at the high court registry for a hearing date in futility as seen from the letters to the advocates on record and the Deputy Registrar of the high court.
  5. He deposed that the dismissal of the suit without notice of the hearing date breached the right to fair hearing and natural Justice. The error on the part of the Registry and the Court required it to be rectified by Court having the orders of 19<sup>th</sup> November, 2015 set aside to pave way for further steps towards “Inter Parte” hearing of the case between the parties. He held that this being a land dispute in which ownership was at stake it was fair and proper that the Court tilted in favour of determining the case on merit and ascertaining the proprietary rights of the parties. He urged the Court to grant the orders as prayed.



### III. The 2nd Defendant/Respondent's Replying Affidavit

6. On 10<sup>th</sup> May, 2022, while opposing the application, the 2<sup>nd</sup> Respondent herein responded by filing a 25 Paragraphed Replying Affidavit sworn by Chabilal Mulji Patel its director and dated 9<sup>th</sup> May, 2022. He deponed that as a Director he was fully conversant with the facts giving rise to the application and duly authorized by the 2<sup>nd</sup> Defendant to swear this Affidavit on its behalf. He informed Court that the suit was filed on 11<sup>th</sup> August 2006 by way of a Plaint dated 8<sup>th</sup> August, 2006. He stated that the 2<sup>nd</sup> Defendant filed its Statement of Defence and Counter Claim on 22<sup>nd</sup> November, 2006 and subsequently filed its pre - trial compliance documents on 3<sup>th</sup> April, 2009. He deponed that prior to its dismissal, this matter was last in Court the suit on 24<sup>th</sup> October 2012 when the Court directed that the file be transferred into this court and to be mentioned on 4<sup>th</sup> December 2012 for further directions. However, the Deponent stated that after the aforesaid date, the Plaintiffs/Applicants failed to take any step in prosecuting, pursuing or following up the status of the transfer of the file to this Court. This prompted the Counsel for the 2<sup>nd</sup> Respondent the Law firm of Messrs. Daly & Inamdar to write to the Plaintiffs/Applicants' Advocate the firm of Messrs. Mogaka Omwenga & Mabeya on 25<sup>th</sup> May 2015, an annexure marked as "CMP – 1" urging them to fix the matter for hearing but the letter was never responded to.

7. The matter was then dismissed by the Court on 19<sup>th</sup> November 2015 when the matter came up for notice to show cause, after the Court satisfied itself that the notices annexed and marked "CMP – 2" on its own motion and after such a long inactivity were served upon the parties. Despite this, there was non attendance by the parties and their Advocates. He stated that the law was clear that the Court had powers to dismiss a matter for want of prosecution upon the lapse of one (1) year where no steps were taken by parties. He averred that indeed their Advocates issued the Plaintiffs/Applicants' Advocates with a hearing notice, annexed and marked as "CMP – 2".

The deponent argued that even if the Plaintiffs/Applicants indeed never received the notice, it was unreasonable for the Plaintiffs/Applicant to expect the file to be still active 9 years later. He held that there was no substantiated reason as to why the never pursued a hearing date prior to the suit being dismissed. The deponent argued that the letters attached to the supporting affidavit of the application between 2018 and 2019 akin on fixing the matter for hearing were all written at least five years since the file was actively in court in the year 2012. Further the deponent claimed that the Plaintiffs/Applicants only took action to settle the matter for hearing three years after the same was dismissed.

8. The deponent dismissed the claim made by the Plaintiffs/Applicants to the effect that the file was missing. He held that the Court file had always been available. For instance, he informed Court that his advocate was able to extract the Court order of 19<sup>th</sup> November 2015 on 3<sup>rd</sup> December 2015 annexed and marked as "CMP – 3" and advised him on the same. The deponent furthermore argued that the Plaintiffs/Applicants ought to have followed the procedure laid down where in the case of missing file one moved the Court to open a skeleton file, which they never did. He contended that the Plaintiffs/Applicants took a back seat and waited for Court to trace the file, allocate a new case number and settle it down for hearing, instead of them taking a leading role in prosecuting their own matter.

