



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC.NO. 77 OF 2010 (OS)**

**MWANAMISI SAID MWAMBODZE..... 1<sup>ST</sup> PLAINTIFF**

**ALFAN RASHID MWAMBOYE..... 2<sup>ND</sup> PLAINTIFF**

**FATUMA ALI MWABITI..... 3<sup>RD</sup> PLAINTIFF**

**KASSIM SAID MWAMBODZE..... 4<sup>TH</sup> PLAINTIFF**

**VERSUS**

**The Estate of the deceased**

**MOHAMED HANIF KHAN.....DEFENDANT**

**RULING**

1. The applicants in this matter have been asked to show cause why their suit should not be dismissed for want of prosecution and this ruling is in respect to that notice.

2. The history of the matter is that on 17 March 2010, the applicants filed an Originating Summons claiming to be entitled to the land parcel Kwale/Diani/185 through the doctrine of adverse possession. Contemporaneously with the Originating Summons, the applicants filed an application for injunction and interim orders of status quo were issued on 18 March 2010. The parties were advised to take a date in the registry. On 29 June 2010, a response to the Originating Summons was filed. The next time the matter was in court was on 28 October 2010 when the case was stood over generally as both applicants and respondent were absent. Nothing happened for 7 years until 21 December 2017 when a mention date for 9 April 2018 was fixed. Again nobody appeared on 9 April 2018 and the judge (Yano J) directed parties to take another date at the registry. Owing to its inactivity, the court, on its own motion, on 12 October 2018, issued a notice to the applicants to show cause why the suit should not be dismissed for want of prosecution. The show cause was fixed for hearing on 8 November 2018. Parties were absent and the court dismissed the suit. There followed an application to reinstate the suit, which I heard and delivered ruling on 27 October 2021. I reinstated the suit for the reason that there was inadequate evidence of service of the notice to show cause. I however still was of the opinion that the applicants need to show cause why the case should not be dismissed for want of prosecution and I directed the applicants to file an affidavit to show cause.

3. An affidavit sworn by Kassim Said Mwambodze, the 4<sup>th</sup> applicant, was filed. He avers that they filed suit through the law firm of M/s Okanga & Company Advocates. He deposes that sometimes in the year 2012, they were informed by their counsel that this matter had been withdrawn. They however did not understand. They reported the matter to the police who followed up and it is alleged that they found out that Mr. Okanga had colluded with another advocate, one called Sewe, from Mulongo & Company Advocates so that they can file a notice of change of advocates and finally make an application to withdraw suit. He deposes that investigations have been going on for almost 7 years. He has added that the land is now transferred and subdivided and new titles have been issued which he claims was against the court order (probably meaning order of status quo). He has also offered that the 1<sup>st</sup> and 3<sup>rd</sup> applicants are deceased. They wish to have their suit so that they are not taken away from the seat of justice. He claims that they are paupers who stand to be evicted from their ancestral home.

4. I have considered the affidavit.

5. I have already set out the history of the matter. There has not been any activity since the interim order of status quo was issued on 18 March 2010. Indeed, the applicants have never taken a date for the hearing inter partes of their application for injunction. It is now close to 12 years thereafter. A lot of water appears to have passed under the bridge since then. This suit was filed against the Estate of Mohamed Hanif Khan (deceased) who was the proprietor of the land parcel Kwale/Diani/185 which is the subject of this suit. From the documents attached to the affidavit of Mr. Kassim, it is apparent that this land no longer exists. I have seen a new title Kwale/Diani SS/2245 which

shows that it is a subdivision of Plot No. 185. That new plot is not even in the name of Mohamed Hanif Khan but in the name of one Joyce Mumbua Mutisya, who is not a party to this suit. She became proprietor on 29 September 2010. The applicants of course say that this subdivision and transfer is illegal owing to the order of status quo. Under Order 40 Rule 4 (2), interim orders exist for 14 days, unless extended by the court. I have no record of extension of interim orders herein.

6. Apart from the foregoing, the 1<sup>st</sup> applicant died on 25 February 2015. There has been no substitution now about 7 years down the road. The 3<sup>rd</sup> applicant is also deceased, having died on 3 April 2019. Again there has been no substitution. Their suits have clearly abated.

7. I am aware that the applicants claim that there were issues regarding a claimed withdrawal of this suit which appears to have been the subject of criminal investigations. However, on record, I have not seen any notice withdrawing suit. In any event, if at all one was filed, it did not bar the applicants from filing an application to reinstate in good time. If none was filed, then there is really no excuse for not having moved the matter for more than 10 years now. If the applicants had issues with their previous advocates on record, nothing stopped them from instructing a new counsel, or even taking over the matter themselves to proceed in person. That does not need 10 or more years.

8. I am afraid that the applicants have failed to give me good reason not to dismiss this suit for want of prosecution. The period of inactivity has been too long and as I have demonstrated above, the delay is not excusable. The suit property does not even exist any more. Even if I am to keep this suit, it is going to be an exercise in futility, for this court cannot issue orders on land that no longer exists.

9. Given the above, I am persuaded that this is a fit case for dismissal for want of prosecution.

10. I proceed to dismiss the suit for want of prosecution with costs to the respondent.

11. Orders accordingly.

**DATED AND DELIVERED THIS 3<sup>RD</sup> DAY OF FEBRUARY 2022.**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA.**