



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**  
**ELC CASE NO.423 OF 2015**  
**[FORMERLY CIVIL SUIT NO.29 OF 2010]**  
**KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF**  
**VERSUS**  
**DR. OBURU ODINGA .....1<sup>ST</sup> DEFENDANT**  
**SAMMY SILAS KOMEN MWAITA.....2<sup>ND</sup> DEFENDANT**  
**RULING**

1. Dr. Oburu Odinga, the 1<sup>st</sup> Defendant, moved the court through the notice of motion dated 29<sup>th</sup> October 2012 seeking to have the suit dismissed for want of prosecution pursuant to **Order 17 Rule 2** of the Civil Procedure Rules. The application is based on the seven (7) grounds on its face and is supported by the affidavit sworn by Dr. Oburu Odinga on the 29<sup>th</sup> October 2012. The main basis of the application being that the Plaintiff has not taken any steps to prosecute the case since 29<sup>th</sup> October 2010 when a ruling was delivered.

2. The application is opposed by Kenya Anti-Corruption Commission, the Plaintiff, through the replying affidavit of Stanley Miriti, an investigator with the commission, sworn on the 28<sup>th</sup> March 2013. The Plaintiff, among others, state that the 1<sup>st</sup> Defendant had offered to surrender the title to the suit land after the revocation of the title under gazette notice No.15577 of 26<sup>th</sup> November 2010. That the Plaintiff was in the process of complying with the provisions of **Order 11 of the Civil Procedure Rules** and should be granted the opportunity to prosecute their case.

3. The 1<sup>st</sup> Defendant responded to the Plaintiff replying affidavit through the further affidavit sworn by Dr. Oburu Odinga on the 30<sup>th</sup> September 2013, among others. denying ever offering to surrender the title to the suit land.

4. The counsel for the 1<sup>st</sup> Defendant and Plaintiff appeared in court on the 27<sup>th</sup> October 2016 and agreed to file written submissions on the notice of motion. The counsel for the 1<sup>st</sup> Defendant filed theirs which is undated, on the 27<sup>th</sup> October 2016 while counsel for the Plaintiff filed theirs dated 9<sup>th</sup> January 2017 on the 13<sup>th</sup> January 2017.

5. The issues for determination by the court are as follows:

a. Whether the Plaintiff has taken any steps to prosecute the case against the two Defendants since

29<sup>th</sup> October 2010.

b. Whether the delay is inordinate and unreasonable.

c. Whether the suit should be dismissed for staying for over one year without steps to prosecute it having been taken.

d. What orders to issue.

6. The court has carefully considered the grounds on the notice of motion, the affidavit evidence by both parties, the written submissions by both counsel and after perusing the record come to the following findings;

a. That indeed the Plaintiff did not take any steps towards prosecuting this case from the date the ruling of 29<sup>th</sup> October 2010 was delivered, to the date the 1<sup>st</sup> Defendant filed their notice of motion dated 29<sup>th</sup> October 2012 and filed on the 31<sup>st</sup> October 2012. That between the two dates a period of two years had lapsed and the 1<sup>st</sup> Defendant was justified in moving the court as he did.

b. That the power to dismiss a suit under **Order 17 Rule 2** of the Civil Procedure Rules is discretionally. This is confirmed by the use of the words “**may dismiss the suit**” where no cause has been shown. That the Plaintiff has in their endeavor to show cause why the suit should not be dismissed explained that it took time to comply with the requirements of **Order 11 of Civil Procedure Rules** that required total disclosure of the parties case by recording, filing and serving the witness statements and documents. The court has noted that the Plaintiffs list of documents, statements of issues and list of witnesses, all dated 26<sup>th</sup> April 2016 were filed on the 28<sup>th</sup> April 2016 which the court takes to be in compliance with the said **Order 11 of the Civil Procedure Rules**. That the court finds the explanation given to be reasonable.

c. That though the 1<sup>st</sup> Defendant has shown that the Plaintiff took more than one year to take steps towards prosecuting their case, the explanation offered by the Plaintiff, and the steps so far taken towards complying with **Order 11** of Civil Procedure Rules makes the court find and hold that a dismissal order is not the way to go in this case. That however the 1<sup>st</sup> Defendant should not be condemned to costs of the notice of motion but the same should be in the cause.

7. That flowing from the foregoing, the court finds no merit in the 1<sup>st</sup> Defendant’s notice of motion dated 29<sup>th</sup> October 2012 and the same is dismissed with costs in the cause.

It is so ordered.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**DATED AND DELIVERED THIS 12<sup>TH</sup> DAY OF APRIL 2017**

In presence of;

Plaintiff Absent

Defendants Absent

Counsel M/s Maina for the Plaintiff

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**12/4/2017**

12/4/2017

S.M. Kibunja Judge

Oyugis court assistant

Parties absent

M/s Maina for the Plaintiff

The Defendants and their counsel absent

Court: Ruling dated and delivered in open court in presence of

M/S Maina for the Plaintiff.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**12/4/2017**