



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC. CASE NO. 299 OF 2015

JAYANTILAL G. PATEL.....1ST PLAINTIFF

ABDUL MOHAMMED OMAR.....2ND PLAINTIFF

RAJESH J. KHANT.....3RD PLAINTIFF

KAYAM CHATUR.....4TH PLAINTIFF

NAREDA SOLANKI.....5TH PLAINTIFF

NISHIT. R. CHAUHAN.....6TH PLAINTIFF

PAUL SINGH.....7TH PLAINTIFF

KIAMLESH KUMAR BHIMJANI.....8TH PLAINTIFF

NEMCHAND BHAGWAJI HANSRAJ.....9TH PLAINTIFF

VERSUS

MANOJAZ ZAVERCHAND GUDKA.....1ST DEFENDANT/RESPONDENT

MERIDIAN MEDICAL CENTRE.....2ND DEFENDANT/RESPONDENT

MUNICIPAL COUNCIL OF KISUMU.....3RD DEFENDANT/RESPONDENT

THE NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY4TH DEFENDANT/RESPONDENT

RULING

1. The 8th and 9th Plaintiffs, through the notice of motion dated 6th April 2017 seeks for the setting aside of the Court orders of 20th March 2017 dismissing the suit for want of prosecution and reinstating of the suit for hearing. The application is premised on seven (7) grounds on its face and is supported by the affidavit of Mitchell J. B. Menezes sworn on the 6th April, 2017.

2. The application is opposed by the 1st Defendant through the grounds of opposition dated 5th May 2017.

The application is supported by the 1st Plaintiff though his replying affidavit sworn on the 13th June 2017, proposing that if Counsel for the 8th and 9th Plaintiffs were not served with the Notice to Show Cause, then the suit should be reinstated and further that no costs should be paid to any party. The application is opposed by the 3rd Defendant through the replying affidavit sworn by Kilinda Kilei, the County Attorney, on the 21st July 2017. The 2nd Defendant opposed the application through the grounds of opposition dated 19th September 2107.

3. The Counsel for 8th and 9th Plaintiffs, 1st to 7th Plaintiffs, 2nd Defendant and 3rd Defendant appeared in Court on the 26th September 2017 when directions on filing and exchanging written submissions were given. Thereafter Counsel for the 1st Defendant, 8th and 9th Plaintiffs, 1st to 7th Plaintiffs and 3rd Defendant filed their submissions dated 20th October 2017, 6th November 2017, 28th September 2017 and 18th December 2017 respectively.

4. The following are the issues for the Court's determination:

a) Whether by the time the notice to show cause under Order 17 Rule 2 was issued on the 24th November 2016, the suit had stayed for more than one year without the Plaintiffs (specifically the 8th and 9th Plaintiffs) taking any steps to prosecute the case.

b) Whether the said notice to show cause was served to the Counsel for the 8th and 9th Plaintiffs.

c) Whether the 8th and 9th Plaintiffs have offered a reasonable explanation for their delay in taking steps to prosecute this case.

d) Whether the order of 20th March 2017 was for dismissal of the suit for want of prosecution or one of settlement of the suit with costs to 1st Defendant

e) Who pays the costs.

5. The Court has carefully considered the grounds on the notice of motion, grounds of opposition, affidavit evidence, submissions filed and come to the following determinations;

a) That before the issue of the notice to show cause under **Order 17 Rule 2 of Civil Procedure Rules** on the 24th November 2016 for the parties to appear in Court on the 20th March 2017, the last court appearance was on the 28th May 2014. That the record shows that the date had been fixed on the 19th November 2013 following the request of Counsel for the 1st Defendant through their letter dated 12th November 2013. That on that date, the 28th May 2014, Mr. Odeny for the 1st Defendant, Nyamweya for Menezes for Plaintiffs and Rodi for 3rd Defendant appeared in court and directions was issued for "Another date to be taken at Court Registry". That from that last court appearance of 28th May 2014 to 20th March 2017, when the order complained of was issued, a period of about two years, nine months and twenty days had lapsed without the Plaintiffs, including the 8th and 9th Plaintiffs, taking any steps to prosecute their case. That there are no explanation presented to this court through the notice of motion dated 6th April 2017, the supporting affidavit or the annexures thereto explaining, or attempting to explain, why no such steps were taken during that period.