The deponent urged court not to allow the application for several reasons. These were:-

- a. They would be highly prejudiced taking that it had been fifteen (15) years since the suit was filed and the witnesses were unavailable the facts and evidence has since changed and may be inaccessible and this would rob the essence of the 2<sup>nd</sup> Defendant defending themselves effectively.



- b. The Law firm for the 2<sup>nd</sup> Respondent had long time closed its file.
- c. It was a public policy that litigation must come to an end. To revive a dead case after six years would miscarriage of Justice.
- d. There had been inordinate delays caused by the Plaintiffs/Applicants by bringing this Application after six years after the dismissal of the suit.

The deponent urged court to dismiss the application filed six (6) years after the suit was dismissed.

#### IV. Submissions

9. On the 25<sup>th</sup> April, 2022, while all parties were present in Court, directions were take to the effect that the Notice of Motion Application herein dated 30<sup>th</sup> August, 2021 be disposed off by way of written submission but with stringent timelines. Pursuant to that, and upon all parties fully complying, the Honorable Court reserved a date for rendering its ruling accordingly.

#### A. The Written Submissions by the 1<sup>st</sup> & 2<sup>nd</sup> Plaintiffs/Applicants

10. On 17<sup>th</sup> May, 2022, the Learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants herein, the firm of Mogaka, Omwenga & Mabeya Advocates filed their written Submissions dated 12<sup>th</sup> May, 2022. Mr. Mogaka Advocate submitted that it occurred from the Court record that a Notice to Show Cause why the suit should not be dismissed for want of prosecution had been issued and scheduled for hearing on the 19<sup>th</sup> November, 2015 during the Judiciary Service Week. The learned Counsel averred that the main contention by the Plaintiffs/Applicants were that they were neither served with the NTSC nor hearing notice for the scheduled date of 19<sup>th</sup> November, 2015 when the suit was dismissed for want of prosecution in the absence of all parties and indeed there was no Affidavit of Service on record to the contrary. Thus, he argued that this failure of service was a violation of their right to fair trial and hearing as enshrined in the provision of Article 50 of the *Constitution* and the principle of natural justice. To him, the orders of 19<sup>th</sup> November, 2015 were irregular and a nullity in law for denial of the right to fair hearing. To buttress his point, the Counsel relied on the decisions of the case of the Court of Appeal, “*Ali Bin Khamis, as the Legal Administrator of the estate of Khamis Bin Suleiman – Ded v Salim Bin Khamis & 2 others* CA No. 18 of 1954”, the Court of Appeal adopted the Holding in “*Craig v Kanseen*”, (1943) 1A. ER 108 in which it held that:- “It is beyond question that failure to serve process where service of process is required, is a failure which goes to the root of our conception of the proper procedure in litigation. Apart from proper ‘ex parte’ proceedings, the idea that an order can validly be made against a man who has had no notification of any intention to apply for it is one which has never been adopted in England. To say that an order of that kind is to be treated as a mere irregularity, and not something which is affected by a fundamental vice is an argument which in our opinion cannot be sustained”. The Learned Counsel, cited other the Court of Appeal case of “*James Kanyitta Nderitu and anor. v Marios Pilotas Ghikas & Anor* (2016) eKLR, where it held that the right to be heard before an adverse decision was taken against a person was fundamental and permeated our entire justice system. Further, the Learned Counsel relied on other cases being “*J.M.K v MWM & Another* (2015) eKLR; “*Mbaki & Others – Versus Macharia & Another* (2005) 2 EA. 206 and “*Tarak Khawaja & 5 Others v The Registrar of Societies & 9 Others* (2017) eKLR all laying great emphasis and underscoring on the importance of the principles of natural justice and not being condemned unheard.
11. The Learned Counsel argued that at all material times, including the dismissal was a high court file HCCC 184 of 2006 until the year 2021 when the same was transferred to this court and issued with the current file number ELC 151 of 2021. The Counsel contended that they became aware of the new case number as well as the transfer of the case on 26<sup>th</sup> August 2021 and immediately filed this application.



