



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENT AND LAND COURT

MISCELLANEOUS CIVIL APPLICATION ELC NO. 958 OF 2013

REPUBLIC.....APPLICANT

-VERSUS-

IN THE MATTER OF JUDICIAL REVIEW UNDER ORDER 53 OF THE CIVIL PROCEDURE (REVISED) RULES OF 2010, THE LAND DISPUTES ACT OF 1990(REPEALED) THE REGISTERED LAND ACT,CAP 300 AND THE ENVIRONMENT AND LAND COURT ACT OF 2011, FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF STAY OF THE DECREE DATED & ISSUED ON 10TH SEPTEMBER 2012 BY THE SENIOR RESIDENT MAGISTRATE KAJIADO LAW COURTS BASED ON THE AWARD IRREGULARLY DATED THE 15TH AUGUST 2011 BY THE KAJIADO NORTH LAND DISPUTE TRIBUNAL CASE NO.TC/329/8/2011

AND

IN THE MATTER OF: AN APPLICATION BY THE APPLICANT

JOSHIAH OLE KERIAAPPLICANT

(alias Josia Ole Muresi)

AND

IN THE MATTER OF

THE CHAIRMAN, KAJIADO NORTH LAND TRIBUNAL.....1ST RESPONDENT

JIMNAH M MACHARIA.....2ND RESPONDENT

THE HON.ATTORNEY GENERAL.....3RD RESPONDENT

THE DISTRICT ALDN REGISTRAR

KAJIADO NORTH DISTRICT EXPARTE.....4TH RESPONDENT

RULING

The matter coming up for determination is the Notice of Motion application dated **15th September 2015**, brought under **Article 159(2) (d) of the Constitution. Order 12 Rule 7 and 51(1) of the Civil Procedure Rules 2010 , Sections 8 & 9 of the Law Reform Act, Sections 1A, 1B, 3A and 3 of the Civil Procedure Act Cap 21 ,Section 12 of the Environment and Land Court Act of 2012** and all other enabling provisions of law.

The application herein is brought by the applicant **Josiah Ole Kerea** alias **Josiah Ole Meresi** and he has sought for the following orders;-

1. Spent

2. Spent

3. That the orders granted and given on 9th June 2015, by the Hon.Lady Justice Gacheru and any other consequent Orders be set aside as the same were done erroneously as Misc.JR No.249 had never been admitted to ELC Division, Milimani Law Courts since such orders to transfer the same by Hon.Jaden J on the 25th July 2013.

4. That Misc.JR App.No.958/2013 dated 25th July 2013, be reinstated thereof and the same be set down for hearing within a time frame.

5. That a temporary injunction be issued as against the 2nd Respondent, his agents, servants, representatives by themselves be restrained from interfering with the suit property pending the hearing and final determination of this application.

6. That the cost of this application be provided for.

The application is premised on the grounds stated on the face of the application and on the supporting affidavit of **Lucas Reperes Naikuni** . These grounds are;-

1. The applicant herein is the original and sole proprietor of all that parcel of land known as title No. Kajiado/Olchoro-Onyore/2779 measuring 3 ½ acres located within Olchoro-Onyore.

2. The same is registered in the Applicant's name and he was issued with a title on the 29th August 1990.

3. That sometime on the 10th July 2013, the 4th Respondent herein wrote a letter to the Applicant and copied to the 2nd Respondent, that it had revoked the Applicant's titles pursuant to the Decree dated 10th October 2012 of the Kajiado Land Dispute Tribunal, in favour of the 2nd Respondent in respect of Title No.s Kajiado /Olchoro-Onyore/15537, 15538 & 15539 (original number 2779).

4. Such irregular, illegal, and wrongful allocation of the Applicant's parcel of land has caused the 2nd Respondent to threaten from time to time to interfere with the quiet and peaceful ownership and possession of the Applicant.

