



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENTAL AND LAND DIVISION**  
**ELC CASE NO. 70 OF 2004**

**MARY GACHAMBI.....PLAINTIFF**

**VERSUS**

**DANIEL KIBE .....1<sup>ST</sup> DEFENDANT**

**MAGDALENE NJANGO KAMAU.....2<sup>ND</sup> DEFENDANT**

**ANTHONY KAMURA.....3<sup>RD</sup> DEFENDANT**

**RULING**

The Notice of Motion before the court for determination is dated 30<sup>th</sup> November 2009, and is brought by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants under Order XVI Rule 5(d) and Order L Rule 1 of the repealed Civil Procedure Rules. The said Defendants are seeking orders that the suit herein be dismissed for want of prosecution, and that the costs of the application and of the entire suit be awarded to them. The grounds for the application are that since the matter was stood over generally on 18<sup>th</sup> December 2008, the Plaintiff has not fixed the matter for hearing.

The 4<sup>th</sup> Defendant swore a supporting affidavit on 30<sup>th</sup> November 2009 wherein he gave a detailed account of the steps taken by the respective parties since the filing of the Plaint on 10<sup>th</sup> February 2004. He stated that since the Plaintiff's application dated 17<sup>th</sup> November 2004 seeking leave to serve summons to enter appearance upon the 2<sup>nd</sup> Defendant by substituted service was dismissed on 18<sup>th</sup> December 2008, the Plaintiff has not taken any step towards prosecuting the suit. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants have contended that it is apparent that the Plaintiff has lost interest in this matter and further, that her inaction is inexcusable.

The Plaintiff opposed the application in the Replying Affidavit she swore on 30<sup>th</sup> April 2013. The Plaintiff states that she never knew about the application before court until 18<sup>th</sup> April 2012 when the firm of Oyugi & Company Advocates was served with a hearing notice. Further, that this was despite the firm of Mutimu Kang'atta & Company advocates having been on record at the material time as representing her, and the Plaintiff attached receipts as evidence of payments made to the said firm.

The Plaintiff further stated that her health is failing and owing to her loss of concentration, she thought her advocates had taken control of her case. While stating that this case involves a fraudulent sale of her inheritance using fake documents, the Plaintiff contended that she is desirous of prosecuting the suit having appointed a new firm of advocates, and she gave an undertaking to abide by any conditions set by

the court.

Parties relied on their written submissions when the matter came up for hearing on 29<sup>th</sup> May 2013. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants in their submissions dated 13<sup>th</sup> May 2013 argued that the Plaintiff had not offered any plausible reasons for delay in prosecuting the case. Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants stated that the Plaintiff had not complied with any pre-trial procedures and was therefore not deserving of the exercise of the court's discretion. Counsel relied on the case of **Trust Bank(in liquidation) -vs- Kiprono Kittony &2 others Nairobi, HCCC No. 223 of 2002** in this respect, wherein the court allowed an application for dismissing the suit for want of prosecution where pre-trial directions were yet to be undertaken.

The 3<sup>rd</sup> and 4<sup>th</sup> Defendants counsel further submitted that that they would be greatly prejudiced by the Plaintiff's failure to serve summons to enter appearance upon the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, who are central parties to this suit. Counsel contended that there is no summons capable of being extended under Order 5 Rule 2(7) of the Civil Procedure Rules since no application to extend the summons was made within 24 months. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants relied on the case of **Mobile Kitale Service Station -vs- Mobil Oil Kenya Ltd & Another (2004) 1 KLR 1** where the court held that according to Order 5 Rule 1(7), the lifespan of summons is 24 months after the expiry of which, if no application has been made to extend them, the court would dismiss the suit without notice.

Lastly, it was submitted that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants have satisfied the court that there has been prolonged delay and the Plaintiff had not given sufficient reason for the delay, and reliance was placed on the case of **Ivita -vs- Kyumbu (1984) KLR 441** in this regard.

Counsel for the Plaintiff filed submissions dated 21<sup>st</sup> May 2013 and argued that the Plaintiff's erstwhile advocates failed her in not having this suit prosecuted despite having been paid a substantial amount of legal fees. Counsel reiterated that owing to the Plaintiff's failing health and lack of concentration, she could not take charge of her legal affairs and entirely relied on her legal advisors. Counsel urged the court to exercise its wide discretion in the Plaintiff's favour and grant her a last chance. Lastly, the Plaintiff's counsel also stated that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants had contributed to the delay having failed to prosecute the instant application since 30<sup>th</sup> November 2009.

I have carefully read and considered the pleadings and submissions filed by the parties. The main issue for determination is whether there has been inordinate delay for which no reasonable explanation has been offered to render the suit filed herein liable for dismissal. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants' Notice of Motion was filed under Order XVI Rule 5(d) of the repealed Civil Procedure Rules which provided for dismissal of suit for want of prosecution if there was inaction in the suit bfor a period of three months.

In the present case, the delay in prosecuting the suit was from 18<sup>th</sup> November 2008 when the court delivered a ruling disallowing an application to serve summons by registered post until 30<sup>th</sup> November 2009 when the present application was filed, slightly over 1 year. Such a delay renders a suit liable for dismissal both under Order XVI Rule 5(d) of the repealed Civil Procedure Rules and under Order 17 Rule 2 of the current Civil Procedure Rules which provide as follows:

**“2. (1) 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.**

**(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.**

**(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.**

**(4) The court may dismiss the suit for non-compliance with any direction given under this Order.”**

The decision in the case of **Ivita vs. Kyumbu**[1984]KLR441, set the test to be applied by the courts in an application for the dismissal of a suit for want of prosecution. This is firstly, whether the delay is prolonged and inexcusable, and, secondly if the delay is excusable, whether justice can still be done to the parties despite the delay. It is my finding that the Plaintiff has offered a reasonable explanation for the delay in prosecuting the suit as there seems to have been communication breakdown with her former advocates. The Plaintiff has since the filing of the subject Notice of Motion also successfully prosecuted an application for leave to amend her Plaint which was allowed on 22<sup>nd</sup> November 2011.

The 3<sup>rd</sup> and 4<sup>th</sup> Defendants on the other hand allege that they will be prejudiced as the suit herein concerns land upon which they have lived and invested in for over a decade. The said land was allegedly transmitted to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants upon the Plaintiff's purported death, and a confirmation of grant in respect of the Plaintiff's estate has been exhibited. It is my opinion that it is in the interests of justice that the circumstances of the transfer of the said land to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants be clarified, and a determination be made on the rights of the respective parties to the suit.

The 3<sup>rd</sup> and 4<sup>th</sup> Defendants' Notice of Motion dated 30<sup>th</sup> November 2009 is accordingly denied for the foregoing reasons, and its costs shall be in the cause. The Plaintiff shall however within 60 days of the date of this ruling take the necessary steps to have the suit herein set for hearing, and in default the suit herein shall stand dismissed.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_4<sup>th</sup>\_\_\_\_ day of \_\_\_\_July\_\_\_\_, 2013.

**P. NYAMWEYA**

**JUDGE**