



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 212 OF 2012**

**ENGEL GISELA T/A ENGELCOP TOURS & SAFARIS.....PLAINTIFF**

**VERSUS**

**SHAIBU HAMISI MDANDI.....1<sup>ST</sup> DEFENDANT**

**SHEIKH ALI TAIB.....2<sup>ND</sup> DEFENDANT**

**THE COMMISSIONER OF LANDS.....3<sup>RD</sup> DEFENDANT**

**MUNICIPAL COUNCIL OF MOMBASA.....4<sup>TH</sup> DEFENDANT**

**ETHICS & ANTI-CORRUPTION COMMISSION.....INTERESTED PARTY**

**RULING**

1. By a Notice of Motion dated **19<sup>th</sup> March, 2018**, the 2<sup>nd</sup> defendant/applicant seeks from this court orders:-

(a) That the suit against the 2<sup>nd</sup> defendant be dismissed for want of prosecution.

(b) That the costs of this application be provided for.

2. The application is brought under the provisions of *Order 17 Rule 2(1)* and *Order 51 Rule 1 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act*. The said application is premised on the grounds:-

(a) That the plaintiff herein instituted this suit under certificate of urgency together with a Notice of Motion Application and plaint all dated 1<sup>st</sup> October, 2012 and all filed in court on even date.

(b) That the 2<sup>nd</sup> defendant entered appearance in this matter vide the Memorandum of Appearance dated 10<sup>th</sup> October, 2012 and filed on even date.

(c) That the 2<sup>nd</sup> defendant filed their Grounds of Opposition to the plaintiffs Notice of Motion dated 1<sup>st</sup> October, 2012 on 24<sup>th</sup> October, 2012.

(d) That the hearing of the Application under Certificate of urgency was adjourned several times until finally the 2<sup>nd</sup> defendant filed a Notice of Preliminary Objection dated 16<sup>th</sup> February, 2013.

(e) That the 2<sup>nd</sup> defendant's Notice of Preliminary Objection was heard on 22<sup>nd</sup> April, 2013 and finalized. A ruling issued shortly thereafter.

(f) That on 5<sup>th</sup> November, 2013, the plaintiff's Notice of Motion dated 1<sup>st</sup> October, 2012 came up for hearing. The same was dismissed with costs.

(g) That since 5<sup>th</sup> November, 2013 to date, the plaintiff has not taken a single step or made any application or even attempted to set the matter down for hearing.

(h) That a period of over four (4) years has since lapsed, a period within which the plaintiff has taken absolutely no step to

set this matter down for hearing nor moved the court in any other way whatsoever.

(i) That the delay of more than four (4) years by the plaintiff has been unreasonable lengthy, is undeniable inexcusable and has greatly prejudiced the 2<sup>nd</sup> defendant rendering a fair trial impossible.

(j) That the indolence shown by the plaintiff has greatly prejudiced the possibility of a fair trial noting that the matter was filed in 2012, under certificate of urgency, yet the plaintiff has not once, in the last four (4) years, set down the matter for hearing.

(k) That compelling the 2<sup>nd</sup> defendant to retrace their witnesses, whom it will be difficult to trace and compel and to recall to testify on matters and events surrounding a land transaction that occurred over 12 years ago, on or about 29<sup>th</sup> March, 1996, greatly prejudices impacts the 2<sup>nd</sup> defendant's case and the accuracy of their witnesses, all to the benefit of the indolent and evidently care free plaintiff.

(l) That it would be plain wrong and serious miscarriage of justice to allow the plaintiff herein to benefit from their indolence.

(m) That the plaintiff has shown total disinterest in prosecuting this matter yet the same remains hanging over the head of the 2<sup>nd</sup> defendant herein and its pendency continue to cause them anxiety.

(n) That a delay of over four (4) years is inexcusable and is the very definition of abuse of the court process.

(o) That it is the primary duty of the plaintiff to take steps to progress their case since they are ultimately the ones that dragged the defendant to court, a duty they have catastrophically failed to carry out.

(p) That this Honourable Court ought to dismiss this suit as the long delay in the prosecution of this case and the existence of this matter in its present state has caused and its pendency continues to cause prejudice and injustice to the 2<sup>nd</sup> defendant.

(q) That this is an appropriate case for dismissal under Order 17 Rule 2 sub-rule 3 of the Civil Procedure Rules 2012.

3. The application is further based on the affidavit sworn by Ian R. Wachira, advocate for the 2<sup>nd</sup> defendant/applicant sworn on 19<sup>th</sup> March, 2018 in which he reiterates the grounds in support of the application.

