



**REPUBLIC OF KENYA**

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

**ELC CIVIL SUIT NO. 605 OF 2012**

**SKYVIEW PROPERTIES LIMITED .....1<sup>ST</sup> PLAINTIFF**

**SCIENIC COURT LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**KENNEDY AMOS NJOROGE ..... 1<sup>ST</sup> DEFENDANT**

**IRENE NDUGI NJOROGE .....2<sup>ND</sup> DEFENDANT**

**LINET ANGOGO SHIUNDU .....3<sup>RD</sup> DEFENDANT**

**SALIM BAKARI .....4<sup>TH</sup> DEFENDANT**

**RULING**

1. On 9/11/2016, the defendants brought a Notice of Motion dated 9/11/2016 seeking dismissal of this suit on the ground of want of prosecution. The Notice of Motion was brought under ***Order 17 Rule 2 (1) and Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, and 3A of the Civil Procedure Act.*** The Notice of Motion is supported by the affidavit of Francis Kamau Njoroge sworn on 9/11/2016. This Ruling relates to the said Notice of Motion.

2. The Applicants contend that the plaintiffs have not taken any step to prosecute this suit since 26/1/2013 when they were granted injunctive orders. They further contend that the delay of two and half years is intentional, inordinate and inexcusable. Lastly they argue that the defendants have been greatly prejudiced by the continued pendency of this suit.

3. The Application is opposed through a replying affidavit sworn on 18/1/2017 by Susan Nyambura. She contends that the delay in prosecuting this suit was occasioned by illness on her part between the year 2014 and the year 2016 which made it impossible for her to give instructions to their advocates. She further depones that when she recovered in 2016, the plaintiffs' case file in their advocates' office went missing. She urges the court to exercise leniency and sustain this suit for the sake of a just resolution of the dispute giving rise to the suit.

4. The Application was canvassed through written submissions. In their submissions dated 28/4/2017, the defendants argue that since 26/7/2013 when the plaintiffs were granted an injunctive order, no step was taken to prosecute this suit. They further argue that the plaintiffs have continued to enjoy the interim injunctive orders, conduct which they see as a gross abuse of the court process. The defendants submitted that the plaintiffs have not offered any satisfactory explanation for the inordinate delay. The defendants invited the court to be guided by the decisions in ***NETPLAN EAST AFRICA LIMITED V***

**INVESTMENT & MORTGAGES BANK LIMITED, (2013) eKLR** and **CHARTERHOUSE BANK LIMITED & ANOTHER V NATION MEDIA GROUP & ANOTHER, (2012) eKLR**. They urged the court to dismiss this suit on ground of want prosecution.

5. In their written submissions dated 3/5/2017, the plaintiffs' advocates submitted that the material delay was not intentional. They further submitted that the delay was occasioned by sickness on part of Susan Nyambura, a director of both the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs. Lastly, the plaintiffs submitted that the defendants would not suffer any prejudice if this suit were allowed to proceed to trial.

6. The issue to be determined in the present Application is whether the suit herein should be dismissed for want of prosecution under **Order 17 Rule 2 of the Civil Procedure Rules**.

7. I have carefully considered the rival affidavits and written submissions, the applicable legal framework and the prevailing jurisprudential principles on the subject of dismissal of suit on ground of want of prosecution.

8. In exercising judicial authority, courts are generally guided by the broad principles spelt out in **Article 159 (2) of the Constitution**. Those broad principles require courts to, inter alia, administer justice without delay and without undue regard to procedural technicalities.

9. The legal framework on dismissal of suits for want of prosecution is spelt out in **Order 17 Rule 2 of the Civil Procedure Rules** which provides as follows:

**"2 (1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.**

**(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.**

**(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.**

**(4) The court may dismiss the suit for non-compliance with any direction given under this Order."**

10. The jurisprudential criteria to be applied in determining whether or not a suit should be dismissed for want of prosecution was articulated by Chesoni, J (as he then was) in **IVITA V KYUMBU, (1984) KLR 441** in the following words:

**"The test is whether the delay is prolonged and inexcusable and, if it is, can justice be done despite such delay."**

11. In **MWANGI NEDANGI S. KIMENYI V ATTORNEY GENERAL & ANOTHER**, the court restated the test as follows:

**"1. When the delay is prolonged and inexcusable such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties – the plaintiff, the defendant and any other third or interested part in the suit, lest justice should be placed too far away from the parties.**

**2. Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues:**

**1) whether the delay has been intentional and contumelious;**

**2) whether the delay or conduct of the plaintiff amounts to an abuse of the court;**

**3) whether the delay is inordinate and inexcusable;**

**4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the defendant; and**

**5) what prejudice will the dismissal cause to the plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.”**

12. There are three questions to be answered in this Ruling. The first question is whether the delay is inordinate. The second question is whether the delay is inexcusable. The third question is whether justice can still be achieved if this suit were to be sustained.

13. It is clear from the court record that from 26/7/2013 the plaintiffs did not take any step to prosecute this suit. The delay of more than 2 years is indeed inordinate. This suit therefore qualifies to be dismissed for want of prosecution under **Order 17 Rule 2 of the Civil procedure Rules**. Secondly, the excuse given by the plaintiff is, in my view, unconvincing. The plaintiffs are limited liability companies. Besides this, no evidence has been tendered to support the contention that Susan Nyambura was struck with illness.

14. The question that remains to be answered is whether justice can still be achieved notwithstanding the delay. This suit was filed in December 2012. The dispute revolves around the reversionary interest in the suit land on which the defendants’ apartments stand. It is in the interest of all the parties that this issue be determined substantively so that parties get to know the extent of their proprietary rights in the suit property.

15. I have reflected on the defendants’ contention that they would be prejudiced if this suit were to be allowed to proceed to trial. There is, however, no evidence to support that contention. In my view, justice can still be achieved notwithstanding the delay.

16. In light of the foregoing, I will make the following orders in disposing the defendants Notice of Motion dated 9/11/2016:

**(a) The defendants’ Notice of Motion dated 9/11/2016 seeking dismissal of this suit on the ground of want of prosecution is declined.**

**(b) The plaintiffs shall within 30 days file and serve a bound, paginated and indexed bundle containing pleadings, witness statements, documents and statement of issues. In default, this suit shall stand dismissed.**

**(c) The defendants shall file and serve a similar bundle within 30 days from the date of service of the plaintiffs’ bundle.**

**(d) A pre-trial date shall be fixed in court at the time of reading this Ruling.**

**(e) The plaintiffs shall pay to the defendants costs of this application assessed at KShs.20,000 within 30 days. In default, this suit shall stand dismissed.**

**Dated, signed and delivered at Nairobi on this 22<sup>nd</sup> day of September, 2017.**

**B. M. EBOSO**

**JUDGE**

**In the presence of:**

..... Advocate for the Plaintiffs

..... Advocate for the Defendants

..... Court Clerk