REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND COURT

ELC. CASE NO. 291 OF 2008

PETER KURIA KIMONDO...PLAINTIFF

VERSUS

EDWARD M. M. TENGA......................................1ST DEFENDANT

CITY COUNCIL OF NAIROBI..............................2ND DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 2nd December 2015 in which the Plaintiff/Applicant seeks for orders to set aside the order made on 15th July 2015 dismissing this suit for want of prosecution and that this court do reinstate this suit.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of Moses Maina Karuga sworn on 2nd December 2015, in which he averred that he is an Advocate of the High Court of Kenya with the conduct of this matter on behalf of the Plaintiff/Applicant. He further averred that the Plaintiff, being the lawful attorney of James Njenga Wagachire, filed a Plaint dated 4th June 2008 which was subsequently amended on 20th June 2014 seeking, inter alia, a declaration that Plot No. S28 Kahawa West Phase II (hereinafter referred to as the “suit property”) as lawfully and legally owned by James Njenga Wagachire. He further averred that this suit came up for hearing on several occasions but did not proceed and that the last time it came up for hearing was on 21st January 2015 when it was taken out of the cause list and parties were advised to take fresh dates at the registry. He further averred that on 19th February 2015, he invited counsels on record for the Defendant to attend to the fixing of another hearing date but that the court could not fix a hearing date since the court diary had been closed on 23rd February 2015. He further averred that he tried again to fix a hearing date for the suit on 19th October 2015 but was informed that the suit had been dismissed for want of prosecution. He further averred that upon perusal of the court file, he came to discover that the notice for dismissal was only served upon the 1st Defendant’s advocates. He also disclosed that in the month of February 2015, they relocated their offices and left a notice to that effect at their old office and this could have contributed to their not being served with the notice of dismissal. On those grounds, he sought for this Application to be allowed.

The Application is contested. The 1st Defendant/Respondent filed the Replying Affidavit of Faraday Nyangoro sworn on 21st January 2016 in which he averred that he is an Advocate of the High Court of Kenya seized with this matter on behalf of the 1st Defendant/Respondent. He further averred that it is true that this suit was filed on 4th June 2008 which is over 7 years ago. He further averred that since the matter was filed, the same has not been heard for one reason or another majorly at the instance of the Plaintiff/Applicant. He added that the Court Registry published and ran on a daily basis a cause list of matters which were scheduled for dismissal for want of prosecution and further that notices were sent to the respective parties and their advocates on record. He averred further that the Plaintiff has lost interest in this suit and that if allowed, this Application would occasion the 1st Defendant great prejudice having waited for over 7 years to offload the burden from his back. He concluded by stating that justice would be served if the Application is dismissed with costs.

The issue for this court's consideration is whether or not to set aside the order issued by this court on 15th July 2015 dismissing this suit for want of prosecution. The applicable law is **Order 17 Rule 2(1) of the Civil Procedure Rules, 2010** which provides as follows:

> ***"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."***

The dismissal of a suit for want of prosecution is meant to prevent an abuse of the court process. The test in an application for dismissal of suit for want of prosecution was laid out in the case of **Ivita vs. Kyumbu [1984] KLR 441**, where Chesoni, J. (as he then was) held that,

> ***"The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents and or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."***

Further in **E. T. Monks and Co Ltd v Evans (1985) KL R 584** the court stated as follows,

> ***"The court when pondering over an application to dismiss a suit for want of prosecution should among other things ask whether the delay was lengthy, has it made a fair trial impossible and was it inexcusable. Whether or not the application should be allowed is a matter for the discretion of the judge who must exercise it, of course, judicially. Each turns on its own facts and circumstances…..... If the plaintiff has caused or consented to the delay which led to its suit being dismissed for want of prosecution then it must blame itself….. It is the duty of the plaintiff to bring his suit to early trial, and he cannot absolve himself of this duty by saying that the defendant consented to the position."***

Whether or not this Application should be allowed is a matter for the discretion of the judge who will be guided by the reasons advanced by the Plaintiff as to why he did not set the suit down for hearing. In this particular case, Counsel for the Plaintiff/Applicant has explained that he did in fact fix this suit for hearing on 18th November 2014 and he was given a hearing date of 21st January 2015. He explained the hearing did not take off on 21st January 2015 as the matter was taken out of the cause list. This explanation is sufficiently evident from the court record. It is only 5 months later that this court issued a Notice to Show Cause Why the Suit Should not be Dismissed for Want of Prosecution which the counsel for the Plaintiff explained he was not served probably due to their move of offices. This explanation

appears plausible to this court. There is no evidence on the court file that the notice of dismissal was served upon the Plaintiff’s counsel.

I am sufficiently satisfied with the reason given by the Plaintiff/Applicant as to why he was not able to fix this matter for hearing. I accordingly allow this Application. Costs shall be in the cause.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 1ST DAY OF SEPTEMBER 2017.

MARY GITUMBI

JUDGE