



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 130 OF 2011**

**ASTRID DORIS PETRA BWAZA.....PLAINTIFF**

**-VERSUS-**

**SALESIANS OF DON BOSCO.....DEFENDANT**

**RULING**

1. For my determination is the application dated 7<sup>th</sup> September 2016 seeking to have this suit dismissed with costs to the defendant for want of prosecution. The application is brought on the grounds that the plaintiff has neglected to set down this suit for hearing. Secondly that the applicant is likely to suffer financial loss and anxiety even as the case stands abandoned.

2. The application is further supported by the affidavit deposed to by Fr Eric Mairura. He deposed that on 1.11.2011 they entered a consent stopping development on the land for 90 days pending survey report. That the plaintiff did not take any steps forcing the defendant to move the Court on 7<sup>th</sup> March 2013 seeking dismissal of the suit. He continued that Justice Mukunya directed the plaintiff to set down the suit for hearing within 30 days on 12<sup>th</sup> February 2014.

3. The defendant/applicant states the plaintiff has no genuine intention to have this matter concluded causing them a lot of inconvenience with donor support being withdrawn from their project due to the unending case. He urged the Court to grant him the orders.

4. The application is opposed by the plaintiff vide grounds of opposition and replying affidavit dated 7<sup>th</sup> October 2016. The plaintiff listed steps he has taken to prosecute the matter stating the delay has not been inordinate. The steps the plaintiff narrated include filing of an application for review on 1.10.2014 which application was determined on 22<sup>nd</sup> April 2015 reinstating the suit. The plaintiff deposed that it could not thereafter trace the Court file and wrote to the deputy registrar hence the reason hearing dates could not be fixed. He urged the Court to dismiss the present application.

5. I have considered the pleadings and the submissions rendered while reaching this determination. I note from the consent annexed by the applicant that the parties herein agreed to “*have the District Land Registrar & the Provincial Surveyor fix and mark the correct boundaries between the original plot No Kwale/Galu Kinondo 372 & 373*”, and file their report within 21 days of completing the exercise. This consent order was later set aside by the ruling of the Judge delivered on 12<sup>th</sup> February 2014. From the reading of that ruling, one of the reasons given was that none of the parties had complied with the order two years down the line. The Judge directed the plaintiff to set down the suit for hearing within 30 days from 12<sup>th</sup> February 2014.

6. The record does show that the plaintiff subsequently filed an application dated 1.10.2014 which was allowed on 22.4.2015 for being unopposed. From 22.4.2015 to the time the current application was filed, no proceedings have taken place. The plaintiff gives the explanation that it could not trace the Court file and therefore wrote a letter dated 9<sup>th</sup> February 2016 in which they said that the matter had been listed for dismissal in May 2015 but they could not access the file.

7. For one reason or another this matter has thus been fixed for dismissal more than for hearings on merits. The letter of 9<sup>th</sup> February & 15<sup>th</sup> March 2016 does not satisfy me as appropriate steps taken to prosecute this matter. The Court file missing is also not excusable as the defendant easily found this file when it brought the current application in September 2016. Be that as it may and in the interest of justice I will give the plaintiff a last opportunity to present his case on its merits. Because the plaintiff has been lethargic in fixing the matter for hearing, I will order that he pays the defendant the costs of this application which I do hereby assess at Kshs 20,000=.

The same be paid within 30 days. In default, the defendant is at liberty to execute.

8. As a way forward, this matter is fixed for Pre – trial directions on 25<sup>th</sup> May 2017. Both parties should comply with the provisions of Order 11 before then. In the event the plaintiff fails to comply fully with order 11 by the 25.5.2017, his suit shall stand dismissed with costs to the defendant.

**Dated and delivered at Mombasa this 11<sup>th</sup> day of April 2017**

**A. OMOLLO**

**JUDGE**