5. Pursuant to this , the Applicant herein moved this Honourable Court vide Notice of Motion dated 24th July 2013 ,under Certificate of Urgency and sought the following;-

a) A temporary injunction be issued as against the 4th Respondent herein restraining him from interfering with the property of the Applicant herein; and

b) A temporary injunction be issued against the 2nd Respondent herein restraining him from implementing the revocation of Title letter issued by the 4th Respondent.

6. That sometimes in July 2013 ,the Misc.J R No.249 was transferred to Nairobi-ELC Court and the Law Firm sought a Hearing date for the said Application and the same was slated to take place on the 4th March 2014 . The same did not take place as the Court file had not yet been admitted to the Court's registry from Machakos.

The application is premised on the grounds stated on the face of the application and on the supporting affidavit of ***Lucas Repeus Naikuni*** . These grounds are:-

1. The applicant herein is the original and sole proprietor of all that parcel of land known as Title No. Title No.s Kajiado/Olchoro-Onyore-Onyore 2779 measuring 31/2 acres located within Olchoro-Onyore.

2. The same is registered in the Applicant's name and he was issued with a title on the 29th August 1990.

3. That sometime on the 10th July 2013, the 4th Respondent herein wrote a letter to the Applicant and copied to the 2nd Respondent, that it had revoked the Applicant's titles pursuant to the Decree dated 10th October 2012, of the Kajiado Land Dispute Tribunal, in favour of the 2nd Respondent in respect of TitleNo.s Kajiado/Olchoro-Onyore/15537,15538& 15539

(Original number 2779).

4. Pursuant to this , the Applicant herein moved this Honourable Court vide Notice of Motion dated 24th July 2013 ,under Certificate of Urgency and sought the following;-

c) A temporary injunction be issued as against the 4th Respondent herein restraining him from interfering with the property of the Applicant herein; and

5. A temporary injunction be against the 2nd Respondent herein restraining him from implementing the revocation of Title letter issued by the 4th Respondent.

6. That sometimes in July 2013 the Misc.J R No.249 was transferred to Nairobi-ELC court and the Law Firm sought a Hearing date for the said Application and the same was slated to take place on the 4th March 2014. The same did not take place as the Court file had not yet been admitted to the Court's registry from Machakos.

7. However, despite the suit Misc.Appl.No.249/2012, having been so transferred to the ELC Division, Milimani Law Courts they were no orders as to adopting it hence acquiring the court file No.Misc.Appl.No. 958 of 2012, hence creating the confusion.

8. On or about the 10th February 2014 , the Law Firm received a Hearing Notice from Messrs. C .N Kihara Advocates for the 2nd Respondent herein in Misc.J R No. 958 of 2013 , in relation to their application dated 22nd November 2013 for dismissal for want of prosecution.

9. That the orders to dismiss this suit for want of prosecution was indeed a miscarriage of substantive justice and this Honourable Court should vacate the same as the subject matter is sensitive as it involves ancestral family land.

10. There has not been inordinate delay in prosecution of this suit and if there was any delay, the same is excusable as the same was neither intentional nor contumelious, as the Law Firm had no instructions to further prosecute this suit, as it does now.

11. If the orders sought herein are not granted, the land belonging to the Applicant and his family will be transferred to the underserving 2nd Respondent and accordingly the Applicant stands to suffer great irreparable loss and damage with no remedy as to cost.

12. It is to the interest of Substantive Justice, Natural Justice, Equity, and Conscience that the Orders are granted accordingly.

In his supporting affidavit **Lucas Reperes Naikuni Advocate** reiterated the averments on the grounds in support of the application and averred that he has instructions to act and represent the applicant in this matter and hence having the conduct of the matter personally, he was competent and duly authorized to swear this Affidavit in support of the Notice of Motion Application (herein after called the “**Supporting Affidavit**”). He also averred that he came to know of the dismissal of the suit upon being served with the extracted order and a forwarding letter from the 2nd Respondent’s advocate on record.

