



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 362 OF 2012**

**FREDRICK E. S. KABUSIA & 12 OTHERS.....PLAINTIFFS**

**VERSUS**

**POST & TELECOMMUNICATION EMPLOYEES**

**HOUSING CO-OPERATIVE SOCIETY LIMITED.....DEFENDANT**

**RULING**

1. In the Notice of Motion dated 19<sup>th</sup> December, 2018, the Plaintiffs have sought for the following orders:

***a. That the order of dismissal of this case issued on the 28<sup>th</sup> September, 2018 for want of prosecution be set aside and the case reinstated for further action.***

***b. Costs be in the cause.***

2. The Application is supported by the Affidavit of the Plaintiffs' advocate who has deponed that there is a partial Judgment in this matter; that the enforcement of the partial Judgement ran into difficulty due to intransigence on the part of the Defendant and that it was at the point of filing the Application for contempt as against the Defendant that he was informed that the matter had been dismissed by the court on 28<sup>th</sup> September, 2018 for want of prosecution.

3. The Plaintiffs' counsel deponed that he was never served with the Notice of Intention to dismiss the suit and that in the circumstances, the case was not up for dismissal.

4. In their Grounds of Opposition, the Defendant averred that the Plaintiffs have not offered any or any reasonable reason on their failure to effectively prosecute the matter; that it is the primary duty of the Plaintiffs to take steps to progress their case and that over one (1) year had lapsed without the Plaintiffs taking any step to progress their case.

5. The Defendant's advocate deponed that the Plaintiffs' inertia runs contrary to the overriding objective of the court to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes and that the Plaintiffs' delay in prosecuting the suit is inordinate and has prejudiced the Defendant greatly.

6. This suit was commenced by way of a Plaint dated 26<sup>th</sup> September, 2012. In the Plaint, the Plaintiffs sought for an order directing the Defendant to release to the Plaintiffs all necessary Transfer and Title Documents in respect of their plots and to sign all the necessary documents for the purpose of processing of the transfer and registration of the individual titles in favour of the Plaintiffs.

7. In the Defence filed on 2<sup>nd</sup> November, 2012, the Defendant admitted most of the allegations raised in the Plaint. Indeed, it was the averment of the Defendant that it was in the process of having the titles rectified to enable it process the titles in favour of the Plaintiffs.

8. The record shows that when the matter came up for mention on 22<sup>nd</sup> April, 2015, the Plaintiffs' and the Defendant's advocates informed the court that the parties were negotiating the matter with a view of settling the dispute out of court. That is the last time the matter was in court until 28<sup>th</sup> September, 2018 when it came up for dismissal for want of prosecution.

9. When the matter came up for dismissal for want of prosecution on 28<sup>th</sup> September, 2018, it is only the Defendant's advocate who was in court. The Defendant's advocate applied for the dismissal of the suit with costs, which prayer the court granted.

10. It is true, as submitted by the Plaintiffs' counsel, that the Plaintiffs filed an Application dated 1<sup>st</sup> October, 2018 to have the Defendant's

committee members committed to prison for contempt of the orders of 16<sup>th</sup> December, 2014 and issued on 10<sup>th</sup> June, 2015. By the time the Application dated 1<sup>st</sup> October, 2018 was filed by the Plaintiffs, the suit had already been dismissed for want of prosecution.

11. Although the copy of the Notice to Show Cause why the suit should not be dismissed for want of prosecution is on record, the said notice does not show if indeed it was posted to the Plaintiffs' advocate postal address. In the circumstances, and in the absence of a copy of the Certificate of Posting or the Plaintiffs' advocate official stamp on the copy of the Notice to show Cause, I am convinced that the same was not served on the Plaintiffs' advocate.

12. The Plaintiffs have exhibited the consent that was entered into between themselves and the Defendant on 16<sup>th</sup> December, 2014. The consent shows that the Defendant had admitted the Plaintiffs' claim and agreed to have the Plaintiffs' title documents rectified before the Chief Registrar of Lands, Nairobi, could issue to the Plaintiffs with new and proper titles. That being the case, it is only fair and just that the execution process of the consent be completed.

13. The Plaintiffs' advocate having not been served with the Notice to Show Cause dated 25<sup>th</sup> July, 2018, and in view of the consent order of 16<sup>th</sup> December, 2014, I allow the Plaintiffs' Application dated 19<sup>th</sup> December, 2018 as prayed.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 12<sup>TH</sup> DAY OF JULY, 2019.**

**O.A. ANGOTE**

**JUDGE**