4. The record shows that the plaintiff's counsels on record were served with the application on 14<sup>th</sup> June, 2018 as shown by the affidavit of service sworn by Hassan Jefa Katana, process server on 29<sup>th</sup> June, 2018 and filed in court on even date. The record also shows that the other defendants and the interested party were served with the said application. However, as at 26<sup>th</sup> July, 2018 when the application came up for hearing inter partes, no replying affidavit or grounds of opposition had been filed by the plaintiff/respondent or the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants. The interested party opposed the application and filed a replying affidavit sworn by Emmanuel Arunga an investigator with the interested party on 25<sup>th</sup> July, 2018 and filed on 26<sup>th</sup> July, 2018. It was the averment of Mr. Arunga that the suit involves property known as **MN/1/9816**, a public property which was irregularly excised from a road reserve abutting links road Nyali area and dismissal of this suit will defeat the access to justice and the public interest of the residents of Nyali. That the interested party herein has been actively involved in conducting the investigations into establishment of the facts raised and confirms that there is substantive evidence to support the suit, and the interested party prays that the suit be determined on merits to safeguard public interest.

5. It was further averred that the interested party herein filed a subsequent suit in **Environment and Land Court Case No. 85 of 2013, Ethics & Anti-Corruption Commission -vs- Shaibu Hamisi Mgandi, Sheikh Ali Taib & Commissioner of Lands** with a view to recover the suit property and it is desirous that the two suits be consolidated to guide the court in determining the matter.

6. It was further averred that the 2<sup>nd</sup> defendant passed on 28<sup>th</sup> June, 2017 and the suit herein cannot proceed without his substitution even when the plaintiff and the interested party are desirous of proceeding with the same. The issue of the death of the 2<sup>nd</sup> defendant was however overtaken by events when the parties by consent allowed the 2<sup>nd</sup> defendant's application dated 13<sup>th</sup> June, 2018 on 26<sup>th</sup> July, 2018 which basically permitted the legal representative of the Estate of the deceased 2<sup>nd</sup> defendant to be made a party to this suit and to be allowed to proceed with the suit on behalf of the deceased.

7. The interested party further avers that the 2<sup>nd</sup> defendant is in occupation and possession of the suit property and has therefore not suffered any prejudice. It is averred that the two suits raise pertinent issues and the interested party urged the court to exercise its inherent power under **Article 159 1(d) of the Constitution** and grant the plaintiff and the interested party an opportunity for a fair hearing to safeguard the recovery of public property and the public interest at large. It was thus the prayer of the interested party that the instant application be dismissed to allow the two suits proceed for full hearing on merit.

8. The 2<sup>nd</sup> defendant/applicant's counsel Mr. Taib, argued the application, relying on the grounds and the affidavit in support of the motion and maintaining that the plaintiff had not opposed the application and has not offered any explanation for the delay in prosecuting her suit hence the same should be dismissed for want of prosecution with costs, adding that the only opposition is by the interested party who is neither the plaintiff nor a defendant. He submitted that the interested party cannot take over the proceedings or insist their prosecution which is the primary responsibility of the plaintiff and the defendants. Mr. Taib added that the interested party had admitted filing another suit, **ELC Case No. 85 of 2013** relating to the same subject matter and involving the same parties and therefore will suffer no prejudice by the discontinuation of this case. Further Mr. Taib submitted that there was no application for consolidation.

9. Mrs. Abdulrahim, counsel for the interested party relied on the replying affidavit filed and urged the court to dismiss the application.

10. Mr. Kiti, counsel for the 3<sup>rd</sup> defendant echoed the submissions of the interested party and urged the court to dismiss the application.

11. I have carefully considered the application as presented and the oral submissions made by counsel for the 2<sup>nd</sup> defendant, for the 3<sup>rd</sup> defendant and for the interested party. In my view, the only issue for determination is whether the 2<sup>nd</sup> defendant has made out a case to warrant grant of orders sought for dismissal of this suit for want of prosecution.

12. The legal basis for dismissal of suits for want of prosecution is the requirement of expediency in the prosecution of civil suits and can be found in **Article 159 (2) (b) of the Constitution** that justice shall not be delayed. The courts are also empowered by **Sections 1A and 1B of the Civil Procedure Act** to ensure that the overriding objectives of the Civil Procedure Act and Rules are attained in the administration of justice in a just, fair and expeditious manner.

13. 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. **Order 12 Rule 2 of the Civil Procedure Rules** stipulates thus:-

**“(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);**

**(4) The court may dismiss the suit for non-compliance with any direction given under this order”.**

14. Accordingly, it is permissible for any party to a suit to move the court for dismissal in situations where no application has been made or step taken by either party for one year. **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.

