



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO.193 OF 2016

IN THE MATTER OF: ARTICLE 22 & 23 OF THE CONSTITUTION OF KENYA, 2010; THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS AND ENFORCEMENT OF THE CONSTITUTION) PRACTICE AND PROCEDURES.

IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 10,27, 28, 40,46,47& 53 OF THE CONSTITUTION REGARDING UPHOLDING OF THE NATIONAL VALUES AND PRACTICE OF GOVERNANCE, RIGHT TO EQUALITY AND FREEDOM FROM DISCRIMINATION, RIGHT TO PROPERTY, PROTECTION OF ECONOMIC INTEREST, RIGHT TO FAIR ADMINISTRATIVE (SIC) AND THE RIGHT TO EDUCATION.

IN THE MATTER OF: THE INTENDED EVICTION OF OCCUPANTS FROM A PORTION OF ALL THAT PARCEL OF LAND ORIGINALLY KNOWN AS PLOT NUMBER 143/2 OF SECTION 1 MAINLAND NORTH

BETWEEN

1. NYAMASYO JAMES
2. BONFACE MUTUA
3. DAVID SYANDI KASANGA
4. JAMES MASAULU
5. JAMES KARIUKI
6. PAMELA WANJIRU
7. RONALD MUTULI
8. COSMAS KIMANZI
9. KISOVO MULONZI
10. SAMY KATUNGA
11. JONATHAN MAITHYA KATIKU
12. HENRY O. MOMANYI
13. JOHN KITHEKA
14. KARITHI JULIUS.....PETITIONERS

-VS-

1. MOMBASA COUNTY GOVERNMENT

2. REGISTRAR OF TITLES,MOMBASA.....RESPONDENTS

AND

1. AHMED MOHAMED MUSA

2. IRSHAD ISLAMIC INSTITUTE

3. AMINA KUSOMA BUNU

4. ABDUL KASSIM AHMED

5. SAID ALI SWABU

6. ATHMAN OMAR ABDALLA.....INTERESTED PARTIES

RULING

1. For determination is the Notice of Motion dated 24th November 2014 (sic) and filed on 27th November 2017 brought under Section 3A of the Civil Procedure Act and Order 17 Rule 2 (1), (3) and (4) and Order 51 Rule 1 of the Civil Procedure Rules. In this motion, the 2nd, 5th and the 6th Interested parties/Applicants are seeking the following orders

1. That the Petitioners/Respondents Petition of 24th September 2014 be dismissed for want of prosecution.

2. That the costs of this Application and those of the Petition be borne by the Plaintiff/Respondents.

2. The Application is premised on the grounds on the face of the motion namely:

a) That the Petitioners/Respondents have been guilty of prolonged inordinate and inordinate and inexcusable delay in setting down the matter for hearing and or taking up any further step pertaining to this matter.

b) That the matter was last in court in 12th July 2016 for ruling whereby the 1st Respondent preliminary objection dated 25th November 2014 was dismissed with costs and consequently an order was made that the petition herein be transferred to the Environment & Land Court for hearing and final determination.

c) That since then, the suit has failed to be set down for hearing and/or mention.

d) That it is in the interest of justice and public policy that litigation must come to an end.

e) That it is apparent that the Petitioners/Respondents are no longer interested in proceeding with this matter.

f) That it is in the interest of justice and fairness that the orders sought are granted as prayed.

3. The Application is further supported by the affidavit of Said Ali Swabu and Athman Omar Abdalla sworn on 27th November 2017 in which they have deposed, *inter alia*, that they were directly affected by the issues raised in this suit as the Petitioners herein have illegally settled on their parcels of land **LR Nos.13638, 13640 and 13643 Section 1 Mainland North** and the Petitioners have procured an injunctive order and thus they have been unable to utilize their said parcels of land at all. That the Petitioners have not taken any step in the matter since 12th July 2016 and therefore have been guilty of prolonged, inordinate and inexcusable delay in having to set the matter for hearing.

