



**REPUBLIC OF KENYA**

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

**ELC MISC. APPL NO.58 OF 2017**

**[FORMERLY MISC. CIVIL APPL NO.304 OF 2010]**

**IN THE MATTER OF THE REGISTERED LAND ACT (CAP 300) REPEALED**

**AND**

**IN THE MATTER OF SECTION 38 LIMITATION OF ACTIONS ACT CAP 22) LAWS OF KENYA**

**BETWEEN**

**WILLIM ROMAN MC. TOUCH.....PLAINTIFF**

**AND**

**LAWRENCE O. HONGO.....1<sup>ST</sup> DEFENDANT**

**LAWRENCE O. HONGO.....2<sup>ND</sup> DEFENDANT**

**(being sued as the Administrator of the estate of MICHAEL HONGO AYIEKO)**

**RULING**

1. Lawrence O. Hongo, and Lawrence O. Hongo (sued as administrator of the estate of Michael Hongo Ayieko), the Defendants, moved the court through the notice of motion dated 14<sup>th</sup> June 2016, and filed in court on the 21<sup>st</sup> June 2016, seeking to have the suit filed by William Mc. Touch, the Plaintiff, dismissed for want of prosecution. The application is based on the four grounds on its face and is supported by the affidavit of Geoffrey O. Yogo, counsel for the Defendants, on the 14<sup>th</sup> June 2016.

2. The application is opposed by the Plaintiff, through the replying affidavit sworn by Bruce O. Odeny, counsel for the Plaintiff, on the 28<sup>th</sup> June 2016.

3. The application was heard on the 24<sup>th</sup> January 2017 when Mr. Oriero and Odeny for the Defendants and Plaintiff respectively offered their oral rival submissions.

4. The issues for determination by the court are as follows;

a) Whether the matter has taken more than one year from the 24<sup>th</sup> March 2015 without the Plaintiff having taken any step to prosecute it.

b) What orders to issue.

c) Who pays the costs.

5. The court has carefully considered the grounds on the notice of motion, the affidavit evidence, the submissions by counsel, the record and concluded as follows;

a) That after the application dated 12<sup>th</sup> January 2015, by M/S Otieno Yogo & Company Advocates, to cease acting for the Defendants was allowed on the 24<sup>th</sup> March 2015, the same firm came back on record for the Defendants through the notice of appointment of advocates dated 1<sup>st</sup> July 2015, and filed in court on the 2<sup>nd</sup> July 2015. The application subject matter of this ruling is dated 14<sup>th</sup> June 2016 and filed on the 21<sup>st</sup> June 2016, through the counsel on record for the Defendants, and therefore is properly before the court.

b) That contrary to the contention by the Defendants that no step has been taken since 24<sup>th</sup> March 2015, the record has confirmed that the matter was subsequently mentioned on the 11<sup>th</sup> May 2015 and 29<sup>th</sup> June 2015. That the notice of motion subject matter of this ruling was filed on 21<sup>st</sup> June 2016 which was evidently about eight (8) days before one year had lapsed from the 29<sup>th</sup> June 2015.

c) That **Order 17 Rule 2 of the Civil Procedure Rules** provides for the dismissal of suits where parties have taken more than one year without taking any steps to prosecute them. That one avenue is through the court issuing notices to show cause under **Rule 2 (1)** and the second route is through any of the parties moving the court through **Rule 2 (3)**. That as the Defendants had cited **Order 17 Rule 2 of the Civil Procedure Rules** as the one the provision under which the application was brought, the claim by the Plaintiff that it was brought under the wrong provision of the law does not have merit.

d) That in view of the finding, in (b) above, the court find that the application dated 14<sup>th</sup> June 2016 was filed prematurely and for that reason it fails.

6. That the notice of motion dated 14<sup>th</sup> June 2016 and filed on the 21<sup>st</sup> June 2016 has no merit and is dismissed with costs.

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          Present

Counsel            M. Odeny for the Plaintiff

M/S Maina for Ojuro for the Defendant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

12/4/2017

Before S.M. KIBUNJA Judge

Oyugi court assistant

Defendant present

M/s Maina for Ojuro for the Defendant

Mr. Odeny for the Plaintiff

Court: Ruling dated and delivered on open court in presence of Defendant, Mr. Odeny for the Plaintiff and M/S Maina for Ojuro for the Defendant.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**12/4/2017**