



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 117 OF 2006**

**DAVID MULATYA MUKEKU .....1<sup>ST</sup> PLAINTIFF**

**PATRICK MUSAU KAVITHI .....2<sup>ND</sup> PLAINTIFF**

**JACKSON MAWEU MULATYA .....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**PHILIP MUASA MBALUTO .....DEFENDANT**

**RULING**

1. In the Application dated 14<sup>th</sup> April, 2015, the Defendant is seeking for the following orders:

***a. That the orders of stay of execution given herein on 15<sup>th</sup> December, 2006 be discharged, recalled and or set aside.***

***b. That the suit herein be dismissed for want of prosecution.***

***c. That the costs of this Application and the suit be awarded to the Defendant/Applicant.***

2. The Application is premised on the grounds that since 20<sup>th</sup> November, 2006, the Plaintiffs have not made any attempts to fix the matter for hearing but have instead taken advantage of an order of stay of execution granted on 15<sup>th</sup> December, 2006.

3. It is the Defendant's case that the Plaintiffs have no intention of proceeding with the suit and that the suit was instituted to frustrate the eviction order in CMCC Miscellaneous Application No. 53 of 2005 and that the entire suit should be dismissed by the court for want of prosecution.

4. In response, the 1<sup>st</sup> Plaintiff deponed that the Plaintiffs had a disagreement with their then advocates in the year 2008; that they then instructed their current advocates and that the advocate was under the mistaken belief that the parcels of land covered in this suit were also covered in HCCC No. 29A of 2012.

5. The Plaintiffs finally deponed that the Defendant himself has never taken any steps to fix the matter for hearing and that this suit should be consolidated with HCCC No. 29A of 2012.

6. The Defendant's/Applicant's advocate submitted that the Plaintiffs have failed to explain why there was a delay in prosecuting this suit.

7. The Plaintiffs' /Respondents' advocate on the other hand submitted that this being a land matter, the court should decline to dismiss the suit because doing so will result in great injustice to the Plaintiffs.

8. According to counsel, the court should not apply its mind to the delay, but to the interest of justice; that the Defendant will not be prejudiced if the matter proceeds for hearing and that the Application should be disallowed.

9. Both the Plaintiffs' and the Defendant's advocate filed their authorities which I have considered.

10. It is not in dispute that before the current Application was filed on 15<sup>th</sup> April, 2015, the Plaintiffs' advocate had filed an Application dated 22<sup>nd</sup> June, 2010. In the said Application, the Plaintiffs' advocate sought for the leave of the court to cease acting for the Plaintiffs. The Application was allowed by the court on 30<sup>th</sup> September, 2014.

11. It is therefore obvious that between 30<sup>th</sup> September, 2014 when the matter was last in court and 15<sup>th</sup> April, 2015 when current Application was filed, a period of one (1) year had not lapsed.

12. Considering that the Plaintiffs' current advocates only came on record on 7<sup>th</sup> April, 2017, and in view of the fact that the Plaintiffs' previous advocates never took positive steps to have the suit fixed for hearing, it will be in the interest of justice to grant to the Plaintiffs' an opportunity to prosecute this suit through their current advocates.

13. In the circumstances, I disallow the Application dated 14<sup>th</sup> April, 2015 with no order as to costs and make the following order:

***a. That the Plaintiffs to fix this matter for hearing and have it prosecuted within 120 days from the date of this Ruling.***

***b. If the suit is not fixed for hearing within the said 120 days from the date hereof, the suit shall stand dismissed with costs.***

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 30<sup>TH</sup> DAY OF JUNE, 2017.**

**O.A. ANGOTE**

**JUDGE**