REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 636 OF 2012

[FORMERLY ELDORET HCCC NO. 112 OF 2010]

KERIO VIEW INVESTMENTS COMPANY LIMITED.....PLAINTIFF

VERSUS

LORNAH KIPLAGAT.....1ST DEFENDANT

LANDS REGISTRAR, KEIYO DISTRICT….....2ND DEFENDANT

RULING

[1ST DEFENDANT'S NOTICE OF MOTION DATED 28TH JULY, 2020 AND PLAINTIFF'S NOTICE OF MOTION DATED 22ND SEPTEMBER, 2020]

1. **Lornah Kiplagat**, the 1st Defendant, filed the application dated the 28th July, 2020 seeking for an order for Kerio View Investments Company Limited, the Plaintiff, to give vacant possession of ***L. R. Irong/Iten/2743*** in 14 days and in default, eviction order to issue; that the County Surveyor, Elgeyo Marakwet and OCS, Iten or their designates to supervise the takeover; demarcations and fencing of the said land and costs. The application is based on the twenty-two **(22)** grounds on its face and supported by the undated affidavit sworn by **Lornah Jebiwott Kiplagat**, the 1st Defendant. The 1st Defendant's case is that L. R. Irong/Iten/2743, the suit land, is registered in the name of Hill Ten Company Limited at which she is a director and shareholder. That the Plaintiff has forcefully retained the suit land since August, 2010 despite this suit having been dismissed on 10th April, 2015 and the Report by the Land Registrar of 30th May, 2011 and those dated 3rd May, 2017 and 6th April, 2017 by the Land Registrar and Surveyor. That the 1st Defendant was wrongly joined as a party, and this suit being a boundary dispute should have been filed before the Land Disputes Tribunal. That the legitimate expectation and fair administrative action for the 1st Defendant, and the Hill Ten Company Limited, should not be aggravated by perpetuating the Plaintiff's stay on the suit land as it would amount to violation of their right to enjoy the property. That the Plaintiff has been in unlawful, illegal and unjust enjoyment of the suit land, and continues to draw commercial income from the property it does not own, and the application should be allowed with costs.

2. The Plaintiff on their part moved the Court through the Notice of Motion dated the 22nd September, 2020 seeking for review and setting aside of the dismissal order dated 10th April, 2015 as the notice to show cause required under **Order 17 Rule 2 of the Civil Procedure Rules** was not issued and served; or alternatively the said dismissal order be vacated for having been made extra-judicially, and the costs be provided for. The application is based on the **(3)** three grounds on its face and supported by the affidavit sworn by **John Eric Butler Williams**, a director to the Plaintiff on the 22nd September, 2020. The Plaintiff's case is that the order dismissing this suit was made without the notice to show cause being issued and served as required. That the dismissal order has not been extracted and served. That the parties have proceeded with other compliance proceedings and consent entered without notice of the order. That the Defendants have not filed a counterclaim upon which an eviction or vesting order can be premised. That the disputed property holds a 4-Star Hotel that handles international clientele, and the paragliding path over the suit land is a natural feature created by God and is among the four in the world.

3. The 1st Defendant opposed the Plaintiff's application through her replying affidavit sworn on the 24th November, 2020. It is the 1st Defendant's case that the Plaintiff has not given reasons why it had not prosecuted its case for five years by the time the dismissal order was made, or explained why it took more than five years to apply for review and or setting aside of the dismissal order. That notices to show cause had been issued through a cause list placed on the notice board. That the Plaintiff had not extracted and served summons to enter appearance for ten years, and the suit has therefore abated. That she had been wrongly sued instead of the company, and statutory notices had not been issued before enjoining the 2nd Defendant. That her advocate notified the Plaintiff of the dismissal order in 2016, but the Plaintiff took no action. That inaction by the Plaintiff after filing the suit shows that the Plaintiff had abandoned its case, was indolent, indifferent and had failed to be proactive in monitoring and managing the case. That the 4-Star Hotel is not on the suit land but a different parcel. That as the Plaintiff has failed to establish ownership of the suit land, no counterclaim was required to be filed before seeking for eviction orders. That the issue of the boundary dispute was settled on the 30th May, 2011 under **Section 21(2) of the Registered Land Act**

Chapter 300 of Laws of Kenya (Repealed), and no challenge through appeal or review proceedings has been mounted against that decision. That the consent of 24th May, 2016 was part of after judgment execution allowed under **Section 34 of the Civil Procedure Act Chapter 21 of Laws of Kenya** but did not amount to reinstatement of the suit. That due to the misjoinder and non-joinder of parties, no useful purposes would be served by reinstating the suit.

