



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC. CASE NO. 7 OF 2017**

**KHAMIS KOMBO GOGO.....APPLICANT/PLAINTIFF**

(Suing as the legal Administrator of the Estate of the Late **MUHAMBI**

**GOGO MWANGARI (DECEASED))**

**VERSUS**

**KHAMIS ANTHONY TSANGE.....DEFENDANT/RESPONDENT**

**RULING**

1. By a Notice of Motion dated 11<sup>TH</sup> July, 2018 expressed to be brought under the provisions of Order 17 Rule 2(3) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, the Defendant seeks orders that this suit be dismissed with costs for want of prosecution. The Application is supported by an affidavit sworn by Angeline Adhiambo Omollo, the Defendant's advocate on 11<sup>th</sup> July 2018. The Defendant's case is that since the ruling and orders given on 20<sup>th</sup> September, 2017, the Plaintiff has not been keen in taking further action in the matter. That the last time the suit came up for hearing in court was on 20<sup>th</sup> September, 2017 where the said ruling and orders were given and that it is now well over ten (10) months since then and the Plaintiff has not set down the date for hearing of the main suit as was ordered. The Defendant states that he has been highly prejudiced by the Plaintiff' inordinate delay in prosecution of the suit and that litigation must come to an end, hence this Application.

2. The Plaintiff opposed the Application by way of a replying affidavit sworn by Christine Kipsang, his advocate sworn on 27<sup>th</sup> March, 2019 in which it is deposed that the Application does not meet the conditions to warrant dismissal of suit for want of prosecution as the matter was last in court on 20<sup>th</sup> September, 2017. That for a matter to be dismissed for want of prosecution, it must have stayed for more than 12 months without being prosecuted. It is further deposed that there have been several attempts to set the matter down for hearing but there has been frustration on the same due to the unavailability of the court file and that the Plaintiff is in the process of setting down the matter for hearing. A copy of a letter dated 24<sup>th</sup> July 2018 addressed to be Deputy Registrar is attached and marked 'CMK 1'.

3. The Application was canvassed by way of written submissions. The Plaintiff filed his submissions on 2<sup>nd</sup> May 2019 while the Defendant filed his on 9<sup>th</sup> May 2019.

4. I have considered the Application`. The only issue for determination is whether the suit should be dismissed for want of prosecution. The power to dismiss a suit for want of prosecution is donated by Order 17 Rule 2 of the Civil Procedure Rules which provides as follows:

**2 (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 that suit.**

**(2) If cause is shown to the satisfaction of the court it may make 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**

5. The Defendant has brought this Application under Order 17 Rule 2 (3) Civil Procedure Rules and Section 3A of the Civil Procedure Act. Sections 1A, 1B and 3A of the Civil Procedure Act as well as Section 3(1) of the Environment and Land Court Act and Article 159 (2)(b) of the Constitution of Kenya all abhor delayed justice and command that civil disputes shall be heard and determined expeditiously. The decision whether or not to dismiss a suit is purely discretionary. However, the discretionary power must be exercised judiciously. In deciding

such Applications, courts will be guided by the principles which the law has developed to guide the courts in its discretions. These principles include whether there has been inordinate delay on the part of the Plaintiff in prosecuting the case; whether the delay is intentional and therefore inexcusable; whether the delay has caused prejudice to the Defendants; whether the Plaintiff has offered a reasonable explanation for the delay and what the interest of justice dictate in the case.

6. In this case, it is not disputed that the matter was last in court on 20<sup>th</sup> September, 2017. This Application was filed on 11<sup>th</sup> July, 2018. The period between the time the Application was filed and the time when the matter was last before court is about 9 months and 20 days. Order 17 Rule 2(3) only permits a party to bring an Application for dismissal where no Application has been made or step taken for one year. In this case, one year is not yet over since matter was in court. It is clear therefore that this Application has been filed prematurely.

7. In the result, I decline to dismiss the suit. The notice of motion dated 11<sup>th</sup> July 2018 is dismissed with costs.

**DATED, SIGNED and DELIVERED at MOMBASA this 3<sup>rd</sup> of October day 2019.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Ms. Okoko for defendant

Ms. Mgala for plaintiff

Yumna Court Assistant

**C.K. YANO**

**JUDGE**