4. The Application is opposed by the Petitioners who filed a Replying Affidavit dated 24th April 2018 sworn by their Advocate, Gikandi Ngibuini. He depones that the Application has been drawn, filed and instituted by an Advocate who has no authority to draw pleadings as he had not filed his Notice of Appointment and therefore does not have the right of audience. That the said Application was filed on 27th November 2017 and served upon them on 26th March 2018 which in itself is inordinate delay, thus the Applicants allegations that the Petitioners are delaying the hearing of the matter is untrue. He further depones that the Petitioners have been very keen in prosecuting this matter which was previously **Petition No.58 Of 2014** but in 2016, the Court directed that the mater be transferred to the Environment and Land Court for hearing and determination. He states that the matter has been proceeding actively and that the Petitioners have filed their statements, list of witnesses, list of documents and all other relevant documents, and that if anything, it is the Respondents who are delaying the hearing of the matter since they have not filed their response. He avers that this is a matter involving an interest in land and dismissing it means parties rights to fair hearing will be highly prejudiced thus leaving the parties with a bitter taste which will bring a lot of social tension.

5. I have carefully considered the Application. I will begin with the issue taken that the Application has been drawn, filed and instituted by an advocate who has no authority to draw pleadings as he has not filed his Notice of Appointment. I have looked at the court record. There is a notice of Appointment dated 23rd November 2017 by M/s Khalid Salim & Company Advocates for the interested party. I also note that the firm of M/s Aoubakar, Mwanakitina & Company Advocates had filed a Notice of Appointment for the affected parties on 5th August 2015. The Notice of Appointments are clear on which parties the advocates were coming on record for. I find that the issue raised on the notice of

appointment is unfounded.

6. The power to dismiss a suit for want of prosecution is donated by Order 17 Rule 2 of the Civil Procedure Rules which provides as follows:

2 (1) In any suit in which no Application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

(3) Any party to the suit may apply for its dismissal as provided in sub-rule -1.

7. The Applicants have brought this Application under Section 3A of the Civil Procedure and Order 17 Rule 2 (1), (3) and (4) of the Civil Procedure Rules. The provisions of Sections 1A, 1B and 3A of the Civil Procedure Act as well as Section 3(1) of the Environment and Land Court Act and Article 159 (2)(b) of the Constitution of Kenya all abhor delayed justice and command that justice shall be heard and determined expeditiously. The power to dismiss suit for want of prosecution is however a discretionary power which should be exercised judiciously. In deciding the Application, I will be guided by the principles which the law has developed to guide the courts in its discretion in application for dismissal of suits for want of prosecution. These principles include whether there has been inordinate delay on the part of the Plaintiff in prosecuting the case; whether the delay is intentional and therefore inexcusable; whether the delay has caused prejudice to the defendant; whether the Plaintiff has offered a reasonable explanation for the delay and what the interest of justice dictate in the case.

8. In the case of **Moses Muriira Maingi & 2 Others – vs- Maingi Kamuru & Another**, Nyeri CA 151 of 2010 citing with approval Chesoni J, (as he then was) in **Ivita –v- Kyumba (1984) KLR 44** it was stated:

“The test is whether the delay is prolonged and is excusable, and if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and the Defendant so that both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, or witnesses may be missing and evidence is weak due to disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that he will be prejudiced by the delay or that the Plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the Plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged, if the court is satisfied with the Plaintiff’s explanation or excuse for the delay the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time.”

The above test can be summarized as under in Halsbury’s Laws of England Vol 37 Paragraph 448:

“The power to dismiss an action for want of prosecution without giving the Plaintiff the opportunity to remedy his default, will not be exercised unless the court is satisfied –

1. That the default has been intentional and contumelious; or

2. That there has been prolonged or inordinate and inexcusable delay on the part of the Plaintiff or his lawyers, and such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as likely to cause or to have caused serious prejudice to the defendants either as between themselves and the Plaintiff or between each other or between them and a third party.”

