REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MISC APP. NO. 25 OF 2013

(Formerly Embu Misc. App. No. 65 of 2012)

REPUBLIC .....APPLICANT

V E R S U S

THE MINISTER FOR LANDS .....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

JOHN NJIRU NGURU .....INTERESTED PARTY

EX PARTE MWANIKI & 16 OTHERS.....RESPONDENT

RULING

1. The application pending before court is by the interested party John Njiru Nguru representing Kiura Nguru dated 18/01/2018 seeking dismissal of the suit for want of prosecution and stay orders be vacated.

2. The grounds are that the matter was last in court on 16/07/2012 when stay orders were issued against implementation of judgment dated 27/10/2011 in Minister's **Appeal Case No. 324 of 2003**. That the respondents have not made any efforts to have the matter proceed since then and have been enjoying interim orders. That they failed to prosecute their case or show cause why it should not be dismissed as per the Notice dated 06/10/2015.

3. That an order was made on 10/01/2013 to have the file transferred from Embu to Kerugoya and the respondents were duly notified. That the respondents have lost interest in the case and the same should be dismissed.

4. The respondents were duly served with Notice to show cause why the case should not be dismissed for want of prosecution under **Order 17 Rule 2 (1) of the Civil Procedure Rules** which provides:

> ***"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."***

5. The respondents though served with the said application did not respond. The application is therefore unopposed.

6. The court exercises discretion if cause is not shown. The respondent has a window to salvage the suit by showing good cause.

Rajesh Rughani v Fifty Investments Limited & Another [2016] eKLR

The Court of Appeal in holding that no credible, satisfactory and sufficient explanation for delay had been given stated;

> **The test for dismissal of a suit for want of prosecution is stated in the case of *Ivita -v- Kyumbu (1984) KLR 441*). The test was expressed as follows:**
>
> ***"The test 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 defendant so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents and or witnesses may be missing and evidence is weak due to the disappearance of human***

memory resulting from lapse of time; the defendant must satisfy the court that he will be prejudiced by 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."

7. The act of dismissing a suit is a draconian measure which should be exercised cautiously as it drives the party away from the judgment seat of justice. Nonetheless the court is bound to do justice to both parties without undue delay, which delay occasions injustice to the either party to the dispute and in this case, delay defeats equity.

8. ***Equity helps the vigilant but not the indolent***. The law encourages a speedy resolution of every dispute. A court of equity has always refused its aid to stale demands, where a party has slept on his right and acquiesced for a great length of time. The respondents have slept on their rights since they were given leave to apply for orders of certiorari and prohibition on 16/07/2012 and were ordered to file the substantive application within 21 days. The matter has been pending for more than 6 years and the respondents are not keen on prosecuting the case. The delay of six years is no doubt in-ordinate. The case should not be left to hang on the neck of the applicant indefinitely, with no end in sight. Litigation must come to an end. A decision was made and a party cannot enjoy the fruits of judgment as the exparte applicant obtained a stay which they have been enjoying at the expense of other parties in the suit. ***Article 159(2)(b) of the Constitution*** provides:

"Justice shall not be delayed"

9. I find that the application has merits. I allow it and order as follows:

1) This matter be dismissed for want of prosecution.

2) The orders of stay of implementation of the Judgment/Award in Minister's Land Appeal Case 324/2003 issued on 27/10/11 are vacated.

3) Costs to the applicant/Interested Party.

Dated at Kerugoya this 14th day of December 2018.

L. W. GITARI

JUDGE