REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 341 OF 2016

NAWAZ ABDUL MANJI.............................1ST PLAINTIFF

PROFESSOR HAROUN MENGECH......2ND PLAINTIFF

TEK EGO BORE..3RD PLAINTIFF

JOSEPH KIPLAGAT LESIEW..................4TH PLAINTIFF

PAUL BRENNAH..5TH PLAINTIFF

VERSUS

VANDEEP SAGOO....................................1ST DEFENDANT

ANDREW CHELOGOI............................2ND DEFENDANT

HELLEN YEGO..3RD DEFENDANT

JAMES WAWERU.....................................4TH DEFENDANT

DR. JOHN KIBOSIA.................................5TH DEFENDANT

BRIAN CUTHBERT..................................6TH DEFENDANT

PATRICK KIPROP...................................7TH DEFENDANT

ISCAH MAIZ...8TH DEFENDANT

SEATTLE LOGISTICS LIMITED...........9TH DEFENDANT

RULING

The 9th defendant has filed an application dated 21.3.2018 praying that the orders for injunction issued by this court on 23.11.2016 have lapsed and ought to be vacated. The application is supported by the affidavit of Tom Mutei who states that the orders have lapsed by operation of the law. Likewise, the 1st to 8th defendants on the other hand have filed an application dated 12.4.2018 for the dismissal of the suit for want of prosecution and that in the alternative, the honourable court to vacate orders issued on 18.1.2017. The application is based on grounds that the plaintiff has neglected to prosecute the suit 15 months down the lane.

According to the affidavit sworn by Andrew Chelogoi, the chairman of Eldoret Club, 15 months have lapsed without the plaintiff taking any action and therefore, the suit should be dismissed for want of prosecution and in the alternative, the temporary orders should be vacated.

The gist of the replying affidavit sworn by Joseph Kiplagat Lesiew is that parties have been attempting to resolve this matter at a general meeting but this has been threatened by the committee because it is pending in court. The plaintiffs' claim to have attempted to reach out to the club members to agree on a programme to isolate the trees that may be hazardous and have them removed but the committee has

remained non-committal.

I have considered the application and supporting affidavits and the replying affidavit of Joseph Kiplagat Lesiew and do find that the suit herein was filed on 21.11.2016 with an application seeking temporary orders of injunction. On the 18.1.2017, the court issued temporary orders of injunction restraining the defendants, their servants and or agents from cutting down the trees forming the natural environment and natural fauna at the club. It is now more than 15 months since the orders were granted. The plaintiff has not taken any action or step towards setting down the suit for hearing.

The procedural underpinning to the above substantive provisions of the Constitution and the law is Order 17 Rule 2 of the Civil Procedure Rules which allows the court on its own motion or on notice to the parties, where no action in a suit has been taken for one year to either have the suit set down for hearing or apply to have it dismissed for want of prosecution.

In **ET Monks & Company Ltd Vs Evans [1985] 584,** the court made it clear that public policy interest demands that the business of the court be conducted with expedition. The flipside of it was as held in **Agip (K) Ltd V Highlands Tyres Ltd [2001] KLR 630.** Visram J (as he then was) stated:

> ***"It is clear that the process of the judicial system requires that all parties before the court should be given an opportunity to present their cases before a decision is given. It is, therefore, not possible that the rules Committee intended to leave the plaintiff without a remedy and to take away the authority of the court when it made Order IV1 Rule 5 of Civil Procedure Rule."***

The above decision by Visram J (as he then was) no doubt echo the provisions of Article 48 of the Constitution that access to justice should not be impeded, as well as Article 50(1) of the Constitution on the right to a fair hearing.

Article 159 of the Constitution and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay.

In the case of **Ivita V Kyumba [1984] KLR 441,** it was stated that:-

> ***"The test applied by the courts in the 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 time. It is a matter of and in the discretion of the court."***

From the above decision, it is trite that the power to dismiss a suit or an action is a discretionary one which discretion must be exercised judiciously.

In **Naftali Onyango v National Bank of Kenya [2005] e KLR**, the court reiterated the burden of proof a defendant seeking for dismissal of suit for want of prosecution must meet. Citing Salmon L.J. in **Allan V Sir Alfred MC Alphine and sons Ltd [1968] 1 ALL ER 543,** F. Azangalala J (as he then was) stated as follows:-

> ***"The defendant must show:***
>
> ***i. That there had been inordinate delay. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case but it should not be too difficult to recognize inordinate delay when it occurs.***
>
> ***ii. That this inordinate delay is inexcusable. As a rule until a credible excuse is made out the natural inference would be that it is inexcusable.***
>
> ***iii. That the defendants are likely to be seriously prejudices by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff or between themselves and the plaintiff or between each of other or between themselves and third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay the greater the likelihood of prejudice at trial."***

In this matter, the plaintiff obtained orders and slept on them for more than 15 months. There is no correspondence between the plaintiffs and the defendants in respect of any negotiation. The delay of 15 months in prosecuting the suit is inordinate as the subject matter relates to very old and dangerous trees at the golf course of what is referred to as the Eldoret Club. It is claimed that the trees could fall any time and cause serious damage to property and life. The defendants are more likely to be prejudiced in the delay to prosecute this matter as the plaintiffs have an injunction restraining the defendants from cutting the trees. I do find that the plaintiffs have not demonstrated that they intend to prosecute their suit and therefore, the same is dismissed for want of prosecution. Costs to the defendants.

Dated and delivered at Eldoret this 29th day of June, 2018.

A. OMBWAYO

JUDGE