The application has been opposed by the 2nd Respondent **Jimnah M Macharia** who filed his Replying Affidavit on **14th October 2015**, and averred that the orders sought to be set aside by the Applicant arise from his Notice of Motion Application dated **22nd November 2013**, (hereinafter his application) . He further averred that despite being served with the said application, the applicant had never filed a response to the same. It was his contention that on **21st July 2014** , the applicant’s advocate herein were granted leave to file an application to cease acting for the applicant after they informed the court that they had been unable to receive further instructions from the Applicant. Further that the said advocate never filed the said application as they had intimated and therefore the applicant’s advocate on record proceeded to take a hearing date for his application. The deponent deposed that despite being served with a hearing notice of the above stated application, the applicant failed to attend the hearing of the above application scheduled for **9th June, 2015**.

Therefore the effect of their absence, coupled with their failure to respond to his application meant that the said application was unopposed. He also stated that he was advised by his advocates on record that the applicant’s Notice of Motion application is fatally defective for being supported by an affidavit sworn by the Applicant’s advocate yet it contains contentious matters. It was his further contention that he purchased the suit property from the Applicant in 1989, but the applicant refused to transfer the suit property to him despite having received the purchase price in full. Further that while the applicant was frustrating the transfer of the suit property to him he was further encroaching in the said property to the extent that he started interfering with his quiet possession of the property. He alleged that the subject property ceased to be ancestral land upon the sale of the same to himself by the Applicant in the **year 1989**. He therefore deposed that the instant application is an abuse of court process and should be disallowed with costs to himself.

Mr Lucas Reperes Naikuni filed a supplementary affidavit and averred that they could only have responded to the instant application with leave of Court as the suit stands dismissed pending the granting of orders for reinstatement sought in the application and he urged that court to reinstate the suit.

The 2nd Respondent filed a further affidavit and averred that on **21st July 2014**, the Applicant’s Advocates herein were granted leave to file an application to cease acting for the Applicant after informing the Court that they were unable to receive further instructions from the Applicant, as they had lost all means of contacting the applicant. Further that the Firm of Advocates only acted after the order by Honourable Lady Justice Gacheru on **9th June 2015**, dismissing **Misc. JR Appl. No.958 of 2013**, dated **25th July 2013**, for being an abuse of the Court process.

He reiterated that he purchased the suit property **No.2779** from the applicant in **1989** vide a sale agreement dated **15th January,1989** but the applicant refused to transfer the suit property to him despite having received the purchase price in full. He further stated that the suit property cannot be said to be ancestral land as the original land number **Kajiado/1523** was subdivided, and sold severally to many none family members. Therefore the applicant’s conduct of dealing with the suit property was improper.

The Notice of Motion was canvassed by way of written submissions. The Law Firm of ***Naikuni Ngaah & Miencha Co. Advocates*** for the applicant filed their written submissions on ***15th April 2016***, and urged the court to allow the application. They relied on the case ***of Mbogo & Another Vs Shah EA LR 1968*** and ***HCC Misc. No. 720 of 2009 ,Prof. Mwangi S Kimenyi Vs The Attorney General & Another*** where the Court held that;-

“ The major issue I should determine is whether the delay herein has been explained such that this suit ought to be reinstated for trial . The Law governing dismissal of suit for want of prosecution cannot be called upon to justify itself. It is well settled” .

The Law Firm of ***C .N Kihara & Co. Advocates*** for the 2nd Respondent filed their written submissions on ***26th May 2016***, and urged the court to dismiss the applicant’s Notice of Motion. They relied on various decided cases among them, case of ***Ivita Vs Kyumbu (1984) KLR 441***; where the court held that:-

“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 Defendant; so both parties to the suit must be considered and the position of the judge too.....thus even if delay is prolonged, if the court is satisfied with the plaintiff’s excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time...”.

Further, he quoted the words of ***Lord Denning Mr*** on the fundamental reasons why courts do dismiss suits for want of prosecution.

