



No.36/2014

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**ELC CASE NO.95 OF 2012**

**AGNESS MWIKALI MWOLOLO alias KIILU..... PLAINTIFF**

**VERSUS**

**GABRIEL KIMUYU KIIO ..... 1<sup>ST</sup> DEFENDANT**

**GREGORY MWOLOLO KIILU..... 2<sup>ND</sup> DEFENDANT**

**R U L I N G**

1. This suit was lodged via a **Plaint** dated **26.3.02** on the 27.3.2012 seeking the following reliefs.
  - a. A declaration that the sale of commercial Plot No.2 situated at NZEEKA market machinery, Makueni County by the 2<sup>nd</sup> Defendant to the 1<sup>st</sup> Defendant is null and void and the same be set aside.
  - b. A mandatory injunction do issue against the 1<sup>st</sup> Defendant by himself or through his agents and/or servants, to give vacant possession of the suit property to the Plaintiff.
  - c. All accrued MESNE PROFITS from 1<sup>st</sup> March, 2012 be paid to the Plaintiff.
  - d. Costs and interest at the prevailing court rates.
2. The Defendants were served with summons and they filed Defence and counterclaim dated 30.4.2012. In their counter claim the Defendants seek the following reliefs:
  - i. An order of specific performance of the contract by directing the Defendants to do all relevant documents and/or transfer documents to effectively transfer Plot No.2 at Nzeeka Market into the 1<sup>st</sup> Defendant's name.
  - ii. That in default of compliance with (a) above the deputy registrar of this honourable court to do all things necessary and execute all the requisite documents to effectively transfer Plot No.21 Nzeeka Market Machinery to the 1<sup>st</sup> Defendant's name.
  - iii. Costs of this suit.
  - iv. Any other order that this court deems fit to grant.

Like Plaintiff they have also filed the list of witness statements and document in consonant

with order II of Civil Procedure Rules.

3. On 22.8.2013 the Defendant lodged Application dated 22.8.2013 seeking the suit to be dismissed with costs for want of prosecution under order 17 Rule 2 Civil Procedure Rules (2010). The grounds on the face of the Motion are:
  - a. That the Plaintiff filed the suit on 27<sup>th</sup> March, 2012.
  - b. That since filing of the suit on the aforementioned date the Plaintiff/Respondent has not moved the court to have the matter set down for hearing.
  - c. That the period of one year has lapsed since the filing of suit.
  - d. That the delay by the Plaintiff in prosecuting the suit is inordinate and inexcusable.
  - e. That it is apparent the Plaintiff/Respondent is not interested in proceeding with the suit.
  - f. That the said suit is frivolous, vexatious and an abuse of the process of this Honourable Court.
  - g. That the pendency of the suit continues to prejudice the Defendant.
  - h. That it is in the interest of justice to grant orders sought.
4. The Application is opposed by the Plaintiff and she has filed an affidavit she swore on 14.4.2014. The Applicant's case is that the suit was filed on 26.3.2012 and since then no steps had been taken up to the time application herein was filed for a period of over 1 year (12 months). According to the Applicant, this is a demonstration of lack of interest in the proceedings by the Plaintiff.
5. The Applicant avers that they are being prejudiced by the continued delay in disposal of the case herein. The Applicant thus seeks the court to dismiss the case with costs. The Plaintiff/Respondent responds that the provisions cited of order 17 Rule 2 Civil Procedure Rules Cap 21 only applies when court acts on its own motion and same provisions do not give party right to apply for dismissal of suit for want of prosecution. The Applicant avers that the suit is not ready for hearing as pretrial directions and conference have not been undertaken and thus suit could not be fixed for directions.
6. The Respondents argue that the duty lies on both parties to activate the preliminary steps leading to fixing matter for hearing and especially in this case which the Defendants/Applicants have filed counter claim. The Respondents urge court to hear case on merit as it involves a commercial building worth over KShs.2.6 million and also take into account that there were no dates available in the court diaries between 2012 and 2013. She argues that even the motion herein was filed on 22.8.2013 but got dates on 28.4.2014.
7. The Respondent therefore prays for the dismissal of the Application with costs. Order 17 Rule 2(1) provides:

***“In any suit which no application has been made or steps taken by either party for one year, the court may give notice in writing to parties to show cause why the suit should not be dismissed and***

***cause is not shown to its satisfaction, may dismiss the suit”***

8. Order 17 Rule 2(3) Civil Procedure Rules provides as follow:

***“Any party to the suit may apply for its dismissal as provided in sub-rule 1”.***

The acts contemplated to be undertaken under the provisions are not only the fixing hearing dates but also other preliminary steps in compliance with Order 11 of Civil Procedure Rules (2010) and filing

and fixing interlocutory applications. That is why the provisions talks of making of application or undertaking steps.

9. The provisions further impose duty on both parties not only the Plaintiff. That is why the

- provisions talk of the Application being made or steps taken by either party. The time line set to lapse, to trigger the opportunity to lodge application to dismiss suit is lapse of one year.
10. In our case, there is no doubt that from 27.3.2012 when suit was filed to 25.4.2014 when application was made is over one year. In **MERU HCC 31/06 SISO TUTA MWAMBIA –VS- KABANSORA CO. LTD & ANOTHER Maku J**, held that parties have to comply with order 11 Civil Procedure 2010 before applying for dismissal of the suit for want of prosecution.
11. The above holding is contrary to the clear words of the rules. This would license parties from undertaking steps preliminary to hearing once aware that the suit cannot be dismissed until Order 11 has been complied with. The rule is very clear that if no application or steps taken for one year. However the court has to look at the circumstances of case not only the lapse of one year period. That is why the provisions talk of the court **may** dismiss the suit not **shall** dismiss the suit.
12. In the case of **E.T. MONKS & CO. LTD –VS- EVANS (1985) KLR 584 Kneller J** held that:

***“Whether an application for dismissal of suit for want of prosecution should be allowed or not, is a matter for discretion of the Judge who must exercise it judiciously. The court shall among***

***other things consider whether the delay was lengthy, whether it has rendered a fair trial impossible and whether it was inexcusable. However, each case will turn on its own facts and***

***circumstances”.***

The delay in our case is slightly over 12 months. The case has a counterclaim pleaded by the Defendant/Applicant. The case involves a commercial premises worth over 2.6 million. Both sides have filed

all the documents and the matter is ready for pre-trial direction and conferences.

13. The court has also to take judicial notice that the ELC station has just been established in Machakos since 2012 when ELC Act came into operation and ELC matters have been going on in Nairobi.
14. Relying on the **ET monks supra** authority, I have to consider whether in the circumstances of the case the delay is lengthy. It is this court's view that in the foregoing circumstances, the delay is not lengthy, on the second test as to whether the trial is impossible, it is the court's view that the matter can still be tried without any prejudice to any party.
15. This court thus exercises discretion and makes the following orders:

- 1. The parties will forthwith take pre-trial direction and fix hearing date in the next 30 days.**
- 2. The application is dismissed with costs in the cause.**

**Signed and Delivered at Machakos this 5<sup>th</sup> day of December, 2014.**

**CHARLES KARIUKI**

**JUDGE**