The Counsel urged court to allow the application and not prejudice the Plaintiffs/Applicants of his right to fair trial which was unlimited by the provision of Article 25 of the Constitution of Kenya, 2010.

## **B. The Written Submissions by the 2nd Defendant/Respondent.**

12. On 16<sup>th</sup> June, 2022, the Learned Counsels for the 2<sup>nd</sup> Respondents herein, the Law firm of Daly Inamdar Advocates LLP, filed their written submissions on behalf of the 2<sup>nd</sup> Defendant/Respondent dated 15<sup>th</sup> June, 2022. Mr. Noorain Advocate while in opposing of the application commenced by stating that the suit was filed in Court on 11<sup>th</sup> August, 2006. Prior to its dismissal, this matter was last in Court on 24<sup>th</sup> October, 2012 where after the Plaintiffs did not take any steps in prosecuting their claim. The suit herein was dismissed on 19<sup>th</sup> November, 2015, at least three (3) years since the last action was taken by the parties. The Counsel averred that the inertia by the Plaintiffs/Applicants run contrary to the overruling objectives of Court stipulated in Sections 1A, 1B and 3A of the Civil Procedure Act, 2010. He argued that there had been no sufficient explanation on the delay save for an allegation that the Court file was missing.

He referred Court to the 2<sup>nd</sup> Edition of the High Court Registry Operation Manual at Pages 33 to 34, Paragraph 4.6 on the procedure and guidelines to be followed in the event the file was missing. These were to the effect that if a file had been missing and could not be traced for 14 days the Registrar would inform the parties to the suit of the same and recommend for reconstruction of the file. The Counsel submitted that the Plaintiffs/Applicants had never produced evidence of the steps they took in initiating the file tracing using the court's laid down procedure.

13. The Counsel contention was that the Court had powers and the discretion to dismiss cases for want of prosecution. He relied on the provision of Order 17 Rule 2 (1) of the Civil Procedure Rules, 2010 to submit that the court had powers to do so where a year lapsed with no step taken by either party. The Counsel argued that it was in order for the Court to dismiss the suit on its own motion after issuing the parties with a notice to show cause, and that the Plaintiffs/Applicants should not hide behind the issue of service of notice. The Counsel argued that parties were sufficiently notified to the satisfaction of the court and relied on the case of "John Njaria Mutunga & 2 others – Versus - Godfrey Muburi Muchiri & another" (2016) eKLR where the court held that:- "the judicial service week was highly publicized and notices were issued both in print and electronic media and counsel for the plaintiffs cannot therefore state that he was not aware that matters were coming up for dismissal"
14. The Counsel submitted that the application has been made six (6) years after the suit was dismissed for want of prosecution and argued that was a recurring delay on part of the plaintiff which resulted to nine (9) years since the matter was last in court. Counsel argued that delay defeats equity and relied on "John Njaria (*supra*) which was held that:- "Considering the circumstances of this case and even if the court was minded to give the learned counsel the benefit of doubt, this court finds that there was inordinate delay in filing the application herein. As submitted by the counsel for the 2nd defendant, there was a delay of 1 year and 2 months which delay, in my view, was not sufficiently explained. Counsel for the Plaintiffs told the court that he learnt of the dismissal of the matter one year after. His client has not explained why he was not following up the matter with his lawyer. The impression given by the Plaintiffs is that of parties who are not desirous of prosecuting their matter."
15. In conclusion the Counsel held that in the delay by the Plaintiffs/Applicants was inordinate from the time taken to realize that the Court file was missing, seeking to trace it or moving the Court to rectify the same or seeking to reinstate the suit upon dismissal. He urged the Court to dismiss the application with Costs to the 2<sup>nd</sup> Defendant/Respondent.



## V. Analysis and Determination

16. I have keenly read through the application filed by the Plaintiffs/Applicants herein, the supporting affidavits, the responses the elaborate written submissions, the numerous cited cases, the relevant provisions of the Constitution of Kenya, 2010 and the statutes.

