REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 163 OF 2008

SHEM OMWAMBA MAYOYO …....…………………………………………1ST PLAINTIFF

EZEKIEL OMBASO OBARA …..…………………………..……………..……2ND PLAINTIFF

ELIJAH M. NYACHIENGA …....……………………………………………3RD PLAINTIFF

DANIEL M. ORASANDI ……...…………………………………………… 4TH PLAINTIFF

JONFACE O. ONDERE ……….....……………………………………… 5TH PLAINTIFF

PETER O. NYACHIENGA ……...………………………………………….. 6TH PLAINTIFF

JAMES M. OMWANGE ………......…………………………………………… 7TH PLAINTIFF

RICHARD M. OBACHI ………....………………………………………………8TH PLAINTIFF

RICHARD RACHAMI ………...………………………………………………… 9TH PLAINTIFF

OMBASA ANDERE ……...…………………………………………………10TH PLAINTIFF

JOHNSON C. MOKANDU ……………...……………………………………… 11TH PLAINTIFF

ZADOCK K. MAGAGARA ……...……………………………………………12TH PLAINTIFF

EZEKIEL M. OUKO …………………………………………………………13TH PLAINTIFF

JAMES O. ORIANGO …………………………………………………………14TH PLAINTIFF

EZEKIEL M. NYABWARI ………………………………………………15TH PLAINTIFF

REUBEN K. NYAKONI …………………………..16THPLAINTIFF

ZABLON O. RACHAMI ………………………………………...………17TH PLAINTIFF

VERSUS

KIYANI GROUP RANCH CO-OPERATIVE SOCIETY LTD ……………………… DEFENDANT

RULING

1. What is before me is the defendant's application by way of Notice of Motion dated 17th March 2014 filed herein on 18th March 2014 in which the defendant is seeking an order for the dismissal of this suit for want of prosecution. The application is supported by the affidavit of Esther Monirei, advocate sworn on 17th March 2014. Ms. Monirei has deposed that; the plaintiffs filed this suit on 19th November 2008 and the defendant entered appearance and filed its statement of defence on 19th November 2010. The plaintiffs thereafter filed a reply to defence on 20th January 2010. Ms. Monirei has deposed that since the plaintiffs filed the said reply to defence, the plaintiffs' have not taken any step with a view to setting down this suit for hearing. She has contended that the plaintiffs have lost interest in the suit and as such it would serve the interest of justice if this suit is dismissed for want of prosecution.
2. The defendant's application was opposed by the plaintiffs through a replying affidavit sworn by David Mogunde Okachi, advocate, on 22nd September 2014 and a notice of preliminary objection of the same date. In his replying affidavit, Mr. Okachi has deposed that when the defendant was served with summons to enter appearance, they entered appearance but failed to file a statement of defence. This led to interlocutory judgment being entered against the defendant in default of defence. The said judgment was set aside by consent of the parties and the defendant granted leave to file its statement of defence. Mr. Okachi has contended that after the defendant filed a statement of defence as aforesaid, the advocates for the parties herein agreed to enter into negotiations with a view to settle this suit out of court and in that regard; several meetings were held and correspondence exchanged between the said advocates.
3. Mr. Okachi deposed further that the parties had some proceedings in the lower court that were withdrawn with costs to the defendant. He contended that the defendant's advocates had put a caveat or a clog to the setting down of this suit for hearing until the defendant's costs in the said lower court case are paid. He contended that he had to seek this court's direction on the effect of the said costs on the hearing of this suit and that it was until 22nd June 2010 that the court directed that thesuit be set down for hearing. Mr. Okachi has stated that the plaintiffs are eager to have this suit heard and determined on merit and that the defendant would not suffer any prejudice if the suit is allowed to proceed to hearing. He has contended that if the orders sought by the defendant are granted, the plaintiffs would suffer for a mistake which is not of their own making. Counsel urged the court to exercise its discretion against dismissing the suit. Mr. Okachi annexed to his affidavit, a copy of a letter dated 20th January 2010 that was addressed to his firm by the defendant's advocates on record on the issue of the costs that were due to the defendant in Kisii CMCC No. 342 of 2006, a copy of a letter dated 17th June 2010 that he wrote to the Deputy Registrar of the High Court to set down this suit for directions before the judge on the issue of the said costs, a copy of his without prejudice letter dated 3rd April 2013 through which he conveyed to the defendant's advocates,a settlement proposal and a copy of a letter dated 6th September 2012 that was addressed to the Commission on Administrative Justice by the plaintiffs in which they complained about the manner in which this suit has been handled by Okachi & Co. Advocates.
4. When the application came up for hearing on 13th May 2015, the plaintiffs' advocates did not appear in court. After satisfying myself that the said advocates were duly served with a hearing notice, I allowed the hearing of the application to proceed, their absence notwithstanding. In his submission, Mr. Sankale, advocate who appeared for the defendant reiterated and adopted the contents of the affidavit of Esther Monirei that was filed in support of the application. He submitted that the plaintiffs have not taken any step in this matter for the last 4 years with a view to having it heard. Counsel submitted that a delay of four years is prolonged and in excusable. He argued that the correspondence which is annexed to the Mr. Okachi's replying affidavit does not