4. The learned Counsel for the 1st Defendant and the Plaintiff filed the written submissions dated the 26th February, 2021 and 8th March, 2021 respectively. That on the 3rd March, 2021 the learned Counsel for the 2nd Defendant informed the Court that their client do not oppose the 1st Defendant's application dated 28th July, 2020 but opposes the Plaintiff's application dated 22nd September, 2020.

5. The following are the issues for the Court's determinations;

(a) Whether the order dismissing the suit for want of prosecution on 10th April, 2015 was procedurally made and if so, whether the Plaintiff has made a reasonable case for reviewing, setting aside or vacating the said order.

(b) Whether the 1st Defendant has made a reasonable case for the Plaintiff to vacate from the suit land and in default, he be evicted.

(c) Who pays the costs of each of the two applications?

6. The Court has carefully considered the grounds on each of the notices of motion, the affidavit evidence tendered, the learned Counsel's written submissions, the superior courts' decisions cited and come to the following findings;

(a) That this suit was commenced by the Plaintiff against the two Defendants through the Plaint dated the 26th August, 2010 seeking primarily for orders of injunction restraining the Defendants from interfering with its proprietary interests over land parcel Irong/Iten/2742, and an order compelling the 2nd Defendant, through the District Surveyor or any other Court approved surveyors, to pick and prepare competent maps demarcating the said land and Irong/Iten/2089. That following the Plaintiff's application dated the 13th February, 2012 that was allowed on the 19th December, 2012, the Court directed that the parties do maintain the status quo obtaining on the ground ***"pending the final hearing and determination of the main suit"***, and that costs be in the cause. That on the 10th April, 2015, the court dismissed the suit under **Order 17 Rule 2 of the Civil Procedure Rules** for there being no steps taken to prosecute the suit for two years since 19th December, 2012. That however, the 1st Defendant then filed the Notice of Motion dated the 12th April, 2016 seeking for the discharge of the order of 19th December, 2012 and vacant possession of land parcel Irong/Iten/2743, among other prayers. The application was certified urgent on the same date it was filed and fixed for interpartes hearing on the 23rd May, 2016. That on that date, the counsel for the two parties entered a consent, among others for Elgeyo Marakwet County Surveyor to conduct a survey demarcating the boundary of parcels Irong/Iten/2742 belonging to the Plaintiff and Irong/Iten/2743 belonging to the defendant. That the matter was thereafter mentioned severally to confirm whether the survey had been done and report filed. That during the Court appearance of 14th February, 2018 and 7th March, 2018, the learned Counsel present informed the Court that the survey had been done but the report thereof was yet to be filed with the Court. The Court directed the parties to follow up with the surveyor on the filing of the report. The other mentions that followed were about the two applications subject matter of this ruling.

(b) That as confirmed from the record, the Plaintiff's suit was dismissed for want of prosecution pursuant to **Order 17 Rule 2 of the Civil Procedure Rules** on the 10th April, 2015. That **Order 17 Rule 20 of Civil Procedure Rules** provides as follows:

> ***"2(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 the dismissal as provided in sub-rule 1.***
>
> ***(4) The Court may dismiss the suit for non-compliance with any direction given under this order."***

That the proceedings of 10th April, 2015 shows that none of the parties was present or represented. That the Plaintiff's claim that no notices to show cause had been issued and served upon the parties before the dismissal order was made has been disputed by the 1st Defendant through her replying affidavit. That the 1st Defendant's position is that the Court had issued notices through the cause list pinned on the notice boards of its intention to dismiss old unprosecuted cases. That deposition has not been challenged by the Plaintiff through a supplementary or further affidavit. That the Court therefore finds that the Plaintiff has failed to prove that the Court had proceeded with the notice to show cause, and made the order of 10th April, 2015 without notifying the affected parties through notices.