“ the delay of justice is a denial of justice.....To no one will we deny or delay right or justice. Over the years men have protested at the law’s delay and counted it as a grievous wrong, hard to bear. Shakespeare ranks it among the whips and scorns of time (Hamlet, Act .SC.1) Dickens tells how it exhausts finances, patience, courage, hope (Bleak House,C.I). To put right this wrong, we will in this court do all in our power to enforce expedition; and if need be, we will strike out actions when there has been excessive delay. This is a stern measure; but it is within the inherent jurisdiction of the court, and the rules of the court expressly permit it. It is only effective sanctions that they contain”.

The 2nd Respondents also relied on the case of ***Fitzpatrick Vs Badger & Co. Ltd (1997) 2 ALL ER 657 Lord Denning citing his decision in Reggentine Vs Beecholme Bakeris Ltd (1967) 111 Sol.Jo.216*** said as follows;-

“ It is the duty of the plaintiff’s advisers to get on with the case. Public policy demands that business of the courts should be conducted with expedition.....”.

The second defendant also relied on the case of ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696, where the Court stated that;***

“the Plaintiff has to take actual solid steps to set down the suit for hearing “.

The 2nd Respondent also submitted that the reinstatement of this matter will prejudice the 2nd Respondent since the matter has been a prolonged litigation and the title deed for ***KJd-Olochoro – Onyore 2779*** was issued through a court process. Further that justice must be viewed from both litigants’ sides. He also submitted that in reinstating this suit, it shall cause more injustice to the 2nd Respondent than it shall do justice to the Plaintiff and therefore the suit should remain dismissed. 2nd Respondent relied on the case of ***Communication 307/1998 J CampBell V Jamaica (View adopted on 24th March 1933, in UN Doc. AOR A/48/40(Vol.11)*** where the right to equality of arms was described as;-

“ An essential feature of a fair trial and I is an expression of the balance that must exist between the prosecution and the Defence”.

The 2nd Respondent urged the Court to dismiss the instant application with costs.

The Court has now carefully considered the instant Notice of Motion dated **15th September 2015**, and the grounds in support of the same and the annexures thereto. The Court has also considered the grounds in opposition to the said application and the annexures thereto. The court has also considered the relevant provisions of law and the written submissions by the respective parties. This court has also considered the cited decided cases and the court renders itself as follows:-

There is no doubt that the applicant herein filed an application for leave to file a Judicial Review application on **15th October 2012**, at Machakos High Court. The Court granted the applicant leave to file the substantive application with the leave operating as **stay** with a condition that the substantive application was to be filed within a period of **21 days** from **15th October 2012**, and in default of which the **stay** granted was to automatically lapse. From the Court's record, the applicant did not file the substantive application until **25th July 2013**. By then the said stay granted by the Court had automatically lapsed.

On **25th July 2013**, the matter was placed before **Jaden J** who directed the matter to be transferred to the nearest Environment & Land Court which is in Milimani and thus the reason why the matter is in this Court. It is also evident from the court record that the court file was received from Machakos on **5th August 2013**, and the Deputy Registrar received and admitted the Misc Application **No. 249 of 2012**, from Machakos and directed that a new number be allocated to the file.

It is evident that the file was given a new number as **ELC No. 958 of 2013**, now domiciled in Milimani Environment & Land Court Registry. From the above history, it is clear that the matter was admitted to Milimani Environment & Land Court Registry on **5th August 2013**, and re-allocated a new number contrary to the allegation by the applicant's advocate that the suit took long to be admitted in Milimani Environment & Land Court Registry.

From the Court's records, it is evident that no action took place in the file from **5th August 2012**, until **29th November 2013**, when the 2nd Respondent advocates filed a Notice of Motion dated **22nd November 2013**, seeking for dismissal of Misc. Judicial Review *Application no. 958 of 2013*, and Misc application **No. 249 of 2012**, for want to prosecution. The said application was slotted for hearing on **3rd March 2014**. The application did not proceed for hearing as the same had not been served on the applicant herein. The court directed the applicant's (2nd Respondent) Notice of Motion dated **22nd November 2013**, be mentioned on **25th March 2014**. The matter was slotted for hearing on several other occasions.