For the Court to reach a balanced, fair, just and reasonable decision, it has condensed the subject matter into the following two (2) broad issues for its determination. These are:

- a. Whether the Notice of Motion application dated 30<sup>th</sup> August, 2021 by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants herein is meritorious. If Yes, should the reliefs sought to set aside the orders issued on 19<sup>th</sup> November 2015 dismissing the suit for want of prosecution and reinstate the suit to be heard on merit should be granted.
- b. Who will bear the costs of the application.

**Issue No. a) Whether the Notice of Motion Application Dated 30<sup>th</sup> August, 2021 by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants herein is Meritorious. If Yes, should the Reliefs Sought to set aside the Orders Issued on 19<sup>th</sup> November 2015 Dismissing the Suit for want of Prosecution and reinstate the Suit to be Heard on Merit should be Granted.**

17. This is a rather wide issue which requires incisive and deep observation. To begin with, it is significant that the Honorable Court extrapolates on the brief facts of the case. Upon perusal of the court record, and with the concurrence of the parties herein this matter was filed before the High Court, Mombasa as HCCC No. 184 of 2006 by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants on 11<sup>th</sup> August 2006 through a Plaintiff. The Plaintiffs/Applicants were seeking for the following reliefs.

- a. An injunction directed at the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from trespassing, charging, alienating, entering into dealings in any way with title known as Land Reference Numbers Mombasa Block XXVI/756.
- b. A declaration that the Plaintiffs were the lawful owners to the suit land.
- c. An order for the 4<sup>th</sup> Defendant to correct and cancel the register inferring that the 2<sup>nd</sup> Defendant was the owner to the suit property and also to cancel the title issued to the 2<sup>nd</sup> Defendant and Costs.

Subsequently, upon being served with Summons to Enter appearance the 2<sup>nd</sup> Defendant filed their Defence and Counter Claim dated on 22<sup>nd</sup> November, 2006 and filed on even date. They sought for the following reliefs:-

- a. Judgement be entered against the Plaintiffs for a sum of Kenya Shillings Two Hundred and Twenty Seven Thousand (Kshs. 227, 000.00)
- b. General Damages;
- c. Interest and Costs.

Whilst at High Court, the matter had been relatively active. On 24<sup>th</sup> October 2012 it came up for hearing before Justice Muriithi. Mr. Omwenga Advocate for the Plaintiffs/Applicants was present. Arising from an issue of jurisdiction being a land matter, the Honorable Court directed that the matter be transferred to the Environment and Land Court to hear and determine it accordingly. The Court further directed it be mentioned on 4<sup>th</sup> December 2012 before this Court for directions. However, for unclear reasons, this never happened. From that time onwards, the file became inactive until 19<sup>th</sup>



