



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**ENVIRONMENT AND LAND COURT**

**ELC NO. 127 OF 2016**

In the Matter of the Limitations of Actions Act Cap 22 Laws of Kenya

AND

In the Matter of the L.R. No. SAMIA/LUCHULULO-BUKHULUNDU 383, 385, 386, 387 and 388

AND

In the Matter for Claim for Adverse Possession between

**LIVINGSTONE WANDERA OGAMA**

**VICKYDORY OGAMA**

**OTORO OGAMA**

**HASTINGS OJIAMBO..... APPLICANTS**

**= VERSUS =**

**DAVID GERSON MUDIBO**

**LEONARD H. MUDIBO**

**MILTON MACHIO MUDIBO**

**THOMAS DUNAN MUDIBO**

**HERBERT ONGANGI MUDIBO.....RESPONDENTS**

**R U L I N G**

1. The application for determination is a Notice of Motion dated 8/2/2019 filed here on 1/3/2019. It is brought under Order 17 Rule 2 of the Civil Procedure Rules, Section 3A of Civil Procedure Act (cap 21) and all other enabling provisions of law. The Applicants – **LIVINGSTONE WANDERA OGAMA, VICKDORY OGAMA, OTORO OGAMA** and **HASTINGS OJIAMBO** – are wrongly indicated as the Respondents. These Applicants are the Respondents in the Originating Summons sought to be dismissed. The Respondents in this application – **DAVID GERSON MUDIBO, LEONARD H. MUDIBO, MILTON MACHIO MUDIBO, THOMAS DUNCAN MUDIBO** and **HERBERT ONGANGI MUDIBO** – are wrongly indicated as the Applicants yet they are not the ones who filed the application. It appears to me that the order in which the parties appear in the suit was imposed unchanged on the face of this application thus giving a misleading role of the parties in the application at hand.

2. The prayers sought in the application are as follows:

- (a) The Plaintiffs (meaning Applicant's in the O.S.) suit be and is hereby dismissed for want of prosecution.

(b) That costs of this application be provided for.

3. The application is premised on grounds, *inter alia*, that the suit herein was filed on 23/9/2016 and the response to it followed on 24/11/2016. The last date the matter was in court was 24/5/2017 and as at the time this application was filed, the Applicants in the suit (Respondents herein) had done nothing to move the matter forward. According to the Applicants the continued pendency of this suit in court is an embarrassment to them.

4. The application was responded to vide a replying affidavit dated 20/5/2019 filed in court on the same date. The response was by the Respondents counsel who deposed, *inter alia*, that he had lost contact with the Respondents and that the apparent delay is not intentional.

5. The application was canvassed by way of written submissions. The Applicants submissions were filed on 20/6/2019. It was submitted, *inter alia*, that delay on the part of the Respondents is admitted and it was pointed out that counsel for the Respondents has not indicated that he has traced the Respondents for purposes of hearing the suit. Two cases were availed to lend weight to the application. They are **RAJESH RUGHANI Vs FIFTY INVESTMENTS LIMITED & Another: [2016] eKLR** and **IVITA Vs KYUMBU [1975] eKLR**.

6. The Respondents submissions were filed on 26/6/2019. It was reiterated that the delay in prosecuting the case is not intentional. It was said to have been caused by lapse of communication between the Respondents and their counsel. The Respondents' counsel submitted that the Respondents are now in contact with him. The court was urged to note that the dispute revolves around rights and interests in property and dismissal of the matter will not have resolved the dispute. The Applicants were said not to be likely to suffer prejudice or risk if the suit is allowed to proceed for hearing. Counsel for the Respondents cited the cases of **IVITA KYUMBU (supra)** cited also by the Applicants. He cited also the case of **MWANGI NEDANGI S. KIMENYI Vs ATTORNEY GENERAL & Another [2014] eKLR**. He ultimately asked the court to dismiss the application.

7. I have considered the application, the response made, and the rival submissions. The philosophy that underlie enactment of Order 17 of Civil Procedure Rules, 2010, is that cases should be expeditiously heard and determined. The Plaintiff should not be denied hearing of his matter on the merits if any prejudice caused by the Defendant can be compensated with costs. Dismissal only takes place where grave prejudice is caused to the defendants.

8. In this matter, I choose to accept the explanation given by the Respondents. But I realise that the Respondents have delayed for too long. The Applicants therefore had some justification in filing the application. It is the higher interests of justice that persuade me not to dismiss the suit. My considered view is that the Applicants can be compensated by way of costs.

9. I therefore dismiss the application herein but order that the Respondents should pay costs amounting to 10,000/= to the Applicants on or before the suit comes up next for hearing. And the suit itself should be prepared and made ready for hearing without further delay.

**Dated, signed and delivered at Busia this 25<sup>th</sup> day of July, 2019.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Applicants: Absent

Respondents: Absent

Counsel for the Applicants: Present

Counsel for the Respondents: Present

Court Assistant: Nelson Odame