(c) That the record further shows that before the dismissal order of 10th April 2015, the last court appearance in the matter was on the 26th September, 2012 when a ruling date of 19th December, 2012 was fixed. That there is indeed a copy of the ruling delivered by *Mshila, J* on the 19th December, 2012 in the presence of Counsel for the two parties. That the Court takes that to be the last step taken by the parties to prosecute this suit. That therefore, a period of over two **(2)** years four **(4)** months had lapsed without any other step being taken to prosecute this suit from the 19th December, 2012 to the 10th April, 2015 when the suit was dismissed for

want of prosecution. That it was upon the Plaintiff to explain their inaction for over two years but has not done so. That indeed, the Plaintiff had done nothing from the date the status quo order was issued on the 19th December, 2012 until after the 1st Defendant filed their notice of motion dated 12th April, 2016 seeking to have the order issued on the 19th December, 2012 discharged. That the foregoing leads the Court to agree with the 1st Defendant that the Plaintiff was indeed, indolent and had no intentions to prosecute its case after it got the order of 19th December, 2012 for the obtaining status quo to be maintained.

(d) That learned Counsel for both sides have cited several superior Courts' decision in urging their respective positions on the two applications. The Court has considered the decisions in those cases and especially ***Fran Investments Ltd Vs G45 Security Services Ltd [2015] eKLR***, where the Court stated that;

> ***"(9) Order 17 Rule 2(1) of the Civil Procedure Rules does not require service of notice; it uses the word "give notice". The court may give notice of the dismissal through its website or through the consent. And those mediums will constitute sufficient notice for purposes of Order 17 Rule 2(1) of the Civil Procedure Rules…What is surprising is that on 12th October 2010, the Court delivered a ruling dismissing the defendant's defence but since that time, the Applicant did not bother at all to progress its case. I agree with the submission of the Respondent that despite the appeal filed, there was no stay of proceedings and so it is a farce for the Applicant to hang on the pendency of the appeal to justify its indolence. Again, if the Applicant was as vigilant as it claims to be, it is quite irreconcilable that they discovered the suit had been dismissed on the 17th February, 2014 – four years since the defence had been struck out. Such delay is not inadvertent as alleged by the Applicant; it is deliberate as a party is expected to prosecute their cases without delay. The delay has not been satisfactorily explained and is a source of prejudice to the Respondent as well as to fair administration of justice."***

That in the foregoing case, the Court declined to review or set aside the dismissal order. That the decision being of the High Court is not binding to this Court. The Court however, agrees with the finding thereof that what **Order 17 Rule 2(1) of the Civil Procedure Rules** requires is to give notice of the intention to dismiss the matters that have taken more than a year without steps being taken to prosecute them. That the notice given herein was through cause list pinned on the notice board, which the Court find to be sufficient for those interested to be heard to attend court on the dates indicated. That the parties herein are represented by Counsel who are expected to frequently check on the cause lists of the courts their clients have suits for their necessarily information and action.

(e) That in opposing the Plaintiff's application, the 1st Defendant has among others stated that she had been wrongly sued as she is only a director and shareholder of the registered proprietor of land parcel Irong/Iten/2743, the suit land. That further, the registered proprietor of the suit land, Hill Ten Company Ltd, has not been enjoined as a party. That she further deponed that the summons to enter appearance has never been served upon her and for the foregoing reasons there would be no value in reviewing the dismissal order of 10th April, 2015 for the suit has abated. The Plaintiff has however deponed that subsequent to the dismissal order, the parties have proceeded to comply with **Order 11 of the Civil Procedure Rules**, and to enter into a consent for survey exercise to be carried out. That the rational in the **Order 17 Rule 2 of the Civil Procedure Rules** is that suits should be heard and determined expeditiously as justice delayed is justice denied. That in the ***Fran Investments Limited case (supra)***, the Court had the following to say about **Order 17 Rule 2 of the Civil Procedure Rules**;

> ***"[8]…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 requirement of Article 159 of the Constitution and the overriding objective which 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 Damocles". But that reality should be checked against yet another equally important constitutional demand that cases should be disposed of expeditiously, which is founded upon the old age adage and now an express constitutional principle of justice under Article 159 of the Constitution, that justice delayed is justice denied. Here, I am reminded that justice is to all the parties and not only the Plaintiff. That is the test I shall apply here."***

That this Court is equally in agreement with the consideration set out in that case in deciding whether or not to review the dismissal order of the 10th April, 2015.