- November 2015 during the Judiciary Service week when the case was listed before Angote J on a NTSC. There being no party who attended as scheduled, the Court being satisfied that service was effectively done, it dismissed the suit for non – attendance and want of prosecution.
18. When the Court further perused the court file, it came across a Hearing Notice dated 2<sup>nd</sup> October 2015 from the court. There is evidence to the effect that the notice was served upon all the Advocates on record. However, the Advocates for the Plaintiffs/Applicants have vehemently refuted having been served with the said notice, which is their main contention. Additionally, they have strongly argued that they were not aware that their matter was coming up for the Notice to Show Cause why it should not be dismissed for want of prosecution by Court during the said Judiciary Service Week and indeed that on 19<sup>th</sup> November, 2015 it was indeed dismissed. It is on record that on 21<sup>st</sup> June 2018, the Counsel for the Plaintiffs/Applicants wrote to the Attorney General and the law firm of Messrs. Kamoti & Co advocates inviting them to fix the matter for pre - trial hearing. The Counsel then wrote to the High Court Deputy Registrar on 27<sup>th</sup> March 2019 and 21<sup>st</sup> May 2019 lamenting their frustration they were undergoing in attempts of tracing the Court file and not being aware whether the Court file had been at the High Court or this court. The Counsel for the Plaintiffs/Applicants argued that as it would be in ordinary circumstances, there was no written communication emanating from the High Court registry forwarding the file from the High Court into this court and neither did they receive the new file number that had been allocated to the file upon its transfer. The Counsel blamed the High Court registry for misplacing the file between the court’s archives and the registries of this court and those of the high court. The Counsel contended that they only came to trace the file at this Court’s registry on 26<sup>th</sup> August 2021, only to discover that the suit had been dismissed for want of prosecution hence the need to file this application.
  19. For the benefit of doubt, this explanation and the arguments mounted b the Counsel for the Plaintiffs/Applicants may be bearing great credence. However, the Honorable Court finds some aspect of the matter unsatisfactory. Firstly, despite the Counsel for the Plaintiffs/Applicants being present in High Court at Mombasa on 24<sup>th</sup> October 2012 when the court ordered the file to be transferred from the high court to the Environment and Land Court at Mombasa and even granted a mention date on 4<sup>th</sup> December, 2012 neither the Plaintiffs nor their Counsel took any tangible action on the matter for about three (3) years. Secondly, there has been no plausible explanation given for the inordinate delay, thus culminating into its dismissal on 19<sup>th</sup> November 2015. Thirdly, from the time the suit was dismissed the Plaintiffs took no action for another three (3) years, until they claim to have started tracing the Court file at the High Court Registry and not even at this Court.
  20. In my own view, the Counsel for the Plaintiffs/Applicants got it all wrong and were misplaced in their wrongful decision to be writing letters to the Deputy Registrar High Court to trace the file when clearly and in their presence the High Court had given express orders that the matter to be transferred to this court. I am not persuaded by the sentiments expressed by the Counsel for the Plaintiffs/Applicants in the averments made out under the contents Paragraphs 5 and 6 of the Supporting Affidavit to insinuate that they waited entirely on the forwarding letter from the high court registry transferring the file to this court. To me this is pure an act of inactivity and extensive lethargy on their part. One wonders why the Counsel for the Plaintiffs, who had been fortunate enough to have handled the matter over the decades sought to extract the orders of court transferring the matter to this court and following up on the same with the various registries. As the English saying goes, “If the Mountain cannot go to Mohammed, Mohamed should go to the Mountain” surely the Counsel should have left the comfort zones of their arm Chairs to at least pursue the Court file from all the Registries. Better still, they should have engaged by calling or meeting their Counterparts over the issue. This never happened. From the pleadings filed, the Honorable Court has noted that the Counsels for the 2<sup>nd</sup> Defendant/Respondent



actually managed to easily access the Court file and extracted the orders of 24<sup>th</sup> October, 2014 and 19<sup>th</sup> November, 2015. They even served the Counsels for the Plaintiffs/Applicants with the hearing notices for 19<sup>th</sup> November, 2015 which though they Plaintiffs/Applicants claim they never received it bears an acknowledgement of receipt through an official stamp and signature. These are marked as “CMP - 1 to 3” of the annexures by the 2<sup>nd</sup> Defendant/Respondent. The court is aware that during the creating of this court a lot of matters were transferred from the high court into this court. History will bear me right that despite the teething problems that occurred with the few misplacement of files, majority of litigants and their Counsels were vigilant and followed up with the files relocations and reconstructions. This case should not be an exception.

21. The introduction of the overriding objective placed a statutory obligation on parties and their Advocates to aid court in furthering the overriding objectives being just, expeditious, proportionate and accessible resolution of disputes. The provision of Sections 1A and 1B of the *Civil Procedure Act*, Cap. 21 and Section 3 (1), (2) and (3) of the *Environment and Land Act*, No. 19 of 2011 ensures that litigants can no longer in the old conservative manner sit pretty at the fence of Justice and be luxuriously be pointing fingers and entirely blaming the court for the backlog of cases or misplacement of files at the registry. It is now a mutually shared responsibility. The working of the court is also the business of the litigants and their Advocates who all have the collective responsibility to ensure that cases are disposed off expeditiously and without undue delay. In my view, the delay in this matter is beyond the acceptable standards and measures. It is not only inordinate, unreasonable but inexcusable. It deliberately goes against the Legal trajectory founded in the Maxim “Justice Delayed is Justice Denied” and indeed which is well summarized under the provision of Article 159 (2) (b) of the *Constitution* of Kenya, 2010 to wit:-

“In exercising Judicial authority, the Courts and the tribunals shall be guided by the following principles – Justice shall not be delayed”.