On **28th May 2014**, the court directed that the applicant (2nd Respondent) do serve the applicant herein with the Notice of Motion dated **22nd November 2014**. It is evident that the applicant was served with the said application as the applicant has attached a copy of the Notice of Motion to his submissions and the same was slotted for hearing on **9th July 2014**.

From the Court records, it is evident that the applicant did not attend Court and the Court directed the 2nd Respondent to serve the applicant herein and file a proper return of service. The matter was set for hearing on **21st July 2014**. On **21st July 2014** when the matter came for hearing the 2nd Respondent's Counsel **Mr Wilson** was ready to proceed with the hearing but **Mr Murei** holding brief for **Mr Naikuni** for the applicant herein, informed the court that **Mr Naikuni** wished to file an application for leave to cease acting for the applicant. There was no response to the 2nd Respondent's Notice of Motion dated **22nd November 2013**, by then. The Court directed **Mr Naikuni** to file the said application for ceasing to act within the next **30 days** from **21st July 2014**. The Court has noted from the Court record that there was no action taken on the file until **18th February 2015**, when the advocates for 2nd Respondent fixed the matter for mention for **5th May 2015**.

Though the advocates for the applicant were served with the mention Notice for **5th May 2015**, as is

evident from the Return of Service sworn on **12th April 2015**, by **Jacob Okore**, a process server, the said advocate did not appear in Court. He had also not filed an application to cease acting for the applicant nor a Replying Affidavit. The court fixed the matter for hearing on **9th June 2015**, with an order that hearing Notice to issue.

It is also clear from the Court record that on **9th June 2015**, Mr Wilson for the 2nd Respondent was present in Court but the applicant and his advocate were not in Court though served with a hearing Notice as per the Return of Service filed in Court on **21st May 2015**, and sworn by **Jacob Okore** with an attached hearing Notice clearly showing that the Notice of Motion dated **22nd November 2013**, was to be heard on **9th June 2015** at 9.00 am. There was a further Notice that in default, of the attendance the same would be heard and decided their absence notwithstanding. The said hearing Notice was clearly received by the Law Firm of **Naikuni Ngaah & Miencha Advocates** on **11th May 2015** at 3.40 pm .

The Court on **9th June 2015**, being satisfied that there was a proper return of service allowed the application to be prosecuted exparte and since the same was not opposed, it was allowed in terms of prayers **no. 2,3, & 4** of the said application with costs to the applicant. The 2nd Respondent did extract the said order on **28th July 2015**, and it is the said order that the applicant now seeks to be set aside and that the Misc Judicial Review Application **No. 958 of 2013**, dated **25th July 2013**, be reinstated.

The said application is vehemently opposed by the 2nd Respondent. The applicant has stated that the said order for dismissal was erroneous as Misc Judicial Review no **249 of 2012**, had not been admitted at Milimani ELC Registry. However, from the Chronology given by the court, it is evident the said application was admitted on **5th August 2013**, and re –allocated **ELC No. 958 of 2013**, but the applicant never took any action on the file. Further that the application was supposed to be heard on **9th July 2015**, but it was heard on **9th June 2015**, and thus the order issued was against the principles of substantive and natural justice, equity, and conscience. However from the Return of service filed on in court on **21st May 2015**, sworn by **Jacob Okore**, it is evident that the applicant’s advocate was served with the hearing Notice for **9th June 2015**, and the said Law Firm acknowledged receipt of the said hearing **Notice**.

The hearing Notice for 9th July 2014, was an early one and which day, the applicant and his advocate did not appear in court but the court directed the 2nd Respondent to serve a hearing Notice and file a proper Return of service. The matter did come up for hearing again on **21st July 2014**, when one **Mr Murei** holding brief for **Mr Naikuni** informed the court that the Law Firm of **Naikuni & Co. Advocate** wished to file an application to cease acting for the applicant .

It is therefore not true that the applicant was not served with the hearing Notice and there was no miscarriage of justice as the Hearing Notice had a default clause that failure to attend Court , the matter would be heard and decided the absence notwithstanding .

