REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. CASE NO. 55 OF 2016 (O.S.)

MARTIN NJIRU NAMU.....1ST PLAINTIFF

DAVID IRERI NAMU.....2ND PLAINTIFF

VERSUS

PIUS KARIUKI NJUE.....1ST DEFENDANT

HAZRON NJIRU NAHASHON.....2ND DEFENDANT

RULING

1. By a notice of motion dated 11th February 2019 brought under the provisions of **Article 159 (2) (b) of the Constitution of Kenya, Section 1A, 1B, 3A & 63 (e) of the Civil Procedure Act (Cap. 21) Laws of Kenya, Order 17 Rule 2 (3), Order 51 Rules 1, 3 &4 of the Civil Procedure Rules, 2010 and all other enabling provisions** the Defendants sought dismissal of the Plaintiffs' suit for want of prosecution.

2. The said application was based upon the grounds set out on the face of the motion. It was contended that the suit has been dormant for more than 2 years and that the Plaintiffs had failed to take steps to prosecute it. It was also contended that the Plaintiff had failed to comply with certain directions by the court which required them to comply with **Order 11 of the Civil Procedure Rules** and to have the suit heard within 12 months.

3. The said application was supported by an affidavit sworn jointly by the Defendants in which they reiterated and expounded upon the grounds set out in the motion. It was further contended that the Plaintiffs had already voluntarily vacated the suit properties. The Defendants further contended that the delay on the part of the Plaintiffs in prosecuting the suit was inordinate, unreasonable and inexcusable. Consequently, they urged the court to allow their application.

4. The 1st Plaintiff filed a replying affidavit sworn on 9th April 2019 in opposition to the said application. It was filed on his own behalf and on behalf of the 2nd Plaintiff. The Plaintiffs contended that the suit was only 2½ years old and that they were aware that the court was giving priority to older suits in assigning hearing dates. They denied having vacated the suit properties. They contended that the Defendants had never occupied the suit properties since they were residents of Kirinyaga County. Finally, the Plaintiffs stated that they were still interested in prosecuting the suit and would be happy to prosecute it if the court allowed them to jump the queue.

5. The Defendants filed a joint further affidavit sworn on 24th June 2019 in response to the Plaintiffs' replying affidavit. The further affidavit simply controverted the contents of the replying affidavit. The Defendants maintained that the Plaintiffs had failed to comply with earlier court directions on the hearing of the suit within one year.

6. When the said application was listed for hearing on 28th May 2019 the advocates for the parties agreed to canvass it through written submissions. The Defendants were granted 30 days within which to file and serve their submissions whereas the Plaintiffs were given 30 days upon the lapse of the Defendants' period to file theirs. The record shows that the Defendants filed their submissions on 10th July 2019 but the Plaintiffs' submissions were not on record by the time of preparation of the ruling.

7. The court has considered the Defendants' said application, the Plaintiffs' replying affidavit in opposition thereto as well as the Defendants' further affidavit. The court has also considered the Defendants' written submissions on the said application.

8. The material on record indicates that the originating summons dated 17th August 2016 was filed on 18th August 2016. The Plaintiffs also filed a notice of motion dated 17th August 2016 for interim orders pending the hearing and determination of the suit. The application for interim orders was determined by the court on 9th December 2016. It was then directed that the parties should take steps to have the suit heard and determined within *12 months* from the date of the ruling.

9. The court is aware that there is a back log in the hearing and disposal of Environment and Land Cases at Embu Law Courts. The court is further aware that it has been giving priority to older cases while assigning hearing dates. The court initially started with cases which were 10 years or older but is now dealing with those which are 4 years or older. The instant suit is about 3 years old hence not eligible for hearing. The Plaintiffs will still have to follow the queue in the hearing of the suit unless they are able to demonstrate special circumstances which would justify a hearing on priority basis.

10. The principles to be considered in an application for dismissal of a suit for want of prosecution under **Order 17 Rule 2 of the Civil Procedure Rules** were summarized in the case of **Ivita Vs Kyumbu [1984] KLR 441** as follows:

> **"So the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced. He 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. Thus, even if 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 will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time. Where the Defendant satisfies the court that there has been prolonged delay and the Plaintiff does not give sufficient reason for the delay the court will presume that the delay is not only prolonged but it is also inexcusable and in such case the suit may be dismissed. To put it in the words of Salmon LJ in Allen Vs McAlpine, at p 561 as a rule, when inordinate delay is established until a credible excuse is made out, the natural inference would be that it is inexcusable. It is an all-time saying, which will never wear out however often said that, justice delayed is justice denied."**

11. The court is of the opinion that there has not been undue delay on the part of the Plaintiff in the prosecution of the suit. The court is further of the opinion that the explanation for the Plaintiff's inability to prosecute the suit is in the public domain. It is a matter of public notoriety of which the court can take judicial notice. It would be bizarre for a court to dismiss a two year old suit for want of prosecution whilst it is struggling to hear suits which are 4 years and older.

12. The court is of the opinion that the court's direction of 9th December 2016 for the parties to take steps to have the suit heard and concluded within 12 months was merely directory. It was meant to get the parties to prepare for hearing expeditiously with a view to having the suit heard and concluded within the shortest possible time. As it turned out, it is the court which was unable to hear the parties within the period of 12 months. At the moment, the court is still struggling with suits which are 4 years and older.

13. The upshot of the foregoing is that the court finds no merit in the Defendants' notice of motion dated 11th February 2019 and the same is hereby dismissed with no order as to costs.

14. It is so decided.

RULING DATED, SIGNED and **DELIVERED** in open court at **EMBU** this **31ST DAY** of **OCTOBER 2019.**

In the presence of Mr. Nzioki holding brief for Ms. Nzekele for the Plaintiffs and in the absence of the Defendants.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

31.10.19