22. Certainly, litigation must come to an end. The explanation given by the Counsel for the Plaintiffs/Applicants that they were never served with the hearing notice does not suffice, simply because the court had earlier given an order on 24<sup>th</sup> October 2012 for the file to be transferred from the high court into this court and the Plaintiffs/Applicants took no action to see it through.
23. While here, I wish to rely on the decision by my brother Gikonyo J in “*Saadia Hirbo – Versus - Adan Haile Darche* [2017] eKLR associated the overriding objective which demands the court to serve substantive justice with Article 159 of the *Constitution* and held:-

“The justification for taking such drastic action is founded on the principles of justice enshrined in article 159 of the *Constitution* after the old age adage that; Justice delayed is justice denied. In that spirit also, our law has seen the introduction of overriding objective of the law which has placed a statutory obligation on parties and their legal counsels to assist the court attain the overriding objective of law inter alia to dispose of cases expeditiously. And I can do no better than Warsame J (as he then was) in exemplifying the dire consequences of delay in prosecuting cases in the case of *London Distillers (K) Limited v Philip Kipchirchir & 2 Others* [2007] eKLR that;

“In my view delay is affront to the administration of justice, delay is something to be deplored, delay is repugnant to justice, delay spoils the image of the judiciary, delay foments public outcry against the judiciary, delay creates disharmony between the consumers of justice and the courts. Delay is a disguised disinterest in the disposal of the suit. Delay creates desolate and despair in the minds of the party affected by the delay. It is a despicable attempt to enslave a party to an



endless contest. That contest must come to an end if the instigator is unwilling to end it. In this case the plaint of the Plaintiff is like a despotic ruler hanging over the head of the Defendants”.

24. The Counsel for the Plaintiffs/Applicants claim that the file was missing, but the letters to the Deputy Registrar complaining of the missing file were written in 2019, which was four (4) years after the matter was dismissed for want of prosecution and seven (7) years after the Court ordered the file to be transferred to this court from the high court. The Plaintiffs can not blame the Court for the missing file, while the truth of the matter is that they had the same advocate on record all along, who was even in court when the court directed that the matter ought to be transferred into this court.
25. This court finds that there is no justifiable reason for the inordinate delay. I find that the delay is a source of prejudice to the Defendant and affects the fair administration of justice. The provision of Article 47 of the *Constitution* of Kenya provides that the right to administrative action that is expeditious, lawful, reasonable and procedurally fair. For these reasons all the elaborate and extensive submissions advanced and the numerous authorities relied on by the Counsel for the Plaintiffs/Applicants to the effect that the Plaintiffs/Applicants ought to be accorded an opportunity to be heard as provided for under the principles of natural justice is without any basis, as it is unfounded, unmeritorious and misplaced given the surrounding facts and inferences in this case. I reiterate Litigation must come to an end.
26. Briefly, let me discern on the powers by this Court to dismiss cases for want of prosecution. Under the provisions of Orders 12 (1) and 17 Rules 1, 2 and 3 of the *Civil Procedure Rules*, 2010, the Honorable Court has discretion power to dismiss any case for non attendance and want of prosecution. The Provisions of order 17 Rule 2 (3) of the *Civil Procedure Rules* provides that:-
  - 1) “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.
  - 2) If cause is shown to the satisfaction of the Court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.
  - 3) any party to the suit may apply for its dismissal as provided in Sub-rule 1”.
27. In order for these legal principles to be applicable the following need to be demonstrated:-
  - a. That no application has been made or step taken by either party for one (1) year from the time of filing the suit and
  - b. That the Respondents have failed to comply with the directions of the court clearly.

Clearly, the powers granted to court hereby by law are discretionally and have to be exercised judicially, fairly and capriciously.

In so doing, the test applied by court in the application for dismissal of suits for want of prosecution is whether the delay is prolonged and inexcusable and if it is, whether justice can be done despite the delay. In other words if the delay is satisfied with the Plaintiff's excuse for the delay and the parties are still keen and interested in pursuing their matter going forward in the fullness of time, justice can still be done to the parties before court, and hence the action would not be to dismiss it but direct that it be heard at the earliest time possible and available.

