



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 123 OF 2015**

**MAYAWA HOUSING COOPERATIVE SOCIETY.....PLAINTIFF**

**VERSUS**

**ATIENO OTIENO.....1<sup>ST</sup> DEFENDANT**

**MAENDELEO YA WNAWAKE ORG, KISUMU COUNTY.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. Atieno Otieno and Maendeleo ya Wanawake Organization, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, through the notice of motion dated 29<sup>th</sup> May 2017 seeks for the suit filed by Mayawa Housing Co-operative Society, the Plaintiff, to be dismissed with costs for want of prosecution. The application is based on the three (3) grounds on its face and supported by the affidavit sworn by Moses Munuango, a counsel from the firm of Advocates on record for the Defendants on the 29<sup>th</sup> May 2017. The main basis of the Defendants application is that the Plaintiff has not taken any steps to prosecute this case for about one year eight months from the 20<sup>th</sup> May 2015 when the matter was last in court.

2. The application is opposed by the Plaintiff through their grounds of opposition dated 21<sup>st</sup> August 2017. That the grounds may be summarized as follows;

- **That both parties have a duty to take steps to sustain the suit in court under Order 17 Rule 2 (3) of the Civil Procedure Rules.**
- **That the 1<sup>st</sup> Defendant has not established inordinate delay on the part of the Plaintiff or that they would suffer prejudice if the suit is not dismissed.**
- **That the Defendants is yet to file a reply to the Plaintiff's application dated 22<sup>nd</sup> May 2015 and that the suit was last in court on the 8<sup>th</sup> June 2015.**

3. That when the application came up for hearing on the 16<sup>th</sup> May 2018, the learned counsel for the parties opted to rely on the grounds and affidavit filed.

4. The following are the issues for determination by the court;

**a. Whether the Plaintiff has taken more than one year without taking any steps to prosecute it.**

**b. Who pays the costs.**

5. The court has carefully considered the grounds on the application and grounds of opposition; the affidavit evidence and the record come to the following conclusions;

a. That this suit was commenced by the Plaintiff through the plaint dated 20<sup>th</sup> May 2015 and filed on the same date. That contemporaneously filed with the plaint is the notice of motion under certificate of urgency of even date seeking for inter alia, injunctive orders. That an amended notice of motion dated the 22<sup>nd</sup> May 2015 was then filed on the 25<sup>th</sup> May 2015. That Mr. Wasuna, Learned Counsel for the Plaintiff, appeared before the court exparte on the 25<sup>th</sup> May 2015. That the amended notice of motion was certified urgent and prayer 2 which restrained the Defendants "from interfering with the Plaintiff and its tenants' occupation and control over the suit property including demanding, collecting or soliciting for rent or any other payments from the tenants of stalls, shops and or development on the property referred to as un-surveyed plot 4 KISUMU MUNICIPALITY edged red on Plan No. 104027/7 or what is known as Maendeleo Market pending the hearing of this application inter partes" granted. That the court further fixed the interpartes hearing on the 8<sup>th</sup> June 2015. That there is no record to show what happened on the 8<sup>th</sup> June 2015.

b. That the exparte order was extracted and issued on the 25<sup>th</sup> May 2015 according to the copy on the record. That the summons to enter appearance dated 26<sup>th</sup> May 2015 were issued. That M/s M. M. Omondi & Company Advocates filed the Memorandum of Appearance dated 4<sup>th</sup> June 2015 for the “Defendants/Respondent’s”. That the same firm of Advocates then filed the “Defendants’ statement of Defence” dated the 10<sup>th</sup> August 2015 on the 16<sup>th</sup> February 2017, and the instant application on the 29<sup>th</sup> May 2017.

c. That though no steps appear to have been taken by the Plaintiff towards prosecuting this case after serving the summons to Enter Appearance, on a date not disclosed as no related affidavit of service has been filed, but which date must be before 4<sup>th</sup> June 2015, when the Defendants memorandum of appearance was drawn, to the 29<sup>th</sup> May 2017 when the application under **Order 17 Rule 2 (3) of Civil Procedure Rules** was filed, the court finds that the filing of the Defendants’ statement of defence dated 10<sup>th</sup> August 2015 on the 16<sup>th</sup> February 2017, was in itself a step towards prosecuting the suit. The Defendants cannot therefore include the period in between and claim no steps were taken to prosecute the case. That in any case, there is no evidence whether the statement of defence has been served so that the court could determine whether or not the pleadings have closed.

d. That the period that has lapsed from the 16<sup>th</sup> February 2017, when the Defendant filed their statement of defence, to the 29<sup>th</sup> May 2017 when the instant application was filed is about three (3) months thirteen (13) days which falls short of the over one year prescribed under **Order 17 rule 2 of Civil Procedure Rules**. That accordingly the court finds the notice of motion dated and filed on the 29<sup>th</sup> May 2017 to be premature and without merit.

6. That flowing from the foregoing, the Defendants notice of motion dated and filed on the 29<sup>th</sup> May 2017 is without merit and is dismissed with costs to the Plaintiff.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**

**DATED AND DELIVERED THIS 31<sup>ST</sup> DAY OF OCTOBER 2018**

**In the presence of:**

Plaintiff Absent

Defendants Absent

Counsel Mr. Olel for Wasuna for Plaintiff

Mr. Lugeno for Omondi for Defendants

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**