



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 207 OF 2015**

**RAMBART MIHESO IFEDHA.....PLAINTIFF/APPLICANT**

**VERSUS**

**ROSEMARY BRENDA MUTENDE)**

**MAHAVIR TRANSPORTERS & CONTRACTOR).....DEFENDANTS**

**THE REGISTRAR OF LANDS, KAKAMEGA**

**RULING**

This application is dated 18<sup>th</sup> September 2017 and is brought under order 17 rule 2 (3), Order 51 Rule 1 of the Civil Procedure Rules, Section 1A and 3A of the Civil Procedure Act seeking the following orders;

1. That the plaintiff's suit herein be dismissed for want of prosecution.
2. That the costs of this application be provided for.

The applicant submitted that, the plaintiff did institute this suit against the 2<sup>nd</sup> defendant through the plaint dated 15/7/2015. That thereafter the plaintiff filed an application under a certificate of urgency vide notice of motion dated 15<sup>th</sup> July, 2015 seeking orders that the court do issue an injunction restraining the 2<sup>nd</sup> defendant, their servants or agents from selling, disposing off, transferring, charging, leasing, pledging, wasting, attempting to take possession of or taking possession and quiet enjoyment of property Block IV/9 Kakamega Municipality. That the matter was heard by Hon. Judge S.M. Kibunja on 20<sup>th</sup> July, 2015 at Busia Law Courts where the application was certified as being urgent and ordered that it be served interparties and further that there be an inhibition against land parcel Block IV/9 Kakamega Municipality to safeguard the legal status of the suit pending inter parties hearing of the application. That the application was heard at Busia Environment and Law Courts on 28<sup>th</sup> September, 2015 whereby court issued an order granting prayer 1 and 2 in the application. That the 2<sup>nd</sup> defendant filed its notice of appointment of an advocate on 24<sup>th</sup> October, 2016. That however, since then nothing has taken place and the plaintiff have not shown any enthusiasm whatsoever to prosecute this suit. That it is now over 1 year since this suit was instituted and the inactivity and inordinate delay on the part of the plaintiff is weighing negatively on the 2<sup>nd</sup> defendant. That in view of the foregoing, the conduct of this suit for and on behalf of the 2<sup>nd</sup> defendant is prejudiced due to the elapse of time hence it would be impossible to conceive a fair trial. That in the circumstances it is in the best interest of justice and fair play that this suit be dismissed with costs to the 1<sup>st</sup> defendant for want of prosecution.

The plaintiff's advocate submitted that, the plaintiff filed the suit herein against the defendants on the 15<sup>th</sup> day of July, 2015. That the 1<sup>st</sup> defendant/respondent entered appearance on the 30<sup>th</sup> day of July, 2015 through the firm of Onsando Getanda & Company Advocates. That to date the plaintiff's advocates have not been served with either a memorandum of appearance or statement of defence by the 2<sup>nd</sup> defendant/applicant. That advocates purported to be on record for the 2<sup>nd</sup> defendant are strangers to the plaintiff. That the 2<sup>nd</sup> defendant has not complied with the provisions of order 11 of the Civil Procedure Rules, 2010 to enable the matter be certified ready for hearing. That the application having been made before the close of pleadings is premature and the orders sought cannot therefore be granted. That in the circumstances the application is made in bad faith and is without basis. That the applicant should not be allowed to benefit from its failure to comply with the requirements of the law. That the plaintiff will suffer prejudice if the orders sought in the application are granted.

This court has carefully considered both the applicant and the respondent's submissions. The application is based on the grounds that, no step has been taken in this matter with a view to proceeding with the same for a period of over a year. The plaintiff is not keen on prosecuting this suit. The delay in prosecuting this suit is inordinate and the 2<sup>nd</sup> defendant is prejudiced by the delay. The continued existence of this suit is an abuse of the process of court. It is in the best interest of justice and fair play that this suit be dismissed for want of prosecution.

In the case of **Utalii Transport Company Ltd & 3 Others v NIC Bank & Another (2014) eKLR**, the court held that it is the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court. The decision on whether the suit should be reinstated for trial is a matter of justice and it depends on the facts of the case. In **Ivita v Kyumbu (1984) KLR 441**, Chesoni J as he then was, stated that the test is whether the delay is prolonged and inexcusable and if justice will be done despite the delay. Justice is justice for both the plaintiff and the defendant. The applicant submitted that, the plaintiff did institute this suit against the 2<sup>nd</sup> defendant through the plaint dated 15/7/2015. That thereafter the plaintiff filed an application under a certificate of urgency vide notice of motion dated 15<sup>th</sup> July, 2015 seeking orders that the court do issue an injunction restraining the 2<sup>nd</sup> defendant, their servants or agents from selling, disposing off, transferring, charging, leasing, pledging, wasting, attempting to take possession of or taking possession and quiet enjoyment of property Block IV/9 Kakamega Municipality. That the matter was heard by Hon. Judge S.M. Kibunja on 20<sup>th</sup> July, 2015 at Busia Law Courts where the application was certified as being urgent and ordered that it be served inter parties and further that there be an inhibition against land parcel Block IV/9 Kakamega Municipality to safeguard the legal status of the suit pending inter parties hearing of the

application. That the application was heard at Busia Environment and Law Courts on 28<sup>th</sup> September, 2015 whereby court issued an order granting prayer 1 and 2 in the application. That the 2<sup>nd</sup> defendant filed its notice of appointment of an advocate on 24<sup>th</sup> October, 2016. That however, since then nothing has taken place and the plaintiff have not shown any enthusiasm whatsoever to prosecute this suit. That it is now over 1 year since this suit was instituted and the inactivity and inordinate delay on the part of the plaintiff is weighing negatively on the 2<sup>nd</sup> defendant. I find that this is a land matter and 16 months delay in these circumstances is excusable. This application has no merit and I dismiss it on condition that the plaintiff/respondent takes a hearing date in the registry within the next thirty (30) days from today's date. Costs of this application to be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 16<sup>TH</sup> DAY OF MAY 2018.**

**N.A. MATHEKA**

**JUDGE**