15. In the case of *Ivita -vs- Kyumba [1984] KLR 441*, it was held:-

**“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”.**

16. The court record does show that this suit was instituted on **1<sup>st</sup> October, 2012** vide a plaint of even date. The plaintiff’s claim against the defendants jointly and severally are for a declaration that the Grant dated **15<sup>th</sup> March, 1996** and registered on **29<sup>th</sup> March, 1996** in favour of the 1<sup>st</sup> defendant over the parcel of land registered as **CR. NO. 28222/1** was issued ultra vires the 3<sup>rd</sup> defendant’s statutory powers and is thus illegal, null and void ab initio; an order directed to the Coast Registrar of Titles and/or Land Registrar in-charge of the Titles formerly registered under the Land Titles Registry - Mombasa, to rectify the register by cancellation of the entries relating to the issuance of the Grant dated **15<sup>th</sup> March, 1996** and registered on **29<sup>th</sup> March, 1996** in respect of the parcel of land registered as **CR.NO.28222/1** and all subsequent entries made thereon; a declaration that the parcel of land created by way of the Grant dated **15<sup>th</sup> March, 1996** and registered on **29<sup>th</sup> March, 1996** is a road reserve to be kept as such for the future generations of Kenya until otherwise lawfully allocated; as against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants an order for vacant possession of the parcel of land registered as **CR.NO.28222/1**; an order against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to demolish the perimeter wall constructed by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants on parcel of land registered as **CR.NO.28222/1**; an order for a permanent injunction against the defendants to restrain them, their agents, servants, employees and/or assigns from trespassing upon, transferring, leasing, wasting, building, constructing, improving and/or any dealing whatsoever with the parcel registered as **CR.NO.28222/1** and costs and incidental to the suit and interest thereon.

17. The suit was filed simultaneously with an application under certificate of urgency on the same day seeking for temporary interim injunctive orders. The said application was subsequently dismissed with costs on **5<sup>th</sup> November, 2013** for want of prosecution. From thence, no action was taken in the suit until **19<sup>th</sup> March, 2018** when this application to dismiss the suit for want of prosecution was filed by the 2<sup>nd</sup> defendant. It is manifest therefore that for purposes of **Order 17 rule (1) and (3) of the Civil Procedure Rules**, the suit was ripe for dismissal for want of prosecution as sought by the 2<sup>nd</sup> defendant.

18. The plaintiff has not filed any replying affidavit to this application explaining the reasons for the inaction for nearly 5 years from the last date when the matter was before court. That being the case, this court can only make an inference that the plaintiff has lost interest in the suit. The delay in setting down the matter for hearing no doubt prejudices the 2<sup>nd</sup> defendant as justice delayed is justice denied. The plaintiff has not given any excuse for her inaction. The interested party filed a replying affidavit opposing the application. With due respect to the interested party, the said affidavit did not give the reason for inaction for 5 years other than to state generally that allowing the application

will prejudice public interest. The interested party has admitted that it filed a separate suit relating to the same subject matter and against the same parties. There is no application for consolidation for determination before this court. The interested party can still safeguard the said public interest through that other suit. They cannot purport to speak on behalf of the plaintiff in this suit.

19. The court is aware that the act of dismissing a suit is a draconian measure which should be exercised cautiously as it drives the party from the judgment seat of justice. Nonetheless the court is bound to do justice to all parties without undue delay, which delay occasions injustice to either party to the dispute and in this case, delay defeats equity.

20. The plaintiff filed suit, failed to prosecute the application which sought injunctive orders to preserve the *status quo* and went to slumber leading to its dismissal for want of prosecution. The plaintiff has not been vigilant or at all to have their suit heard and determined. It is quite apparent that the plaintiff has lost interest in the suit. The court shall therefore not hesitate to have the suit dismissed because the continued delay no doubt infringes on the 2<sup>nd</sup> defendant's rights and legitimate expectations that disputes against him should be resolved expeditiously.

21. In the end, I find the application dated **19<sup>th</sup> March, 2018** by the 2<sup>nd</sup> defendant seeking to dismiss the plaintiff's suit against him for want of prosecution merited. Accordingly, the same is allowed and the plaintiff's suit against the 2<sup>nd</sup> defendant is dismissed. I award costs of this application and the suit to the 2<sup>nd</sup> defendant. Orders accordingly.

Dated, signed and delivered at Mombasa this **17<sup>th</sup>** day of **December, 2018**.

**C. K. YANO**

**JUDGE**