



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 28 OF 2012

CHAIRMAN, SECRETARY AND TREASURER, SCHOOL MANAGEMENT

COMMITTEE OF SIR ALI BIN SALIM PRIMARY SCHOOL KHALDUN

KHALDUN MAHMOUD VAE.....PLAINTIFFS

VERSUS

1. FRANCIS BAHATI DIWANI

2. ERNEST KAHERO KIMANI

3. MUNICIPAL COUNCIL OF MALINDI

4. REGISTRAR OF TITLES, MOMBASA

5. COMMISSIONER OF LANDS

6. ATTORNEY GENERAL.....DEFENDANT

RULING

1. By this Notice of Motion dated and filed herein on 24th October 2018, Ernest Kahero Kimani (the 2nd Defendant) prays for an order that this suit be dismissed with costs for want of prosecution.

2. The application which is supported by an affidavit sworn by his advocate Ms Jackline Chepkurui Chepkwony is premised on the grounds:-

a. That the Plaintiff has neglected and/or otherwise failed to set down the suit for hearing or take any steps to prosecute the same for a period of 18 months; and

b. That it is apparent that the Plaintiff is no longer interested in pursuing the suit.

3. In two Replying Affidavits sworn by the 2nd Plaintiff Khaldoun Mahmoud Vae and one Athman Ali Said, a former Chairman of the 1st Plaintiff School, they deny that they have willfully neglected to prosecute the suit. It is their case that they filed this case with the intention to continue prosecuting the same with the support of the 1st Plaintiff School Management Committee but the same has been delayed because:

i. The School Committee Members who filed the case were removed in 2013 and the new officials have no interest in prosecuting the case;

ii. At some point in time, the 2nd Defendant came up with documents purporting to discontinue the services of the Plaintiffs current Advocates and thus creating confusion in the matter;

iii. The 2nd Plaintiff fell ill at some point and was taken to India for treatment.

4. It is however the Plaintiff's case that this suit is of great public importance and that it should be allowed to proceed to conclusion.

5. I have considered the application and the response herein. I have also considered the oral submissions thereon by the Learned Advocates for the parties.

6. Order 17 Rule 2 of the Civil Procedure Rules provides as follows:-

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.

7. The guiding criteria to be applied in considering whether or not a suit should be dismissed for want of prosecution has been articulated and settled in a number of authorities among them, the case of *Ivita –vs- Kyumbu (1984) KLR 441* where the Court stated that:-

“The test is whether the delay is prolonged and inexcusable and; if it is, can justice be done despite such delay.

...(the defendant) must show that justice will not be done in the case due to the prolonged delay on the part of the Plaintiff before the Court will exercise its discretion in his favour and dismiss the action for want of prosecution.”

8. I have carefully examined and evaluated the Court record in these proceedings. I note that the Plaintiffs have not taken any steps to prosecute this matter since 20th March 2014. The reasons given for the delay is that at some point in time the 2nd Plaintiff fell ill and was hospitalized in India. No evidence of the illness and/or alleged hospitalization was however provided.

9. From their own Affidavits in reply, it is evident that the Plaintiffs filed this suit as officials and on behalf of Sir Ali Bin Salim Primary School. From their own admission they are no longer officials of the said school and it is apparent that the school no longer has any interest in pursuing this matter. That must be the reason no official from the school has filed any response to this application.

10. In the circumstances I am satisfied that no useful purpose would be served in perpetuating the existence of this suit. The same is dismissed for want of prosecution.

11. Each party shall bear their own costs.

Dated, signed and delivered at Malindi this 9th day of April, 2019.

J.O. OLOLA

JUDGE