(f) That the Plaintiff did not file a specific replying affidavit or any other specific response to the 1st Defendant's application. The 1st Defendant's application therefore appears unopposed. That however, the Plaintiff's supporting affidavit sworn on the 22nd September, 2020 and filed with the notice of motion of even date has depositions that amounts to a reply to the 1st Defendant's application. The specific depositions include paragraphs 13 to the effect that the Defendants had not filed any counterclaim upon which prayers of eviction or vesting could be grounded, and paragraphs 7 to 12 on the proceedings that have taken place after the dismissal order. That there is however, no rebuttal or challenge to the 1st Defendant's contention that she was wrongly enjoined; that she had not been served with summons to enter appearance, and that Hill Ten Company Ltd, that is the registered proprietor of the suit land, has not been enjoined in the suit. That the Court notes that **Order 5 of the Civil Procedure Rules** provides for issuing and service of summons. That summons to enter appearance have a validity period of one year as seen under **Rule 2(1)** of the said order. That **Order 5 Rule 2 (7) of the Civil Procedure Rules** provides as follows:

> ***"7. Where no application has been made under sub-rule (2), the Court may without notice dismiss the suit at the expiry of twenty-four months from the issue of the original summons."***

That there is no evidence on record of the Plaintiff having ever applied for extension of the validity of summons to enter appearance as provided for under **Order 5 Rule 2(5) of the Civil Procedure Rules** or any explanation tendered as to why the Defendants were not served with the summons.

(g) That the findings above leads the Court to the question whether the continuation of the proceedings after the dismissal order of 10th April, 2015 were predicated on any pending suit in this file. That the Court's view is that any proceedings that took place after the dismissal order of 10th April, 2015 that appear to be in furtherance or prosecution of the already dismissed suit was nothing but a nullity. That unless the order of 10th April, 2015 was first reviewed, set aside and or vacated and the suit reinstated, the only proceeding that could procedurally, lawfully or regularly take place was on costs and execution thereof. That the fact that the parties proceeded to litigate and take directions in the matter that had already been dismissed was unfortunate, but never changed the status of the suit which had been dismissed. That the situation would have been different had the Defendants filed a defence that had a counterclaim because further proceedings on the counterclaim would have continued if not affected by the dismissal order.

(h) That as the Plaintiff has not explained the delay in prosecuting its suit, and in moving the court to challenge the dismissal order of 10th April, 2015, the Court is in agreement with the 1st Defendant that to review or set aside the order would be prejudicial to the Defendant as justice delayed is justice denied.

(i) That on the prayers sought by the 1st Defendant in the application dated 28th July 2020, it is apparent the 1st Defendant is not the registered proprietor of Irong/Iten 2743. That the suit land is registered with Hill Ten Company Limited that has legal capacity to sue and be sued in its own name as held in ***Salomon Vs Salomon [1817] A1 78*** and ***Victor Mabachi & Another Vs Nurtum Bates Ltd [2013] eKLR***. That in any case, the dismissal order of 10th April, 2015 did not leave any pending suit, or issue to be prosecuted upon which the 1st Defendant's application can be predicated upon. That so long as the order of 10th April, 2015 remains in force as it is now, the only proceedings that can follow are of execution under **Section 34 of the Civil Procedure Act Chapter 21 of Laws of Kenya**. That the dismissal order for want of prosecution, though not amounting to a judgment, do not warrant the 1st Defendant to found her application on it. That for the orders sought by 1st Defendant to issue she needed to have the dismissed suit reinstated to enable her file her defence, probably with a counterclaim and thereafter originate such an application. That with the 1st Defendant taking the position that the Plaintiff's suit is bad in law for reasons of misjoinder and or non-joinder, the Court is then surprised how she seeks for orders that should be prayed for by Hill Ten Company Ltd, who is not a party in the dismissed suit. That having found that there is no justifiable reasons presented to review, set aside or vacate the dismissal of the suit for lack of prosecution order of 10th April, 2015, it follows that the 1st Defendant's application is not properly before the court, and the court has no basis to consider it.

(j) That needless to state, but for avoidance of doubt, the injunction status quo order issued through the ruling of 19th December, 2012 lapsed on the date the suit was dismissed for want of prosecution, that is 10th April, 2015.

(k) That as both the 1st Defendant and Plaintiff have failed in their respect applications, each should bear their own costs in the two applications.

7. That from the foregoing, the Court finds no merits in the 1st Defendant's application dated 28th July, 2020 and that by the Plaintiff dated 22nd September, 2020. That the two applications ae dismissed with each party bearing their own costs.

It is so ordered.

Delivered virtually and dated at Eldoret this 28th day of April, 2021.

S. M. KIBUNJA

JUDGE

In the presence of:

Plaintiffs: Absent.

Defendants: Absent.

Counsel: M/s Waweru for Katwa for 1st Defendant.

Mr. Wabwire for 2nd Defendant.

Court Assistant: Christine

and the Ruling is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.