

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 211 OF 2011

LAKEVIEW INVESTMENTS LTD.....PLAINTIFF

VERSUS

JENNIFER WAITHIRA NDEGE.....1ST DEFENDANT

MANWAH BWOSIEMO MAGARA.....2ND DEFENDANT

AL RUHIA ESTATES LTD.....3RD DEFENDANT

RULING

1. The Defendants have filed an Application dated 17th January, 2018 in which they are seeking for the dismissal of the suit for want of prosecution. The Application is premised on the ground that the matter was last in court in the year 2014; that the Plaintiff has not taken any steps to set the matter down for hearing and that the delay in prosecuting the matter is inordinate and inexcusable.

2. In response, the Plaintiff's Director deponed that the 1st and 2nd Defendants breached the terms of the Sale Agreement in respect of L.R. No. 25692 situate in Mavoko Municipality in Machakos County; that other than this suit, the Plaintiff also sued the registered owner of the suit land in Machakos ELC. No. 210 of 2011 and that the Plaintiff's effort to consolidate the two suits was not successful.

3. The Plaintiff's Director deponed that it has since prosecuted ELC. No. 210 of 2011 in which a Judgment was delivered on 5th October, 2017; that the delay in prosecuting the matter was occasioned by the fact that the Plaintiff was engaged in prosecuting ELC. No. 210 of 2011 and that having paid to the 1st and 2nd Defendants in excess of Kshs. 6,000,000, it will suffer substantial loss if the suit is dismissed for want of prosecution. Both the Plaintiff and the Defendants' advocates filed submissions which I have considered. I have also considered the filed authorities.

4. The record shows that the Plaintiff filed this suit on 17th August, 2011 claiming for an order of specific performance to issue in respect of L.R No. 25692. The Defendants filed their joint Defence on 22nd January, 2012. In the meantime, the Plaintiff had also filed an Application dated 17th August, 2011 seeking for orders of injunction.

5. From the record, this Application has never been heard and determined. Indeed, on 13th November, 2013, the Plaintiff's advocate informed the court that parties have filed their respective submissions in respect of the Application for injunction and that what was pending was for the court to deliver a Ruling. Although the Deputy Registrar slated the matter for 21st January, 2014, none of the parties appeared before the Judge.

6. It is true that the Plaintiff has never fixed the matter for directions or hearing since 21st January, 2014. However, considering that the matter was pending the delivery of a Ruling in respect of the Application dated 17th August, 2011, I shall allow the Plaintiff to prosecute the said Application and the suit.

7. Indeed, the Plaintiff has given plausible reasons for the delay in prosecuting this matter. The fact that the Plaintiff has prosecuted a related matter to conclusion shows that it is desirous in prosecuting this matter. As was held in the case of *Ivta vs. Kyambu (1984) KLR 441*, 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 notwithstanding the delay, the action should not be dismissed.

8. The Application dated 17th August, 2011 which was pending for Ruling and the prosecution of ELC No. 210 of 2011 is a good reason for the delay in prosecuting this suit. The Defendants have not satisfied the court that they have been prejudiced by the delay. In the circumstances, I shall grant to the Plaintiff an opportunity to prosecute its claim.

9. For those reasons, I dismiss the Application dated 17th January, 2018 but with no order as to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 8TH DAY OF MARCH, 2019.

O.A. ANGOTE

JUDGE