amount to a step taken in this suit with a view to having the same heard. He submitted that the plaintiffs have lost interest in the suit and as such it would only be fair that the same is dismissed for want of prosecution.

5. I have considered the defendant's application together with the submissions that were made before me by the defendant's advocate. I have also considered the replying affidavit and notice of preliminary objection that were filed by the plaintiffs in opposition to the application. In the case of **Ivita –vs- Kyumbu [1984] KLR 441** it was held that:

   > **"The test applied by courts in an application for the dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable and if it is, whether justice can be done despite the delay. Thus even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the available time. It is a matter in the discretion of the court."**

6. In the case of **Trill –vs- Sacher [1993] 1 ALL ER 961**, Neill L. J stated as follows at page 978:

   > **"(1) The basic rule is that an action may be struck out where the court is satisfied that:-**

a. **That there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between them and a third party".**

   > **(2) The general burden of proof on an application to strike out for want of prosecution is on the defendant.**
   >
   > **(3) 'Inordinate' delay cannot be precisely defined. 'What is or is not inordinate delay must depend on the facts of each particular case'…….**

7. It is on the foregoing principles that the defendant's application herein will be considered. The plaintiffs brought this suit against the defendant on 28th November 2008. In their amended plaint dated 10th July, 2009, the plaintiffs averred that on or about 9th February, 2006, the defendant without any right or lawful authority harvested 3425 mature blue gum trees belonging to the plaintiffs all valued at kshs. 27,400,000/=. The plaintiffs averred that as a result of the said unlawful act they have suffered loss and damage. The plaintiffs have sought judgment against the defendant in the sum of kshs. 27,403,000/= for special damages and general damages. The defendant was served with summons to enter appearance on or about 27th July 2009 and did enter appearance on 29th July 2009. The defendant however failed to file a statement of defence within the prescribed time.
8. The plaintiffs sought interlocutory judgment against the defendant in default of defence which was entered on 21st August 2009. On 29th October 2009 the defendant applied to set aside the interlocutory judgment and for leave to file a statement of defence. On 19th January 2010, the defendant's application was allowed by consent and the defendant filed its statement of defence on 19th January 2010. In its defence, the defendant denied the plaintiffs' claim in its entirety. The defendant admitted however that it did harvest some trees on or about 9th February 2006 but denied that the said trees belonged to the plaintiffs. The defendant contended that the plaintiffs suit is incompetent, fatally defective, null and void for having been instituted against a non-existent entity. The plaintiffs filed a reply to defence on 20th January 2010. The suit was thereafter set down for directions on 22nd July 2010 and 16th September 2010. On 16th September 2010, the matter was stood over generally. The plaintiffs took no further step in the matter from 16th September 2010 aforesaid, until 18th May 2014 when the defendant filed the present application seeking the dismissal of the suit for want of prosecution. The period of inaction was in excess of 3

½ years.

