



**REPUBLIC OF KENYA**  
**IN THE LAND AND ENVIRONMENT COURT OF KENYA AT KAKAMEGA**

**ELC CASE NO. 274 OF 2015**

**BERTHA NALIAKA OTWERE.....PLAINTIFF/APPLICANT**

**(SUBSTITUTED FOR JUSTO OTWERE SABALA)**

**VERSUS**

**RAMESH KOTECHA.....DEFENDANT/RESPONDENT**

**RULING**

The application is dated 3<sup>rd</sup> September 2015 and is brought under Order 17 Rule 2 (1) of the Civil Procedure Rules 2010. And Section 3A of the Civil Procedure Act, seeking the following orders;

1. That this suit be and is hereby dismissed for want of prosecution.
2. That costs of the suit and of this application be born by the plaintiff/substitute.

The application is grounded on the affidavit of Ramesh Kotecha, the reasons herein and the nature of this case. That since 23<sup>rd</sup> July 2009, a period of over 6 years there has been no action/step in this case. That the plaintiff/substitute has no interest in this case. That the defendant is the sole owner of the subject matter – Kakamega Town Block 1/180 and his rights and interest are affected. That pendency of this case is prejudicial to the defendant.

The applicant submitted that this application is brought pursuant to the provisions of order 17 rule 2 (1) of the Civil Procedure Rules; it is grounded on the five general grounds on the face of the application and those in the supporting affidavit of Ramesh Kotecha sworn on the 3<sup>rd</sup> September 2015.

The last action in this case was on 23<sup>rd</sup> July 2009 when the court delivered a ruling. Since July, 2009 to date the plaintiff has not taken any action in this case.

Order 17 rule 2(1) provides as follows:-

***“In any suit in which no application has been made or step taken by either party for one year .....*”**

Order 17 rule 2 (3) provides;

***“Any party to the suit may apply for its dismissal as provided in sub rule II”***

In view of the above express provisions the application is properly before this court. The issues raised in

the statement of grounds dated 5<sup>th</sup> October 2015 are irrelevant. There are no attempts to explain the delay. The allegation that there was no court with appropriate jurisdiction is not correct. There was no such thing as Land and Environment Court in 2009. Thereafter there were judges in Kakamega and several matters were dealt with. There has been no action of any kind for a period of over 6 years. Not even a mere mention in this matter.

The plaintiff/respondent opposed the application by filing statement of grounds of opposition and also a replying affidavit. In her replying affidavit, the plaintiff/respondent explained why she was unable to fix the case for hearing during the period. Most part of the period complained of, there was no judge to handle land matters Justice Mwita who took charge for sometime was found by the Court of Appeal to have acted without the requisite jurisdiction. That her explanation is good and they urge the court to find that it satisfies the requirement of order 17 Rule 2 (2) of the Civil Procedure Rules. This is more so given that on the 9<sup>th</sup> September, 2015, the hearing failed to take off for the same reason for the last more than 1 ½ years.

The plaintiff has taken issue with the firm of Fwaya & Co. Advocates representing the defendant/applicant. The respondent submitted that, it is evident from the face of the notice of motion that Fwaya & Co. Advocates drew and filed the application for service upon the plaintiff personally. It is not known why the advocates would want to serve and indeed served the respondent personally when there was a lawyer representing the plaintiff/respondent. The only explanation is that the firm of Fwaya & Co. Advocates were coming into a matter for the defendant/applicant who was by then represented by another firm of advocates namely J.J. Mukavale Advocate and in doing so defied the legal requirements to file and serve notice of change upon all parties including the defendant's previous lawyer. The representation by Fwaya & Co. Advocates violates order 9 rules 5 & 6 of the Civil Procedure Rules 2010 and is to that extent in effective rendering the application incompetent.

This court has considered both the applicants and the Respondents submissions in detail. I have perused the court file and I find that the last action in this case was on 23<sup>rd</sup> July 2009 when the court delivered a ruling. Since July, 2009 to date the plaintiff has not taken any action in this case. Order 17rule 2(1) provides as follows:- "In any suit in which no application has been made or step taken by either party for one year ....." Order 17 rule 2 (3) provides; "Any party to the suit may apply for its dismissal as provided in sub rule II"

In view of the above express provisions the application is properly before this court. The issues raised in the statement of grounds dated 5<sup>th</sup> October 2015 are not relevant in trying to explain the inordinate delay. The allegation that there was no court with appropriate jurisdiction is not correct. The Land and Environment Court came into being in 2010 and no issues of jurisdiction would have arisen in 2009. Thereafter there were Judges in Kakamega and land matters were handled accordingly. There has been no action of any kind for a period of over 6 years. I find this application has merit and I grant it as prayed.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 21<sup>ST</sup> DAY OF JUNE 2017.**

**N.A. MATHEKA**

**JUDGE**