



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ELC CIVIL SUIT NO.123 OF 2011**

**YOUNG FARMERS ASSOCIATION SELF HELP GROUP** (suing through its officials namely:

- 1. PETER WACHIRA KANGARA**
- 2. MWANGI MAKANGA**
- 3. TERESA WANJIKU**
- 4. ABBY M. NGAIRE.....PLAINTIFFS**

**=VERSUS=**

- 1. JOHN NGUNYI**
- 2. JOSEPH MWIKYA**
- 3. GERALD GIKONYO**
- 4. JOSEPH MUTUA**
- 5. GEORGE OILA**
- 6. FRANCIS OBONGO**
- 7. MARTHA ADHIAMBO**
- 8. PERIS IRUNGU.....DEFENDANTS**

**RULING**

**Introduction:**

1. On 25/3/2011, Young Farmers Association Self Help Group (hereinafter referred to as “**the Association**”) brought this suit through its Officials; Peter Wachira Kangara, Mwangi Makanga, Teresa Wanjiku and Abby M. Ngaire. Through a Complaint dated 25/3/2011, they contend that in 1998 the Government of Kenya allotted to the Association Land Reference Number 18282 which they allege is situated in Dandora Nairobi. They allege that in or about 2000, the Defendants forcefully entered the suit property seeking to evict the Association from the suit property. This is what triggered this suit. In its statement of claim, the Association seeks a declaration to the effect that the Association is entitled to

possession of the suit property, among other prayers.

2. Together with the Plaint, the Association filed a Notice of Motion dated 25/3/2011 seeking an interim injunctive order restraining the Defendants against dealing with the suit property. On 6/4/2011, the Application came up for hearing before Okwengu J. On that day, Mr. Uvyu, Counsel for the 3rd and 6th Defendants applied for an adjournment because he needed time to file a response to the Application. The Application came up for hearing again on 31/5/2011 when counsel for the Plaintiff intimated to the court that there had been delay on part of the Court Registry in processing the formal court order granting the Plaintiffs leave to effect substituted service through a notice in the Daily Nation Newspaper. Hearing of the Application was stood over to 29/6/2011. On 29/6/2011, parties appeared before the Deputy Registrar and by consent fixed the Application for hearing on 22/9/11. On 22/9/11, the Application was not listed for hearing. Subsequently, on 25/11/2011, the Plaintiffs' Advocate fixed the Application for hearing on 24/1/2012. Again on 24/1/2011 the Application was not listed. On 15/2/2012, the Firm of Mwathi Njue & Co. Advocates fixed the Application for hearing on 27/3/2012. On 27/3/2012 the Application was listed before Nyamweya J. On this day, it was intimated to the court that the first two officials of the Association, Peter Wachira Kangara and Mwangi Makanga were deceased. The court was further informed that Mwathi Njue & Co. Advocates had not served M/S C N Kihara & Co. Advocates who had all along acted for the Plaintiffs. During that particular court session, a Mr Waiganjo held brief for a Mr. Gathii for the Plaintiffs. Mr Gachoka who held brief for Mr Kihara indicated that the Firm of C N Kihara and Co. Advocates had not been served with any notice of change of advocates. Nyamweya J stood over the matter to 25/5/2012 and directed the Advocates to resolve the issue of legal representation of the Plaintiffs. From the record, there were no court proceedings on 23/5/2012. What followed subsequently was the present Application dated 3/7/2013, filed by the 2nd and 5th Defendants on 4/7/2013, seeking an order dismissing this suit for want of prosecution. I have outlined the above chronology because it is necessary in an application of this nature.

### **Issue for determination**

3. The issue for determination in the Application dated 3/7/2013 is whether or not the suit herein is liable for dismissal for want of prosecution under Order 17 Rule 2 of the Civil Procedure Rules.

### **Legal Framework & Guiding Principles**

4. In exercising judicial authority, courts are generally guided by the broad principles set out under Article 159(2) of the Constitution. A court's determination of any issue before it must resonate with the letter and broad spirit of those principles.

5. The legal framework on dismissal of suits for want of prosecution is found in Order 17 Rule 2 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.**

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

From the plain wording of Order 17 Rule 2, it is clear that a party to a suit may move the court to dismiss a suit for want of prosecution. My understanding of the framework contained in Order 17 Rule 2 is that a court may *suo motto* dismiss a suit for want of prosecution. Within the same framework, the court may dismiss a suit on the same ground on the application of either party.

6. Besides the legal framework set out in Order 17 Rule 2, the guiding criteria to be applied in considering whether or not a suit should be dismissed for want of prosecution has been articulated and settled in a number of leading authorities, among them, the case of Ivita -vs- Kyumbu(1984) KLR 441 where it is summarized as follows:

**“The test is whether the delay is prolonged and inexcusable and, if it is, can justice be done despite such delay.”**

7. In Mwangi S. Kimenyi -vs- Attorney General and Another, Civil Suit Misc. No. 720 of 2009, the court restated the test as follows:-

***1. When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.***

***2. Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the Plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and 5) what prejudice will the dismissal cause to the Plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.”***

8. From the court record, no action was taken by either party to this suit between 23/5/12 when the Court Registry failed to list this matter before a judge and 4/7/2013 when the 2nd and 5th Defendants filed the present Application seeking to dismiss this suit for want of prosecution. Valerio Mwathi Njue, Counsel for the 2nd and 5th Defendants, swore an affidavit in support of the Application in which he contends that the thirteen (13) months period of inaction is sufficient ground for dismissal of this suit for want of prosecution.