The application herein is brought under Order 12 Rule 7 which provides that:-

“ Where under this Order judgement has been entered or the suit has been dismissed, the court on application may set aside or vary the judgement or under upon such terms as my be just”.

The Court has on **9th June 2015**, proceeded exparte in the absence of the applicant whose advocates had been served with a hearing Notice but he failed to attend Court. Again the Notice of Motion dated **22nd November 2013**, though served on the applicant had not been opposed as no Replying Affidavit nor grounds of opposition had been filed by the applicant herein.

Order 12 Rule 7 calls upon the Court to exercise its discretion in deciding whether to allow an application for setting aside an exparte order or not. The said discretion must be exercised judicially. This was the finding in the case of **CMC Holdings Ltd Vs James Mumo Nzioki Civil Appeal No. 329 of 2001 where the Court held that:-**

“ in an application before a court to set aside ex parte judgement, the court exercises its discretion in allowing or rejecting the same and that discretion must be exercised upon reasons and must be exercised judicially....”.

Further, the application is also premised under **Article 159(2)** of the Constitution and among the principles that should guide the court in exercise of its judicial authority is that justice shall not be delayed and shall be administered without undue regard to procedural technicalities.

The applicant has also based his application upon **Sections 1A & 1B** of the **Civil Procedure Act** which deals with the overriding objectives of the Act and such overriding objective is to facilitate the **just and expeditious** disposal of disputes under the Act. The Court also has a duty to further the overriding objective by among other things ensuring that there is timely disposal of the proceedings and all other proceedings in the Court at a cost affordable by the respective parties. Further the court is donated inherent power under **Section 3A** of the **Civil Procedure Act** to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Taking into account the above provisions of law, has the applicant satisfied this Court that he is deserving of the orders sought?.

The applicant herein relied on the case of **Professor Mwangi S Kimenyi Vs The Hon. Attorney General an Another** where he Court held that;-

“ The major issue I should determine is whether the delay herein has been explained such that this suit ought to be reinstated for trial”.

Whereas the 2nd Respondent relied on the findings in the case of **Fitzpatrick Vs Badgei (supra)** where it was held that ;-

“it is the duty of the plaintiff advisers to get on with the case. Public policy demands that business of the court should be conducted with expeditious”.

Being guided by the above findings and the settled principles to be considered in an application for reinstatement of a suit, the Court finds that the issues for determination are:-

- i. Whether the applicant has sufficient reasons to warrant the court to set aside the orders of 9th June 2015.***
- ii. Whether there has been inordinate delay on the part of the applicant in prosecuting the case.***
- iii. Whether the reinstatement of the suit will prejudice the Respondent.***
- iv. Who will bear the costs.***

As the court had already stated, the applicant alleged that it did not attend court on **9th June 2015**, as he was not aware of the hearing of **9th June 2015**. The advocate for the applicant alleged that he was served with a hearing Notice for **9th July 2015**, whereas the matter was slotted for hearing on **9th June 2015**. However, it is clear that the Law Firm of **Naikuni Ngaah & Miencha Advocates** for the plaintiff was served with the hearing Notice on **21st May 2015**, as per the Return of Service and they acknowledged receipt of the hearing Notice.

The applicant was served with the Notice of Motion for hearing on **9th July 2014** and not **July 2015**, and on **9th July 2014**, the court did directed that the applicant be served with a hearing Notice and a proper return of service filed.

Though the applicant also alleged that the Misc. Judicial Review No. 249 of 2012, had not been admitted at Milimani Environment & Land Court by the time of prosecution of the Notice of Motion dated **22nd November 2013**, the Court noted that the suit herein was admitted at Milimani Environment & Land

Court. Registry on **5th August 2015**, and re-allocated a new number Environment & Land Court. **No. 958 of 2013**, and the Plaintiff's Advocate attended Court thereafter and was aware that the matter had been admitted at Milimani Environment & Land Court. The applicant therefore has no good reason as to why he did not attend court on **9th June 2015**, or his advocate. The applicant's advocate cannot aver that the matter proceeded in his absence and he was not aware of this date as a hearing Notice had been served upon his Law Firm.

