REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 123 OF 2008

PHILIP KATTUKYA NYUMBA..................................1ST PLAINTIFF

MARGRET KIMWELE...2ND PLAINTIFF

MASYUKI MUNYWOKI..3RD PLAINTIFF

PATRICK MUSINGA NGUTHU................................4TH PLAINTIFF

DANIEL MWENDWA MUNYWOKI........................5TH PLAINTIFF

(Suing on their behalf and on behalf of all the Residents of Kitukuni/Kwale Village, Mukuyuni Sublocation, Kwavonza Location, Yatta Division, Kitui)

VERSUS

COUNTY COUNCIL OF KITUI.............................1ST DEFENDANT

KENYATTA UNIVERSITY....................................2ND DEFENDANT

RULING

1. Vide an Application dated 12th July, 2016, the 2nd Defendant is seeking for the dismissal of the suit with costs for want of prosecution. The Application is premised on the grounds that following the order of the Court of 3rd July, 2012, the Plaintiffs were evicted from the suit land; that the Plaintiffs have never fixed the matter for hearing since 3rd July, 2012 and that the Application should be allowed.

2. The Plaintiffs filed Grounds of Opposition in which they averred that the delay in fixing this matter was caused by the mistake of the advocate on record and that the court lacks the requisite jurisdiction to handle the dispute.

3. In the Replying Affidavit, the 2nd Plaintiff deponed that after an order of eviction was issued by the Court, they were evicted from the suit land and they scattered all over the country; that they have since regrouped and are ready to prosecute the suit and that the 2 nd Defendant also had an obligation to fix the matter for hearing.

4. The 2nd Defendant`s advocate submitted that the Plaintiffs have not stated the mistake that their advocate committed that led to the delay of the matter; that the Plaintiffs have not demonstrated that they were diligent in pursuing the matter and that the Application should be allowed. Counsel relied on numerous authorities which I have considered.

5. The Plaintiffs’ advocate submitted that the period of less than four years is not inordinate delay in prosecuting a matter; that the Plaintiffs have explained why they were unable to fix the matter for hearing and that the delay in prosecuting the matter was not intentional and contumelious. Counsel relied on several authorities which I have considered.

6. The Plaintiffs have not denied that the last time this matter was in court was on 3rd July, 2012 when the court delivered its Ruling ordering them to vacate the suit land. According to the Plaintiffs, after the order of eviction was granted, they scattered all over the county and were unable to have the matter fixed for hearing. The other reason that the Plaintiffs have preferred for not fixing the matter for hearing is that it was their former advocate who was supposed to do that.

7. Order 17 Rule 3 of the Civil Procedure Rules provides that a party to the suit may apply for its dismissal where no step has been taken by either party for one year. That is what the Applicant has done in the instant case.

8. It has been four years since the Plaintiffs took action in this matter. The principles that ought to guide the court in deciding whether to dismiss a suit for want of prosecution or not were stipulated in the case of ***Aken –vs- Sir Alfred McAlpine & Sons Limited (1968) ALLER 53*** and include: whether the delay was inordinate and therefore inexcusable; can justice be done despite the delay and has the Plaintiff offered reasonable explanation for the delay.

9. A delay of four years in taking an action in a matter is inordinate. Indeed, the law provides that if a party does not take action in a matter for one year, the court may on its own motion dismiss such a matter for want of prosecution. In determining whether justice can be done despite the delay, the court ought to look at the circumstances that led to the delay.

10. The Plaintiffs have not offered any plausible explanation for the delay in fixing this matter for hearing. Indeed, the Plaintiffs have admitted that after the Ruling of the court, they scattered all over the country, meaning that they lost interest in pursuing the claim. Although the Plaintiffs have attempted to blame their advocate for the inaction of the matter, they have not informed the court the efforts they made, as litigants, to either appoint another advocate or to fix the matter for hearing themselves. In the case of ***Habo Agencies Limited Vs Wilfred Odhiambo Musingo(2016)eKLR,*** the Court held as follows:

> ***"It is not simply enough to accuse the advocate for failure to inform as if there is no duty on the client to pursue the matter. Whereas it is true that in general, mistake of counsel should not be visited upon a client it is equally true that when counsel or agent is vested with authority to perform some duties and does not perform the duty as directed the principal bear the consequences"***

11. In a nutshell, there is no good reason that has been given by the Plaintiff as to why this suit should not be dismissed for want of prosecution for more than four(4) years.

12. For those reasons, the Application dated 12th July, 2016 is allowed as prayed. The suit is therefore dismissed with costs for want of prosecution.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 25TH DAY OF MAY, 2018.

O.A. ANGOTE

JUDGE