b) That the copy of the Notice to Show Cause dated 24th November 2016 has on its face the names and postal addresses of the six firms of advocates it was posted to. The firms includes "**L. G. Menezes, P.O. BOX 341 Kisumu**" at position 6. The Court has perused the Court record and noted that is the same postal address contained in the Notice of Appointment of Advocate dated 2nd January 2012 among other documents filed by L. G. Menezes Advocates. That though Counsel for

the 8th and 9th Plaintiffs has deponed in the supporting affidavit sworn on the 6th April 2017 that he “was not aware that the matter had been listed for dismissal on the 20th March 2017 (that he) and also missed it on the causelist” the Learned Counsel has not availed any explanation why his clients did not take any steps to prosecute their case for the period of over two years and ten months.

c) That when the Notice to Show Cause under **Order 17 Rule 2 of Civil Procedure Rules** came up for hearing on the 20th March 2017, only Counsel for the 1st to 7th Plaintiffs, and the 1st Defendant were present. That the Amended plaint that incorporated the 8th and 9th Plaintiffs in the suit dated 5th March 2012 is signed by “Kasamani & Company Advocates for the Plaintiffs.” That the verifying affidavit was sworn by the 1st Plaintiff with the written authority of all the other Plaintiffs dated 5th March 2012. That the firm of L. G. Menezes Advocates for the 8th and 9th Plaintiffs filed the plaintiff’s supplementary list of documents dated 20th June 2012 confirming therefore that they still appeared for the two named parties.

d) That it is apparent from the Amended Plaint dated 5th March 2012 that the orders sought were in respect of parcels Kisumu Municipality/Block 10/115 and 778, then registered in the name of 1st Defendant who intended to lease them to the 2nd Defendant, for use as a hospital. That when Counsel for the 1st to 7th Plaintiffs and 1st Defendant appeared in Court for the hearing of the notice to show cause on the 20th March 2017, the Court was informed that the “Plaintiff claim has been overtaken by events as the 2nd Defendant is no longer the owner of the Lands and the matter be marked settled with no orders as to costs.” That the Counsel for the 1st Defendant did not oppose the prayer that the matter be marked settled, but sought for costs for his client. That the Court then made the following order;

“Having heard Counsel for the Plaintiffs and 1st Defendant in the Notice to Show Cause and noting that the 1st Defendant had filed replying documents herein, and is represented today, the Court grants the Plaintiffs’ Counsel’s application to have the suit marked settled. However, the 1st Defendant is awarded the costs”

e) That it is therefore apparent that instead of the Court issuing the order contemplated in the Notice to Show Cause that was coming up for hearing as no attempt to explain the delay had been made, the court instead marked the suit as settled with costs to the 1st Defendant. That there is therefore no order dismissing the suit for want of prosecution that was made on the 20th March 2017 that can be set aside as sought by the 8th and 9th Plaintiffs through their application dated 6th April 2017. That the position given by Counsel for 1st to 7th Plaintiffs on 20th March 2017 that the claim has been overtaken by events has not been recanted and reinstating the suit would be an act into futility.

6. That the Notice of Motion dated 6th April 2017 by the 8th and 9th Plaintiffs is found to be without merit and is dismissed with costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 9TH DAY OF MAY 2018

In the presence of:

Plaintiffs Absent

Defendants Absent

Counsel Mr. Olang for Maseki for 1st to 7th Plaintiffs

Mr. Odeny for 1st Defendant

Mr. Mwasigwa for Rodi for 3rd Defendant

Mr. E. K. Gitonga for 4th Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE