REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 95 OF 2013

KESTEM COMPANY LTD.....PLAINTIFF/APPLICANT

VERSUS

NDALA SHOP LIMITED.....1ST DEFENDANT/RESPONDENT

COMMISSIONER OF LANDS.....2ND DEFENDANT/RESPONDENT

THE ATTORNEY GENERAL.....3RD DEFENDANT/RESPONDENT

RULING

INTRODUCTION

Kestem Company Ltd, ***(hereinafter referred to as the applicant)*** has come to court seeking orders that the ruling delivered on 7.4.2015 dismissing this suit for want of prosecution be set aside together with all consequential orders thereof and that the suit be reinstated. The application is based on grounds that this suit was dismissed for want of prosecution on 7th April, 2015 whereas no notice was served on the plaintiff/applicant, or its advocates on record, prior to the said dismissal. In any event, the plaintiff/applicant was not otherwise aware of the intention of the court to dismiss this matter, of its own motion. Had it been so aware the applicant would have taken steps to oppose the said intention and to contest it.

The plaintiff/applicant claims that he had not prosecuted this matter for the reason that the director of the plaintiff/applicant had been taken ill, had one of his legs amputated, was bedridden over a considerable period of time and thus, unable to instruct the company's lawyers to prosecute the matter.

The applicant's advocates were also unable to reach the plaintiff/applicant's director for reasons of the latter's ill health and did not therefore receive instructions to prosecute the suit. This suit raises serious triable issues, has overwhelming chances of success and relates to property of considerable value. It would be fair and just if the suit is heard and determined on merits, rather than on technicalities. The plaintiff applicant states that there is a need to maintain the substratum of the suit pending the hearing and determination of the main suit.

The applicant believes that the defendants/respondents will not suffer prejudice if the suit is reinstated and that the plaintiff/applicant shall prosecute this matter with due dispatch if given an opportunity by way of reinstatement of this suit and shall abide by any directions that this Honourable court may give.

Stephen Kipleting Metto, a director of the plaintiff states that the plaintiff/applicant filed this instant suit in 2000, against the defendants/respondents contesting the ownership by the 1st defendant/respondent of title No. Eldoret Municipality Block 10/48. The contention of the plaintiff/applicant was and is, that the title in the name of the 1st defendant/respondent was obtained unlawfully and fraudulently and that the suit was never heard and its merits has therefore not been tested in trial. The court file went missing sometime in the year 2004 or thereabouts. Efforts on the part of his lawyers and him to have it traced bore no fruits.

That he was taken ill in the year 2005 with among other ailments, diabetes. For a long time thereafter, he was admitted in various hospitals, bedridden and had his leg amputated. To compound this bad state of affairs, he is an old man. He was therefore not able to keep up with this matter nor to issue instructions to their lawyers with a view to finding a way to prosecute this case one way or the other having regard to the non-availability of the court file.

That his ill health prevented him from being able to see his lawyers or conversely for his lawyers to see him. The plaintiff/applicant was therefore unable to keep up with the proceedings in this matter, especially the fact that this matter was transferred from the High Court to the Environment and Land Court, twice renumbered, first as ELC 48 of 2012 and subsequently as ELC 95 of 2013. He learnt of these transfers when the plaintiff/applicant's advocates on record, Mr. Gregory Mutai attempted to file a Notice of Change of Advocates and was unable to trace the court file.

The plaintiff states that neither the plaintiff/applicant nor him on its behalf were served with the Notice communicating the court's intention to dismiss this suit for want of prosecution. He has been advised by the plaintiff/applicant's advocate on record believes it to be true that such dismissals can only be done once notices are issued to the parties. Had they known of the said intention to dismiss this suit they would have opposed it. That as the previous injunctive orders were set aside on 13th April, 2018, he prays that orders maintaining status quo be issued so that the suit property is maintained until this case is heard and decided on merits as the 1st defendant may sell it.

The subject matter of this suit is a very substantial parcel of land situated within the former Eldoret Municipality. It would be fair and just if its ownership was decided on merit and not on technicalities. That he verily believes that the respondents won't be prejudiced in any way by grant of the orders they seek vide this application.

That the plaintiff/applicant is ready and willing to abide by any directions that this Honourable court may give regarding the prosecution of this suit.

John K. Chebii, the former Advocate for the applicant states that from the time he took over the matter the court file in respect of ***Eldoret Hccc No. 137 of 2000, Kestem Company Ltd Vs Ndala Shop Ltd and 2 Others*** has not been available despite numerous attempts to have it availed. This matter has therefore not proceeded to hearing on merits. He states that that sometime in year 2005, he lost touch with the director of the plaintiff/applicant herein, Mr. Stephen Kipleting Metto, after he fell ill and was hospitalized. By dint of lack of contact with him, he had no instructions to prosecute the matter, even had the court file been available.

Dr. Chebii, being a legal practitioner, understands that following the promulgation of the new Constitution, and the creation of the Environment and Land Court, that all High Court matters touching on land were transferred to the Environment and Land Court and renumbered. As a counsel on record for the plaintiff/applicant, he was not advised of the change attendant to this matter nor otherwise updated by this Honourable court.

Dr. Chebii claims that he was not advised by this Honourable court when this matter was supposedly renumbered again in 2013 despite the fact that he was still on record for the plaintiff/applicant at the time. That neither him nor his firm was notified of the intention to dismiss this suit for want of prosecution on 7th April, 2015. That had he been aware of the intention to dismiss this matter for want of prosecution, he would have taken all the necessary steps to inform his next of keen so that he could get further instructions.

The subject matter of this suit is a very substantial property of land in the Industrial area of Eldoret. It would be in the interest of justice if this suit is determined on merits, rather than on technicalities. Justice would therefore be served if the ruling dismissing the suit was set aside and the matter reinstated.

The 1st defendant filed grounds of opposition stating that the application is made by a stranger to the proceedings as the purported recognized agent of the plaintiff only filed their Notice simultaneous with the application in disregard of Order 9 Rule 6 Civil Procedure Rules and that the application is utterly hopeless as the suit sought to be reinstated has been in limbo for close to 3 years and was in court from year 2000 having been commenced as Eldoret Hccc No. 137 Of 2000, which militates against the legitimate expectations of the parties and offends the doctrine of estoppel by laches.

The subject matter at commencement of this action was Title No. Eldoret Municipality Block 10/48 which has transited and mutated by law rendering the suit impossible to prosecute in its current form. The applicant is being less than candid and is unworthy of the discretion of the court, as it has litigated over the same subject matter before the National Land Commission, in Eldoret ELC No. 48 of 2012 in Eldoret ELC Petition No. 7 of 2016 and 7 of 2017 which revolved over the same subject matter and the question of ill health was never an issue.

The 1st defendant already divested itself of the suit property and would be greatly prejudiced and embarrassed, were the suit to be revived and prosecuted. That there is no substratum for the maintenance of a suit capable of being maintained in favour of the plaintiff against the current defendants as such orders will be contrary to Sections 24, 25 and 26 of the Land Registration Act about the legal effect of registration of land from one entity to another.

Japheth Kipkemboi Magut, an Interested Party filed a replying affidavit stating that he truly believes that the application is filed and sustained by a party without authority. That the suit having been dismissed for want of prosecution and the Plaintiff having been represented by Counsel, the firm of Kipsang & Mutai Advocates cannot properly enter record and file any pleading without the leave of Court or prior filed Consent of outgoing Counsel, such as has been done herein. He believes that the application is grossly incompetent for seeking Orders against a party who has not been formally enjoined to the proceedings under Order 1 Rule 10 of the Civil Procedure Rules.

There is no prayer in the application for enjoinment of Japheth Kipkemboi Magut, under Order 1 Rule 10. As such this being a civil case, Orders cannot issue in the matter over the property, until there is an order of joinder of Japheth Kipkemboi Magut, under Order 1 Rule 10.

He further states that the Applicant does not offer any excusable explanation for failure to prosecute the case for 18 years: The suit was filed by Plaint dated 9th June 2000. On the issue of the missing file, he states that no letter to Deputy Registrar is exhibited and states further that had the Court file been truly missing, the Plaintiff had the facility of applying for reconstruction. Plaintiff made such application for reconstruction in 2018 and file was immediately reconstructed. The Court file has all along been available at Court Registry. This is evidenced by the fact that when his advocates visited the Court Registry, the file was readily availed on request over the counter.

According to the deponent, Stephen Kipleting Metto was allegedly taken ill in 2005, a whole 5 years since filing the suit and the Applicant is a company with many directors, not a natural person and therefore ailment of one director does stop operations. Even on death of a director, suits by a company still survive hence the fact that Mr. Metto was taken ill in 2005, is not excusable explanation for failure to prosecute a case filed by a company for 10 years.

He reiterates that between 2004 until 2015, when the suit was dismissed for want of prosecution, there was no activity in the suit. The Applicant has never been keen to prosecute its case.

In May 2016, he filed Petition No. 7 of 2016 in which he made reference to the case that he understood to have been christened as ***ELC 48 of 2012 Kestem Company Limited vs. Ndala Shop Limited & Others***. Even after being aware of the existence of the suit and Court file in June 2016, the Applicant herein ignored the suit in favour of the National Land Commission. The Applicant did not pursue the filed suit at all. The Applicant has now returned to the suit, 3 years after being aware of existence of the suit and court file, as an afterthought.

That the suit property has morphed, it is now no longer L.R No. Eldoret Municipality Block 10/48, it now subsists differently having been subdivided and accordingly, the proceedings herein as originally incepted have been overtaken by events and now stand inferior to existing rights.

He laments that it has been 18 years since the suit was filed and 3 years since the suit was dismissed for want of prosecution. He has organized himself and handled evidence in such a way and belief that the litigation in the civil case is concluded. Reopening the case presently shall egregiously prejudice him and shall grossly prejudice fair trial herein.

He urges that discretion of the Honourable Court be exercised in refusing the application and dismissing it with costs. That he truly believes that interest of justice shall be served by dismissing the present application with costs.

Stephen Kipleting Metto filed a supplementary affidavit stating that he is aware, having been his personal friend as well as his client that Japheth Kipkemboi Magut is a director cum shareholder of Ndala Shop Ltd and that he has overall control over it and that given the control, Mr. Magut has over Ndala Shop Ltd it cannot be argued with any seriousness that he purchased resultant subdivisions of Title No. Eldoret/Municipality Block 10/48 as an innocent Purchaser for value without notice;

That Ndala Shop Ltd and Mr. Magut share a postal address, to wit P.O Box 815 Eldoret. The signature of Mr. Magut is exact same signature as the one that attested the affixation of the seal by Ndala Shop on the Sale/Transfer documents. The purported transfer by Ndala Shop Ltd to Mr. Magut was done when this matter was pending determination by court, in open disregard of the legal principle of *lispendens* that prohibits actions that negate the substratum of a case.

That he has now confirmed that no notice was given to their advocates as required by the Rules. The subject matter of this suit is a substantial parcel of land whose value is in excess of Kshs. 300,000,000. It would therefore be in the interest of justice if this matter is heard on merits as opposed to being dismisses on technicalities;

That the Plaintiff/Applicant has a strong case, whose merits have been affirmed by the findings of the National Land Commission; That the Plaintiff/Applicant will, if given an opportunity prosecute this matter with due diligence and shall abide by any directions issued by the court.

In a further supplementary affidavit of ***Eric Kiprotich Metto***, he states that he is a shareholder and also a director of Kestem Company Limited. his father, Mr. Stephen Kipleting Metto, is a co-shareholder and a co-director in the said company.

That him, together with his said father jointly ran the affairs of the Plaintiff/Applicant until the year 2004 when he was taken ill with a debilitating heart ailment; That he was first treated at the MP Shah Hospital, Nairobi. His condition was so severe that the doctors who were treating him referred him to a hospital in India for specialized treatment;

He was admitted in MADRAS MEDICAL MISSION HOSPITAL in its Institute of Cardiovascular Disease Hospital Research Training Centre in Chennai city, India on 14th July, 2005 and was hospitalized from the said date to 28th July, 2005 and that from the time he was taken ill and to date, he stopped taking part in the management of the affairs of the plaintiff/applicant as his condition was and is severe and debilitating. He travels to Eldoret or elsewhere whenever he needs to mostly for the purposes of treatment and or review.

He has not made full recovery and continues to receive treatment and review to date and that his current condition does not permit him to engage in exacting tasks, or in any activity that is emotionally involving as such tasks or activities may have severe repercussions for him.

That he is presently being closely monitored by Dr. Kimaiyo and also at Moi Teaching and Referral Hospital's Chandaria Cancer and Chronic Diseases Clinic, which he frequently visits. He was last attended to on the 14th day of May, 2018 and is scheduled for the next review on the 31st day of May 2018 unless there are complications in which case he will be reviewed before then.

That given his past and present health condition and the attendant physical infirmity, he has not had the time nor the ability to prosecute this matter. In any case, it would be unreasonable to expect him to have been able to do so.

That the recent active prosecution of this matter has been at the behest of his younger brother, Mr. Josiah Kipkemei Metto, who upon completing his University Studies in December 2014, has been assisting his father and him to pursue justice by first taking this matter to the National Land Commission and now in court.

Their respective poor health conditions notwithstanding, him, together with his co-director remain interested in getting justice and prays that this instant application be allowed so that the suit the plaintiff/applicant filed is heard and determined on merits.

SUBMISSIONS

Mr. Mutahi, learned counsel for the applicant eloquently submitted that this court should apply Article 159 of the Constitution of Kenya,

2010 by not putting undue regard on procedural technicalities and that this court should apply Article 50 of the Constitution that provides for the right of every person to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or if appropriate, another independent and impartial tribunal or body.

Further, he submits that section 3A of the Civil Procedure Act gives this court inherent power to make such orders as may be necessary for the ends of justice to be met. The applicant argues that substantive justice is at the heart of this litigation. The court should determine the matter on merit unless a party's conduct amounts to abuse of the court process.

He argues that he has given good reasons for the setting aside of the judgment entered herein and that he has given good reasons for failure to prosecute the matter. Moreover, that there are triable issues with overwhelming chances of success. Furthermore, that the defendant shall not suffer any prejudice of the suit in reinstatement.

On his part, ***Mr Ngigi Mbugua learned counsel for the 1st respondent*** strongly submits that Notice was given to parties as required by law regarding the dismissal of the suit for want of prosecution. That the notice was given to show cause as required by Order 17, Rule 2(1) of the Civil Procedure Rules, 2010. Moreover, that the applicant has not given reasons why the suit has not been prosecuted for 18 years. According to the defendant, there is no excuse for the delay in prosecuting the matter.

Mr. Ngigi further argues that the plaintiff litigated on the same subject matter before the National Land Commission in Eldoret Petition No. 7 of 2016 and Eldoret Environment & Land Court Petition No. 7 of 2017 that revolved around the same subject matter and the issue of ill health was never raised.

The 1st defendant argues that the suit has been dormant for 3 years after dismissal on the 7.4.2015 and therefore is affected by the doctrine of laches. Moreover, that the substitution of the suit which is land title No. Eldoret Municipality/Block 10/48 no longer exists as the same has been subdivided and transacted by law to third parties who legally hold it for value as per the provision of Land Registration Act, 2012.

Mr. Odongo, Senior Litigation Counsel for the Attorney General for the 2nd and 3rd defendants/ respondents passionately submitted that it is important to demonstrate that notice to show cause was given to the parties and that the court should consider the reasons given by the applicant and arrive at a fair decision. The Attorney General further submits that the court should consider public interest and the rule of law.

Mr. Bwire learned counsel for the interested party argues that the suit was dismissed 15 years after it was filed and that is now over 18 years after the suit was filed. The interested party relies on Order 17 Rule 2 that provides for notice to show cause why the suit should not be dismissed and argues that the minimum requisite period for the court to exercise the jurisdiction to dismiss a suit is one (1) year after a party failing to take any step to prosecute the suit. In the present case, the plaintiff had taken a period of 15 years without prosecuting the suit. He argues that notice was given through justice at last programme, a countrywide exercise that was general towards closing cases that were dormant for more than 7 years.

Moreover, the interested party argues that there is no explanation for the delay in prosecuting the suit and that there is no evidence that the court file was missing. On the director's illness, he submits that the plaintiff is not a retired person and that the sickness of the director does not stop a company from operating.

In a nutshell, the interested party submits that the illness of the director of the applicant cannot be used as an excuse to fail to prosecute the suit and that even after recovery, they did not take any action to prosecute the suit and that setting aside the dismissal will prejudice the fair trial.

ANALYSIS AND DETERMINATION

I have considered the application and the supporting affidavit and the supplementary affidavits on record and the replying affidavit and submissions of all counsels on record and do find the following issues ripe for determination:

1. ***Whether the firm of Kipsang & Mutahi is properly on record.***
2. ***Was there proper notice?***
3. ***Was there delay and is it excusable?***
4. ***Will setting aside be prejudicial to the defendants?***

CASE BACKGROUND

By plaint dated 9.6.2000 and filed on 12.6.2000, the plaintiff/applicant through Chebii & Company Advocates prayed for cancellation of title issued in the name of Ndala Shop Limited and that the same be registered in the names of the plaintiff/applicant and on the 22.6.2000, the 1st defendant entered appearance and filed defence on 7th July, 2000 through the firm of tom Mutei & Company advocates. Reply to defence was filed on 17.7.2000. The Attorney General filed Memorandum of Appearance and defence on 16.10.2000.

On the 12.2.2001, Kibichy & Company Advocates were appointed to act alongside Chebii & Company Advocates and on the 23.6.2004, the matter was listed before Justice Gacheche where Mrs. Kituny appeared for Ruto for Plaintiff whilst Mr. Kipnyekwei holding brief for Kibichy for the defendant and the court noted that the parties had not exchanged documents.

Mrs. Kituny conceded to this fact. The matter was stood over generally and the plaintiff punished to pay the court adjournment fees. That was the last date the matter appeared before the Judge or registry until the 7.4.2015 when the same was listed and dismissed for want of prosecution almost 10 years thereafter.

However, before that date on 16.5.2006, the defendant filed an application dated 12.5.2006 for dismissal of the suit for want of prosecution which appears to have been abandoned.

All parties having gone to sleep, the court on its own motion and through the countrywide exercise known as Justice @last decided to notify the parties of its intention to dismiss the case for want of prosecution. The court targeted matters that had been dormant for 7 years. This matter was listed as one of the suits that had been dormant for more than 7 years. In fact, it had been dormant for 10 years.

The notice for dismissal was given through the judiciary website and cause-list displayed promptly on the notice boards. The suit herein was listed on the 7.4.2015 as No. 14 on the cause list for dismissal. The parties failed to attend and the same was dismissed for want of prosecution.

This court observed that after inordinate delay of 10 years since the last step was taken herein on 23.6.2004 with a view of proceeding with the suit, and in exercise of the powers conferred upon it by Order 17, Rule 2 of the Civil Procedure Rules, 2010 ordered the suit dismissed. No action was taken upon the dismissal until the 26.4.2018 almost 3 years thereafter when the plaintiff filed an application to reinstate the suit and set aside the ruling delivered on the 7.4.2015 dismissing the suit for want of prosecution.

WHETHER THE FIRM OF KIPSANG & MUTAHI IS PROPERLY ON RECORD.

The 1st issue is whether the firm of Mutahi and Company is properly on record. By consent dated 23.4.2018 and filed on 25.4.2018 between the firm of Chebii & Company and Kipsang & Mutahi Advocates, it was agreed that M/s Kipsang & Mutahi Advocates be allowed to act for the plaintiff, Kestem Company Limited, in place of Chebii & Company Advocates notwithstanding that the matter had been dismissed for want of prosecution. The firm of Kibichy & Company advocates and Ngigi Mbugua were not involved in the said consent.

Order 9, Rule 9(b) of the Civil Procedure Rules, 2010 provides for Change of advocate to be effected by order of court or consent of parties when there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall be effected by order of the court upon an application with notice to all the parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

I do find that the consent filed on the 26.4.2018 is sufficient as it was between the outgoing advocate and the incoming advocate. Though the consent was not endorsed by the court, the applicant's former counsel and current counsel strictly complied with the requirements of Order 9, Rule 9(b) and therefore, the firm of Mutahi & Company is properly on record.

WAS THERE PROPER NOTICE?

On the issue of notice, Order 17 Rule 2 (1) of the Civil Procedure Rules grants the court power to dismiss a suit in which no step has been taken for one year. The Order also requires the court to give notice to the party concerned to show-cause why the suit should not be dismissed for want of prosecution, and if no cause is shown to the satisfaction of the court, the court may dismiss the suit. I agree with hon justice Gikonyo in ***Fran Investments Limited v G4S Security Services Limited [2015] eKLR*** in holding that ***"this order is permissive and allows quite significant room for exercise of discretion to sustain the suit. And I think, it is so especially when one fathoms the requirements of article 159 of the Constitution and the overriding objective which demands of courts to strive often, unless for very good cause, to serve substantive justice. This is well understood in the legal reality that dismissal of a suit without hearing it on merit is such draconian act comparable only to the proverbial ''sword of the Damocles''. But that reality should be checked against yet another equally important constitutional demand that cases should be disposed of expeditiously, which is founded upon the old age adage and now an express constitutional principle of justice under article 159 of the Constitution, that justice delayed is justice denied. Here I am reminded that justice is to all the parties and not only the plaintiff. This is the test I shall apply here."***

Order 17 Rule 2 (1) of the Civil Procedure Rules **does not require service of notice; it uses the word ''give notice''. The court may give notice of dismissal through its official website or through the cause-list.**

I do find that the notice of dismissal of the suit was given through the judiciary website and cause-list prepared which to the court, was adequate notice to the parties.

WAS THE DELAY INORDINATE AND IS THERE A JUSTIFICATION FOR THE DELAY?

I do find a delay of 10 years inordinate. Moreover, a delay of 3 years to make the application to set aside equally inordinate. The applicant claims that the file went missing, however, there is no single letter to the Deputy Registrar, High Court complaining of the missing file. Dr. Chebii in his affidavit of 23.4.2018 appears to be blaming the court due to the missing file. He states that he took over the matter from Kibichy & Company Advocates but does not state when he took over the matter. However, the truth of the matter is that Dr. Chebii was on record from the filing of the suit to the dismissal of the same. Mr. Kibichy was only acting alongside Mr. Chebii and was appointed on 12.2.2001. Dr. Chebii does not tell the court when he lost contact with his client. He claims that he lost contact sometimes in 2005 but does not state the month and date. He claims that he was not notified of the change of particulars. It was transferred from High Court to Environment & Land Court, however, in the cause list, both numbers for the High Court and Environment & Land Court were indicated and therefore that cannot be an excuse. Both Mr. Stephen K. Metto and Dr. Chebii have not informed us when they discovered that the file was lost.

Mr. Metto informs us that the file went missing in 2004 and he was hospitalized in 2005, however, the medical report shows that he was hospitalized on the 14.3.2006 to 29.3.2006. the report by Stephen L. Burget, the Medical Superintendent, Tenwek Hospital observed that Stephen Metto had been diagonized for diabetes for 10 years. This means that even at the time of filing the suit, he was diabetic as from 1995.

This court is not oblivious to the fact that diabetes is a serious disease but this was not the cause of failure to prosecute the suit as the director of the plaintiff had the condition when he filed the suit. He was admitted for 15 days on 14.3.2006 but even after discharge on 29.3.2006, he did not take any action until 26th day of April, 2018. Nothing stopped the director from contacting their advocates for purposes of fixing the suit for hearing.

Instead of the plaintiff pursuing his claim before the court. He complained to the National Land Commission and a determination was made in his favor but was later quashed by the consent of the parties.

This court finds that even if the ailment that the plaintiff's directors suffered affected their activities, it was not for the entire period of 10 years and that the said directors could have approached the court the way he approached the National Land Commission in the year 2016. They could have summoned Dr. Chebii and instructed him to take a hearing date. This court finds that there is no excuse for the inordinate delay. Moreover, that the plaintiff chose to abandon the suit herein and only came back to court after failing to succeed at the National Land Commission.

WILL SETTING ASIDE BE PREJUDICIAL TO THE DEFENDANTS?

On whether setting aside the dismissal will prejudice the fair hearing of the case, I have found that t**he delay of 10 years has not been satisfactorily explained and is and do further find that delay is a source of prejudice to the Respondent as it affects the fair administration of justice. Article 47 of the constitution of Kenya 2010 provides for the right to administrative action that is expeditious, lawful, reasonable and procedurally fair. Article 159 of the said constitution provides that justice shall not be delayed. Failure to set down the suit for hearing for 10 years was a clear infringement of Article 159 of the Constitution of Kenya, 2010 as the failure delayed justice in this matter.**

In conclusion, I do not find merit in the application and the same is dismissed with costs.

Dated and delivered at Eldoret this 28th day of September, 2018.

A. OMBWAYO

JUDGE