

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 370 OF 2011

JONAH MALIKA MUEKE.....1ST PLAINTIFF

JOSEPH MUENDO MALIKA.....2ND PLAINTIFF

VERSUS

CO-OPERATIVE BANK OF KENYA LTD.....1ST DEFENDANT

GARAM INVESTMENTS COMPANY.....2ND DEFENDANT

RULING

1. The Application dated 11th April, 2017 is seeking for the dismissal of the suit for want of prosecution. The Application is premised on the grounds that since 5th September, 2014 when the matter was referred to this court by the High Court, the Plaintiffs have never taken any further steps to prosecute the suit. It is the Defendants' deposition that the delay in prosecuting the suit by the Plaintiffs is inordinate, inexcusable and prejudicial to the Defence.

2. In his Replying Affidavit, the 2nd Plaintiff deponed that although this suit was transferred from the High Court to this Court in 2014, there was no sitting ELC Judge to hear and determine the present suit; that the court got a permanent ELC Judge in the year 2017 and that filing the present Application two (2) days after service of the Notice of Change was in bad faith and that there has been no delay in fixing the matter for hearing.

3. In the Further Affidavits, the 1st Defendant's advocate deponed that as at the time the suit was transferred from the High Court to the ELC, there was a visiting Judge in the ELC; that there is no evidence of any follow-up with the registry and that the Plaintiffs never invited the Defendants to fix the matter for hearing.

4. The Defendant's advocate submitted that the Plaintiffs have never taken any step in the prosecution of the suit since 5th September, 2014; that there has been a delay of over two and a half years and that the Plaintiff is guilty of inexcusable delay because there have been numerous opportunities to set down the matter for hearing which have not been utilized by the Plaintiff. Counsel relied on several authorities which I have considered.

5. The Plaintiff's advocate submitted that there was no permanent ELC judge in Machakos until the year 2017; that the delay in fixing the matter for hearing is not inordinate, intentional and contumelious and that this Application should be dismissed.

6. The record shows that after the filing of this suit in the year 2011, the High Court referred this matter to the Environment and Land Court (ELC) on 18th April, 2013. It is common knowledge that since the ELC was operationalized in October, 2012, none of the initial fifteen (15) Judges of the ELC was posted to Machakos. Machakos therefore remained without an ELC judge until in January, 2017 when an ELC Judge was posted in the station.

7. Considering the unique situation that the court found itself, it is not untrue when the Plaintiffs claims that since 5th September, 2014 until the year 2017, the suit could not be fixed for hearing for lack of a judge in the ELC, Machakos. Indeed, by the time this Application was filed on 12th April, 2017, the permanent judge of the ELC had barely been in the station for three (3) months.

8. The failure by the Plaintiffs to fix the matter for hearing between the year 2014 and 2017 cannot therefore be attributed to the Plaintiffs or their advocate. The failure by the Plaintiffs to fix this matter for hearing was due to the systemic administrative shortcomings on the part of the Judiciary which I have explained above. For those reasons, I dismiss the Application dated 11th April, 2017 but with no order as to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 16TH DAY OF NOVEMBER, 2018.

O.A. ANGOTE

JUDGE