



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**MILIMANI LAW COURTS**  
**ELC SUIT NO. 359 OF 2011**

**NYAGA BOORE KITHINJI.....PLAINTIFF**

**=VERSUS=**

**HOUSES AND PLOTS LIMITED.....DEFENDANT**

**RULING**

1. The Defendant/Applicant filed a Notice of Motion dated 23<sup>rd</sup> May 2016, in which it sought to have the Plaintiff's suit dismissed for want of prosecution. The applicant contends that the parties in this case exchanged a list of agreed issues and pre-trial questionnaire was served upon the Defendant /Applicant on 3<sup>rd</sup> February 2014. That since then, it has been two years and the Plaintiff/Respondent has not taken any step to prosecute this suit. That the pendency of this suit is causing unnecessary anxiety to the Defendant/Applicant.

2. The Plaintiff/Respondent has opposed the applicant's application based on a replying affidavit sworn on 11<sup>th</sup> April 2017. The Respondent contends that non prosecution of the suit was as a result of non-availability of the court file. The Respondent wrote to Court seeking a mention date for pre-trials in vain. That it is for the same reason that the applicant was unable to fix a date for its counter-claim.

3. I have considered the applicant's application as well as the opposition thereto by the Respondent. I have also considered the submissions filed by the parties herein. The factors to be considered before dismissing a suit for want of prosecution were aptly captured by Justice Chesoni as he then was in the case of **Ivita Vs Kyumbu 1984 KLR 441 at 442** where he held as follows:-

**“ The test applied by the Courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable , and if, it is whether justice can be done despite the delay. Thus even if the 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 , the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time. It is a matter in the discretion of the Court”.**

4. I have perused through the Court file. I notice that the respondent's advocate wrote to Court on 28.1.2014 seeking a date for pre-trial directions. The Deputy Registrar remarked that there was no defence on record and statement of witnesses. The Respondent's advocate wrote back on 20.2.2014 indicating that the defendant's defence was on record and that the statements of witnesses were already in the Court file. The Deputy Registrar then remarked that what was not on record were statements of the defendant's witnesses.

5. I have perused the Court record and notice that there are no witness statements from the Defendant. The case could not be fixed for pre-trial without those statements. The applicant was directed to comply by filing the statement. This was not done. Instead, the applicant filed this application on 23<sup>rd</sup> May 2016. A date could not be taken for the application until 13<sup>th</sup> February 2016 when the application was given a date for hearing. This is after the applicant's lawyers wrote to court on 25<sup>th</sup> January 2017 asking for a date.

6. I have no reason to doubt that the Court file went missing for some time. This is clearly indicated by the applicant's own inability to fix a date for its application or even fix a date for hearing of its counter-claim. The delay in prosecuting this suit is not prolonged. It is excusable. I dismiss the applicant's application and direct that the applicant files a list of witnesses and documents to be relied on in its counter-claim within 14 days from the date hereof. A date for hearing in this case shall be given immediately after delivery of this Ruling. Costs of this application shall be costs in the cause.

It is so ordered.

**Dated, Signed and delivered at Nairobi on this 15<sup>th</sup> day of February ,2018.**

**E.O.OBAGA**

**JUDGE**

In the presence of :

Mr Njeru for Plaintiff

Court Assistant : Hilda

**E.O.OBAGA**

**JUDGE**