The second issue is whether there has been inordinate delay on the part of the applicant.

From the court records, it is clear that the applicant was granted leave to file a substantive Judicial Review application on **15th October 2013**, within a period of 21 days from the date hereof. The applicant did not file the said substantive Judicial Review until **25th July 2013**, when the matter was ordered transferred to Milimani Environment & Land Court. Further after the transfer the applicant never took any step to set the matter up for hearing until **2nd November 2013**, when the 2nd Respondent filed his application for dismissal of the judicial Review application. Even after having been served with the said Notice of Motion dated **22nd November 2013**, the application never filed any Replying Affidavit or grounds of opposition or even set the Judicial Review Application for hearing. There is no action taken by the applicant since **25th July 2013**, to set the Judicial Review Application for hearing. There was indeed unexplained delay on the part of the applicant herein. The Court is enjoined by **Article 159(2)** of the **Constitution** and **Sections 1A and 1B** of the **Civil Procedure Act** to decide disputes before it without undue delay. The applicant filed a Misc Judicial Review in Court and left it unprosecuted for over a period of 2 years .

That delay was inordinate and unexplained and the court finds that the 2nd Respondent's should not be held by the applicants inert grip.

The 3rd issue is whether the reinstatement of the matter will prejudice the 2nd Respondents case in anyway.

The applicant alleged that the suit property herein is an ancestral land and if the orders are allowed to remain as granted by the Court on **9th June 2015**, then the applicant will suffer prejudice but the Respondents will not be prejudiced. The 2nd Respondent on his part submitted that the reinstatement of the suit will prejudice him immensely as he purchased the suit land in 1989 and the applicant refused to transfer the suit land to him. The matter has been heard before the Chief's Office Kajiado, District Office, Ngong, the Land Dispute Tribunal Ngong, Kajiado Law Court and finally at ELC Milimani. He submitted that the reinstatement of the suit will prejudice him as the matter has been prolonged through various litigation and that the suit should remain dismissed.

The Court has noted that the 2nd Respondent submitted that the original ancestral land No. 1532 was subdivided into various distinct plots and the applicant remained with title No. 2779 comprising of 3½ acres.

That the other plots were sold to different individuals with the 2nd Respondent purchasing **title Nos 2779** and therefore this land is not an ancestral land as claimed by the applicant. That allegation was not disputed by the applicant. If that is the case, the suit herein is not an ancestral land as claimed by the applicant. The 2nd Respondent alleged purchased the suit land and has gone through litigation in various offices. The applicant filed a judicial Review and failed to prosecute the same. It was rightly dismissed by the Court for want of prosecution as this is a court of Equity and it is indeed correct that equity abhors the indolent but aids the vigilant. Further justice delayed is justice denied.

It is the Court's findings that, reinstating this suit will prejudice the 2nd Respondent more than would do justice to the applicant herein as it was rightly held in the case of **Ivita Vs Kyumbu (1984) KLR 441 that:-**

“ 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.....”.

On the 4th issue of who will bear the costs, it is evident that costs normally follow the event. The 2nd Respondent herein is the successful party and therefore the Court finds that he should be awarded the costs of this application. The Court consequently finds that the applicant herein should bear the costs of this application.

Having now carefully considered the instant Notice of Motion dated **15th September 2015**, the Court finds it not merited and the same is consequently dismissed entirely with costs to the 2nd Respondent.

It is so ordered.

Dated, Signed and Delivered this **20th day of January, 2017**.

L.GACHERU

JUDGE

In the presence of ;-

Mr Masharia holding brief for Mr Naikuni for the Applicant/Plaintiff

Mr Maina for the 2nd Respondent

Court Clerk: Hilda

Court:

Ruling read in open Court in the presence of the above advocates.

L.GACHERU

JUDGE