9. The Plaintiffs oppose the Application through an affidavit sworn by Felister Wangari, in which she has explained that the inaction was caused by the death of the Association’s Chairman and Secretary who passed on in May 2011 and September 2011 respectively. She contends that their replacement required elections in a properly convened and quorated general meeting.

## **Determination**

10. I have carefully considered the affidavits in support of and against the Application, the submissions by counsel for the Applicants, the legal framework and guiding jurisprudential principles on an application for dismissal of suit for want of prosecution.

11. There are two key questions to be answered in this Ruling. The first question is whether there has been inordinate and inexcusable delay on the part of the Plaintiffs. The second one is whether it would cause grave injustice to the Defendants if this case were to be allowed to proceed to trial in the circumstances. In answering the two questions, the court is to be guided by the court record, the explanation tendered by the Respondents in response to the Application for dismissal, the general prevailing circumstances within the judicial system at the time, and the grounds put forth by the applicant in advancing the view that he would be exposed to grave injustice if the suit were to be allowed to proceed to trial.

12. The explanation tendered by the Plaintiffs for the inaction is that two of the Association’s key officials passed on. That explanation has not been challenged by the Applicants. I would however point

out that, with due diligence, replacement of the deceased officials could have been achieved in a shorter period of time than the 13 months. This explanation nonetheless constitutes a reasonable excuse for the 13 months delay.

13. Counsel for the 2nd and 5th Defendants contend that the existing interlocutory orders have undermined the 2nd and 5th Defendant's right to own property as guaranteed under the Constitution of Kenya. The Applicants have, however, not demonstrated to the court what prejudice or injustice they stand to suffer if this suit were to proceed to trial forthwith.

14. A defendant seeking dismissal of a suit for want of prosecution must show that there was inordinate delay in the circumstances of the case. He must also satisfy the one year threshold stipulated in Order 17 of the Civil Procedure Rules. Thirdly, he must satisfy the court that he will be prejudiced by the delay. Lastly, he must satisfy the court that owing to the delay, a fair trial cannot be achieved. In **Ivita Vs. Kyumbu**, the court echoed this view by stating as follows:

**“(the defendant) 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.”**

15. I have deeply reflected on the prevailing circumstances within Kenya's judicial system and more particularly, in the Environment and Land Court at the material time when the delay occurred. In 2010, the people of Kenya enacted and promulgated a new Constitution. In many remarkable ways, the new Constitution redesigned and reconstructed the Country's Judiciary. Article 162 of the new Constitution created five categories of superior courts:- a supreme court, a court of appeal, a high court, a court of equal status with the high court to hear and determine disputes relating to employment and labour relations, and a court of equal status with the high court to hear and determine disputes relating to the environment and the use and occupation of and title to land. In addition, Article 165(5) of the Constitution divested the high court of jurisdiction to hear disputes reserved for the latter two courts.

16. This suit was filed in 2011 in the High Court as it existed under the repealed Constitution. The establishment of the Environment and Land Court required a legislative framework by Parliament. Suffice to say, transition to the new constitutional order and operationalization of the reconstructed judiciary took time and is still ongoing to date. During that transition, diaries of the courts were often shut. Indeed, transfer of land disputes files require formal court, orders issued in a formal sitting in chamber or open court, and depends on the availability of judges to issue those orders. The delay giving rise to the present Application happens to have occurred during the transition period.

17. Even after the environment & land court was established and operationalized, there was an acute shortage of judges. Hearing dates were not available in the registry. Ruling and Judgments remained pending for inordinately long. It is partly because of this acute shortage of judges that the present Application has taken close to 4 years to be heard and determined. This problem was addressed in late 2016 through the recruitment and appointment of additional judges to this court.

## **Disposal**

18. Taking into account the explanation tendered by the Association, the legal framework and the guiding principles on dismissal of suits for want of prosecution, and considering the prevailing circumstances within Kenyan's judicial system at the time of the material delay, I am persuaded that it would be inappropriate to dismiss this suit for want of prosecution. I would accept the Plaintiffs' explanation. I am similarly of the view that justice can still be achieved in this matter notwithstanding the 13 months of inaction on part of the Plaintiffs.

19. The upshot of the foregoing is that the Notice of Motion dated 3/7/2013 by the 2nd and 5th Defendants seeking dismissal of this suit for want of prosecution is disallowed. I would however make the following orders with a view to achieving the expeditious hearing and determination of this suit:-

**(a) The Plaintiffs shall amend the Plaint to substitute the Deceased Plaintiffs and shall file and serve the amended plaint within 30 days.**

**(b) The Plaintiffs shall within 30 days serve a bound, paginated and indexed bundle containing pleadings, witness statements, documents and statement of issues. In default, this suit shall stand dismissed.**

**(c) The Defendants shall file similar bundles within 30 days from the date of service.**

**(d) A mention date shall be given at the time of reading this Ruling in court, for the purpose of confirming compliance and fixing an early hearing date.**

**Dated, signed and delivered at Nairobi on this 27th day of April 2017.**

**B M EBOSO**

**J U D G E**

**In the presence of:-**

.....Advocate for the Plaintiffs

.....Advocate for the Defendants

.....Court clerk