This court on the legal ration of Order 17 (2) (3) of the *Civil Procedure Rules*, 2010 relies on the decision of “*Investment Limited v G4s Security Services Limited* (2015) eKLR where court held :- “This order is permissive and allows quite significant room for exercise of discretion to sustain the suit. And I think



it is so especially when one fathoms the requirements of Article 159 of the Constitution of Kenya and the overriding objective when demands of courts to strive often, unless for very good cause, to serve substantive justice. This is well understood in the legal reality that dismissal of a suit without hearing it on merit is such draconian act comparable only to the proverbial “Sword of the Damocles”. But in reality should be checked against yet another equally important constitutional demand that case should be disposed of expeditiously, which is founded upon the old adage and now an express Constitutional Principle of Justice under Article 159 (2) of the Constitution of Kenya that justice delayed is justice denied. Here I am reminded that justice is to all the parties not only to the Plaintiff. This is the test I shall apply.

28. From the facts and the legal principles on Order 17 Rule 2 (3) of the Civil Procedure Rules 2010, is graphically clear to the effect that from the time the suit was filed on 11<sup>th</sup> August, 2006. And even transferred from High Court to this Court on 24<sup>th</sup> October, 2012 and the subsequent mention date of 4<sup>th</sup> December, 2012 no action was taken by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants herein. I need not belabor the point again on what transpired later on. Suffice it to say, a wake up call was made by the Court issuing the Notice to Show Cause and listed in the daily cause list during the Judiciary Judges service week all intended to clear them from unnecessarily clogging the Judiciary system. The decision was working marvelously and borne positive robust results whatsoever.

For this very reason the application must not succeed. Thus, the relief to Reinstate the suit after it’s dismissal for want of prosecution must fail accordingly.

#### **Issue b). Who will bear the Costs of the Application**

29. It is now trite law that the issue of Costs are at the discretion of the Honorable Court. Costs are awards that a party is granted at the conclusion of any legal action, process or proceeding in a litigation. The proviso of Section 27 (1) of the Civil Procedure Act, Cap. 21 provides that Costs follow the events. By events here it means the result or outcome of any such legal action, process or proceeding s from a litigation.
30. From the instant case, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants herein have not been in a position to establish their prima facie case from the filed Notice of Motion application dated 30<sup>th</sup> August, 2021 against the Defendants/Respondents herein. For these reasons therefore, it follows that the Plaintiffs/Applicants herein should bear the costs for the application to be awarded to the 2 Defendants/Respondents who actively participated in defending the application.

#### **VI. Conclusion and Disposition**

31. Conclusively, having critically and indepth analyzed all the framed issues herein, on preponderance of probability, the Honorable Court finds that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants herein have not been successful in establishing their case through the filed Notice of Motion application dated 30<sup>th</sup> August, 2021 against the Defendants/Respondents herein. Therefore, I wish to proceed and make the following orders:-
- a. That the Notice of Motion application dated 30<sup>th</sup> August, 2021 filed by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants herein against the Defendants herein is found to be unmeritorious hence be and is hereby dismissed.
  - b. That costs of the application to be awarded to the 2<sup>nd</sup> Defendant/Respondent.
32. It Is so ordered accordingly.



**RULING DELIVERED, SIGNED AND DATED AT MOMBASA THIS 14<sup>TH</sup> DAY OF NOVEMBER 2022**

**HON. MR. JUSTICE L.L NAIKUNI (JUDGE),  
ENVIRONMENT & LAND COURT AT MOMBASA**

In the presence of:

- a. M/s. Yumnah, the Court Assistant.
- b. Mr. Mayiaka Advocate holding brief for Mr. Mogaka for the 1st and 2nd Plaintiffs/Applicants
- c. M/s. Baraza Advocate for the 2nd Defendant/Respondent.
- d. No appearance Advocate for the 1st, 3rd, 4th and 5th Defendant/Respondent.

