



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. PETITION NO. 206 OF 2018**

*(Formerly Nairobi ELC No. 586 of 2015)*

**IN THE MATTER OF CONTRAVENTION OF ARTICLES 27, 28, 29, 35, 40, 43, 47, 50 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE LAND ACT 2012**

**AND**

**IN THE MATTER OF THE ROADS ACT, 2007**

**BETWEEN**

SIMON WAMBUA MUKULA.....1<sup>ST</sup> PETITIONER  
RAPHAEL MUTINDA MULINGE.....2<sup>ND</sup> PETITIONER  
FREDRICK YUMBYA.....3<sup>RD</sup> PETITIONER  
CHRISTINE MAVINDU.....4<sup>TH</sup> PETITIONER  
JESCA MUMBLI.....5<sup>TH</sup> PETITIONER  
FRANCIS MUTIA MWANGA.....6<sup>TH</sup> PETITIONER  
RICHARD MUTHUI WAMBUA.....7<sup>TH</sup> PETITIONER  
JOSEPH KIVWEAA NDUNDU.....8<sup>TH</sup> PETITIONER  
NGUU NDONGA.....9<sup>TH</sup> PETITIONER  
STEPHEN MWIKYA MANG'ATU.....10<sup>TH</sup> PETITIONER  
STEPHEN MAITHYA KAGWE.....11<sup>TH</sup> PETITIONER

**VERSUS**

THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT  
KENYA NATIONAL HIGHWAY AUTHORITY.....2<sup>ND</sup> RESPONDENT  
THE PRINCIPAL SECRETARY MINISTRY OF LANDS,  
HOUSING AND URBAN DEVELOPMENT.....3<sup>RD</sup> RESPONDENT

**RULING**

1. Vide a Notice of Motion dated 17<sup>th</sup> January, 2020 that was brought pursuant to the provisions of Sections 3A and 63(e) of the Civil Procedure Act and Order 17 Rule 2 (3) of the Civil Procedure Rules 2010, the 2<sup>nd</sup> Respondent/Applicant sought for the following orders:

**a) The Petitioners' suit herein be dismissed for want of prosecution.**

**b) Costs of this Application together with the suit be for the 2<sup>nd</sup> Respondent/Applicant.**

2. The Application was supported by the Affidavit of the 2<sup>nd</sup> Respondent's Advocate who deponed that the Petitioners have not taken any step in the matter for a period of over one (1) year since 16<sup>th</sup> October, 2018 when the matter was last in court.

3. Counsel deponed that the Petitioners had lost interest in the suit and were not keen to prosecuting the same; that the Petitioners were enjoying an ex-parte court order issued in their favour on 26<sup>th</sup> June, 2015 to the detriment of the 2<sup>nd</sup> Respondent herein who has been rendered unable to discharge its statutory mandate and that it is only fair that the suit is dismissed with costs to the 2<sup>nd</sup> Respondent.

4. The Application was opposed vide a Replying Affidavit dated 13<sup>th</sup> November, 2020 sworn by Simon Wambua Mukula, the 1<sup>st</sup> Petitioner, who deponed that the Respondents had proposed that joint survey work be done on the suit property and that the joint survey work was not done.

5. The 1<sup>st</sup> Petitioner deponed that the only reason as to why they had not taken steps to prosecute the matter was because the 3<sup>rd</sup> Respondent had failed to co-operate in the joint survey work and site inspection and that had the 3<sup>rd</sup> Respondent intimated that they had reconsidered their position, then it would have been clear to them that the issue was no longer viable to be pursued as a consequence of which they would have fixed a hearing date for the suit or the Application.

6. The Petitioners' and the 2<sup>nd</sup> Respondent's advocates made oral submissions which I have considered. Having considered the pleadings and the submissions, the only issue that arises is whether the suit should be dismissed for want of prosecution.

7. Order 17 Rule 2(1) of the Civil Procedure Rules provides as follows:

*"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 dismissed, and if cause is not shown to its satisfaction, may dismiss the suit."*

8. The principles to be considered in an Application for dismissal of the suit for want of prosecution were set out in the case of ***Ivita vs. Kyumbu (1984) KLR 441*** where the Court held that:

*"The test in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable and if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and the Respondents, so both parties to the suit must be considered and the position of the Judge too. The Respondent must however satisfy the court that he will be prejudiced if the delay or even that the Plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the Plaintiff before the Court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus even if the delay is prolonged, if the court is satisfied with the Petitioners excuse for the delay and that justice can still be done to the parties notwithstanding the delay, the action will not be dismissed but will be ordered that it be set down for hearing at the earliest available time."*

9. This suit was commenced by way of a Plaint and an Application for conservatory and prohibitory orders dated 23<sup>rd</sup> June, 2015. The record shows that the last time the matter was in court was on 16<sup>th</sup> October, 2018. After the lapse of almost two (2) years, the 2<sup>nd</sup> Respondent filed the current Application on 5<sup>th</sup> February, 2020.

10. Indeed, this matter remained dormant for a period of more than one (1) year since it was last in court. The Petitioners stated that the reason they have not been able to prosecute the matter was because they had agreed on a joint survey/inspection of the suit property.

11. The Petitioners have annexed on their Affidavit a letter dated 19<sup>th</sup> April, 2017 by the 2<sup>nd</sup> Respondent's advocate. In the said letter, the 2<sup>nd</sup> Respondent's advocate informed the Petitioners' advocate that his client had found it extremely difficult to ascertain with precision the parcels of land occupied by the Petitioners. The advocate suggested to the Petitioners' advocate to agree to a joint inspection preferably before the next mention date of 19<sup>th</sup> July, 2017.

12. On 7<sup>th</sup> March, 2018, the Petitioners' advocate informed the 2<sup>nd</sup> Respondent's advocate that they should appoint M/S Gappy Consultants to undertake the survey work. In the letter dated 16<sup>th</sup> April, 2018, the 2<sup>nd</sup> Respondent's advocate informed the Petitioners' counsel that having perused the survey report annexed on their client's Affidavit, they did not see the need of undertaking a joint survey work. In the said letter, the advocates informed the Petitioners' advocate as follows:

*“This however does not prevent the Petitioner from undertaking and serving us their own survey report.”*

13. From the above correspondences, it is clear that the Petitioners were given the option of conducting their survey, using their own appointed surveyor and supply it to the 2<sup>nd</sup> Respondent, which they never did. Indeed, having filed the suit in the year 2015, the burden of proving the claim was on the Petitioners. The Petitioners were under an obligation to fix the Petition for hearing, with or without the said survey report.

14. It is trite that in determining civil rights and obligations, a person is entitled to a fair, speedy and public hearing before an independent and impartial Court or Tribunal established by law. A *“speedy hearing”* means conducting a trial within a reasonable time. For the realization of this right, all parties, including the court, have a responsibility to ensure that proceedings are carried out expeditiously.

15. Considering that the last communication between the parties was in the year 2018, and in view of the fact that the Petitioners did not progress the Petition at all since the year 2018, it is my finding that the Petitioners have not given a plausible reason as to why the Petition remained dormant for more than one (1) year.

16. For those reasons, I allow the 2<sup>nd</sup> Respondent’s Application dated 17<sup>th</sup> January, 2020. The Petition dated 23<sup>rd</sup> June, 2015 is dismissed with costs to the 2<sup>nd</sup> Respondent for want of prosecution.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 28<sup>TH</sup> DAY OF MAY, 2021.**

**O. A. ANGOTE**

**JUDGE**