9. The plaintiffs have put forward several explanations for their failure to take action in this matter for the said duration of over 3 ½ years. The first excuse put forward is that the parties were engaged in negotiations with a view to settle this matter out of court. As evidence of this endeavour, the plaintiffs annexed to their affidavit in reply, a copy of a without prejudice letter that the plaintiffs' advocates had written to the defendant's advocates proposing a settlement of the plaintiffs' claim herein at an all-inclusive sum of kshs. 16,000,000/=. The other excuse advanced by the plaintiffs for the delay in fixing this suit for hearing is that the defendant had insisted on being paid the costs that were awarded to it in the lower court case mentioned above before this suit is set down for hearing. In this regard, the plaintiffs annexed a copy of a letter from the defendant's advocates on record dated 20th January 2010 in which they had suggested that the costs that were awarded to the defendant in the lower court be agreed upon and paid before this suit is set down for hearing.
10. I am in agreement with the submissions by the defendant's advocates that in the circumstances of this case, the delay of over 3 years by the plaintiffs to fix this suit for hearing is inordinate. The excuses put forward by the plaintiffs in my view cannot justify this delay. The fact that the parties were trying to reach an out of court settlement in the matter could not have prevented the plaintiffs from setting down the suit for hearing. In any event, there is no evidence of active negotiations between the parties that has been placed before this court by the plaintiffs. I am not persuaded that,the without prejudice settlement proposal that was put forward by the plaintiffs' advocates to the defendant's advocates through the letter dated 3rd April, 2013 can without more amount to a settlement negotiation. The proposal itself was made 2 ½ years after the suit was stood over generally. The current application was made after about 1 year from the date of the said proposal. This court is not convinced that the settlement negotiations between the parties went on for over one year. There is no evidence before me that that is the case. The second excuse by the plaintiffs has no basis. The defendant was entitled to have its costs of the suit that the plaintiffs had withdrawn in the lower court paid before this suit proceeds to hearing. Order 25 rule 4 of the Civil Procedure Rules is clear on this. The plaintiffs' failure to set down this suit for hearing because of the defendant's threat to seek a stay thereof until its costs aforesaid are paid had no justification.
11. Having found that the delay in the prosecution of this suit is inordinate and inexcusable that should have been sufficient to seal the fate of this suit. However, the plaintiffs have expressed a desire to prosecute this suit. I have noted that the plaintiffs' claim against the defendant is not at all frivolous. I have also noted from the record that the plaintiffs have expressed displeasure in the manner in which their advocates on record have handled this matter. Mr. Okachi's contention that the delay in the prosecution of this suit has been occasion by a mistake on the part of the plaintiffs' advocates may not be far from the truth in the circumstances. In the court of appeal case of **Richard Nchapi Leiyagu –vs- IEBC & 2 Others, Civil Appeal No. 18 of 2013 (unreported)**, the court stated as follows:-

    > **"The right to be heard has always been a well protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent power to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality."**

12. The court's duty is to determine disputes. The court should therefore aim at sustaining suits so that they are determined rather than striking them out summarily thereby leaving the dispute unresolved. As stated in the authorities that I have cited above, even where the court finds the delay inordinate and inexcusable, the court has to consider, where the plaintiffs expresses a desire to prosecute the suit, whether it is still possible despite the delay to have a fair trial. The affidavit in support of the application herein was sworn by the defendant's advocate. There is no indication in the said affidavit that justice cannot be done to the parties if this suit was to be set down for hearing. The burden was on the defendant to demonstrate that owing to the delay in the prosecution of this case, there is substantial risk that a fair trial would not be possible. The defendant has not established the existence of such risk. Due to the nature of the plaintiffs claim and the defence that has been put forward by the defendant, I am of the view that a fair trial of the

issues arising in this suit can still take place. There is no evidence that the defendant is likely to suffer any serious prejudice if this suit is allowed to proceed to hearing. In the circumstances, I don't think that the plaintiffs should be denied their constitutional right to have the dispute herein heard and determined by the court on merit.

13. Due to the foregoing, I would dismiss the defendant's application dated 17th March 2014 and direct that this suit shall be set down by the plaintiffs for pre-trial case conference within six (6) months from the date hereof failure to which the suit shall stand dismissed with costs to the defendant without any further reference to the court. The defendant shall have the costs of the application.

Delivered, Dated and **Signed** at **Kisii** this **17th day** of **July, 2015.**

S.OKONG'O

JUDGE

In the presence of;

N/A for the plaintiffs

Sankale for the defendant

Milcent Maore Court Assistant

S.OKONG'O

JUDGE