9. The Petitioners filed this suit on 24th September 2014 as **High Court Petition No.58 of 2014**. The suit was transferred to this court on 12th July 2016 for hearing and determination following a preliminary objection which was raised by the 1st Respondent. Before the suit was transferred to this court, the Petitioners had filed their witness statements and list of documents on 18th March 2016. However, no action was taken in the matter from 12th July, 2016 until 27th November 2017 when the Interested Parties filed the present Application.

10. Dismissal of suit for want of prosecution is meant to prevent delayed justice and to ensure parties expedite their cases in court. A Plaintiff who files a case in court in pursuit of a remedy should take all steps at his disposal to achieve an expeditious determination of his claim. He should not leave the matter pending for unnecessarily too long without any apparent reason. On the other hand, when the Plaintiff fails to bring his claim to speedy conclusion, a defendant is at liberty to invoke the process of court towards that end as soon as is convenient by either applying for its dismissal or setting down the suit for hearing. As already stated hereinabove, the law and more so Article 159 of the Constitution commands that justice shall be administered without undue delay. And it is the duty of the Plaintiff to ensure that the suit is prosecuted expeditiously and without delay. Nonetheless, it is also settled that delay is a matter to be decided on the circumstances of each case. Where a reason for the delay is offered, the court should be lenient and allow the Plaintiff an opportunity to have his case determined on merit. Whereas dismissal of a suit for want of prosecution is a matter of discretion of the court, a court of law should always avoid acting intuitively on such Application or hastily dismiss a suit for want of prosecution, but rather, it should make further inquiries into the matter to establish *inter alia* whether there has been inordinate delay on the part of the Plaintiff in prosecuting the case, whether the delay is intentional or contumelious and therefore inexcusable, whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the defendant, what prejudice the dismissal will occasion the Plaintiff, whether the Plaintiff had offered a reasonable explanation for the delay and even if there has been delay, what does the interest of justice dictate?

11. The delay herein is from 12th July 2016 when the case was last in court for ruling when it was transferred to this court and no action was taken until 27th November 2017 when the Interested Parties filed this Application. This is a period of about one year and four months. Even

though it is the view of this court that the Petitioners have not offered any explanation for not taking any step in the matter between 12th July 2016 and 27th November 2017, I note that this is a dispute over land and dismissal of the suit without hearing the merits would be draconian act. I associate myself with the sentiments of Gikonyo J in the case of **Utalii Transport Company Limited & 3 Others –v- Nic Bank & Another (2014) eKLR** in which he stated as follows:

“I am guided by a high sense of promoting the principles of substantive justice enshrined in the constitution and therefore convinced that the circumstances of this case deserve lenient exercise of discretion by the court in favour of sustaining rather than dismissing the suit.”

12. In my humble view, if the suit is dismissed, I have no doubt in my mind that an injustice will be occasioned to the Petitioners. This court is alive to the constitutional dictates of Article 159 of the Constitution to render substantive justice to all parties to a dispute without undue delay, which principle, in my view, is overridden by the fundamental unlimited right to a fair hearing and the right to access to justice. Although there has been delay on the part of the Petitioners to set down the matter for hearing, this court has not been shown that the delay, though inordinate, is deliberate, contumelious and therefore inexcusable. In my view, in as much as there is delay, the interest of justice can still be served if the Petitioners are given an opportunity to prosecute their case. I am also not convinced that the Applicants have suffered any injustice or prejudice.

13. Accordingly, I decline to dismiss the suit and the Application is hereby dismissed. The Petitioners will, however pay the costs of the Application to the Applicants. The parties are directed to take a date for directions within 30 days on how the Petition will be heard and thereafter the matter shall be set down for hearing.

Delivered, signed and dated at Mombasa this 19th September, 2018.

C. YANO

JUDGE