



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 288 OF 2009**

**BETWEEN**

**PHILIP KISIA.....1<sup>ST</sup> PLAINTIFF**

**AND**

**PAUL ODHIAMBO.....1<sup>ST</sup> DEFENDANT**

**LILIAN ODHIAMBO.....2<sup>ND</sup> DEFENDANT**

**AJAA OLUBAYI T/A AJAA OLUBAYI & CO. ADVOCATES..... 3<sup>RD</sup> DEFENDANT**

**R. M. MABERA.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. The Notice of Motion for hearing today is one for dismissal of the suit for want of prosecution by the 1<sup>st</sup> and 2<sup>nd</sup> defendants. From the deposition and record, it is clear that no step has been taken to fix the suit for hearing since the ruling dated 28<sup>th</sup> May 2015 by Kamau J., declining to dismiss the suit for want of prosecution. In that ruling the court directed that, “*The Case Management Conference will be held on 10<sup>th</sup> September 2015*”. No step was taken thereafter until the defendants’ motion to dismiss the suit once again.

2. The plaintiff has filed grounds of opposition to the application but in absence of a replying affidavit, the defendants’ averments must be taken as uncontroverted. That notwithstanding, the plaintiff’s advocate has shown a letter dated 22<sup>nd</sup> June 2017 in which it sought to peruse the file. In the grounds of opposition, it is averred that the court file was not available for perusal yet no further action seems to have been taken. I have also looked at the court record and it shows that by a letter dated 17<sup>th</sup> December 2015, the plaintiff’s self-same Advocates wrote to enquire about the file and they were informed by the Deputy Registrar by the letter dated 11<sup>th</sup> January 2016 that the file was available.

3. Based on all the facts aforesaid, I find that the period from June 2017 is unexplained and given that there had been a previous move to dismiss the suit for want of prosecution before, the margin of any discretion in the plaintiff’s favour is now diminished.

4. Counsel for the plaintiff stated from the bar that the counsel who was dealing with the matter had left the firm without handing over hence the delay. This, in my view, does not absolve the plaintiff of the duty to prosecute the suit. If anything, it only shows that their client, the plaintiff, was not interested in pursuing the matter.

5. I decline to exercise my discretion in allowing this 10-year-old suit to survive on the rolls. Consequently, the Notice of Motion dated 7<sup>th</sup> July 2019 is allowed. The suit is dismissed for want of prosecution with costs to the Plaintiff, 3<sup>rd</sup> and 4<sup>th</sup> Defendants.

**DATED and DELIVERED at NAIROBI this 4<sup>TH</sup> day of NOVEMBER, 2019.**

**D. S. MAJANJA**

**JUDGE**

Mr. Mwenesi for Mr. Mutua for the plaintiff.

Mr. Nyawara for the 1<sup>st</sup> & 2<sup>nd</sup> defendants.

Ms. Gathoga for the 4<sup>th</sup> defendants.