



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**  
**ELC CASE NO. 142 OF 2015**  
**(FORMERLY MISC CIVIL CASE NO. 21 OF 2015)**  
**(FORMERLY NYERI H.C MISC CIVIL CASE NO. 28 OF 1978)**

**KIMOTHO GITARE.....PLAINTIFF**

**VERSUS**

**MARY MUSA MUMAI.....DEFENDANT**

**RULING**

**Order 17 Rule 2 (1) of the Civil Procedure Rules** 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”**

**Sub-rule (3)** provides that:

**“Any party to the suit may apply for its dismissal as provided in Sub-rule 1”**

Citing the above provision, the defendant has moved this Court by his Notice of Motion dated 31<sup>st</sup> July 2017 seeking the main prayer that the plaintiff’s suit be dismissed with costs to the defendant for want of prosecution.

The application is supported by the affidavit of **MARGARET NYANGATI GICHAHI** an advocate having conduct of the matter in which she has deponed, inter alia, that this suit was filed in 2015 and was last in Court on 14<sup>th</sup> March 2016 for pre-trial but the plaintiff has made no effort to comply with **Order II of the Civil Procedure Rules** and it may take ages before being disposed hence causing unnecessary anxiety to the defendant.

The plaintiff filed grounds of opposition and conceded that whereas it is true that the suit has been pending for more than a year, the counsel has been having challenges receiving instructions from the plaintiff who has been un-well compounded with old age and that the plaintiff is now ready to proceed at the earliest opportunity.

Counsels urged me to determine the application on the basis of the pleadings filed.

I have considered the application and the grounds of opposition.

Although both counsels appear to be under the misapprehension that this suit has been pending since 2015, I have perused the record and the correct position is that this suit was first filed at the High Court in Nyeri on 25<sup>th</sup> September 1978 some 39 years ago in which the plaintiff seeks orders on adverse possession with respect to land parcel No. KABARE/MIKARARA/54. The plaintiff's case was dismissed by the late **MULI J.** on 11<sup>th</sup> June 1981. An application to review the orders of the late **MULI J.** dismissing the suit was similarly dismissed by **TUNOI J.** (as he then was) on 18<sup>th</sup> July 1990. In my view, the order of **TUNOI J.** (as he then was) dismissing the plaintiff's application to review the orders of **MULI J.** dismissing the suit effectively brought this suit to an end and although it was subsequently mentioned again before **TUNOI J.** (as he then was) on 23<sup>rd</sup> October 1990, nothing really happened and on 8<sup>th</sup> October 2015, **NGAAH J.** made an order transferring this file to this Court.

When the file was placed before me on 27<sup>th</sup> January 2016, both **MR. NDUKU** advocate for the plaintiff and **MR. KAGIO** advocate for the defendant (both counsels are new in this matter) were under the mistaken belief that this case was still alive and directions were subsequently taken on 14<sup>th</sup> March 2016 that the parties do comply with pre-trial directions. This application seeking the dismissal of the suit was then filed.

It is clear therefore that this suit was dismissed with costs by the late **MULI J.** on 11<sup>th</sup> June 1981. There is no suit pending after an application to review the dismissal order was equally dismissed with costs by **TUNOI J.** (as he then was) on 18<sup>th</sup> July 1990. The application dated 31<sup>st</sup> July 2017 seeking the dismissal of this suit is therefore superfluous and need no consideration.

Even assuming, for purposes of argument, that this suit is still alive, then this Court need not confine itself to 14<sup>th</sup> March 2016 when it was last mentioned for directions. The Court would need to go back to the record of 23<sup>rd</sup> October 1990 when it was last mentioned before **TUNOI J.** as he then was and was, by consent of the parties, listed for a further mention on 23<sup>rd</sup> November 1990 when nothing was recorded as per the proceedings herein. That would mean that for a period of 26 years until the matter came up before me on 27<sup>th</sup> January 2016, the plaintiff had taken no action in prosecuting this suit. That delay is not only in-ordinate but is not explained. The test for dismissal of a suit for want of prosecution was expressed in the case of ***IVITAU KYUMBU 1984 K.L.R 441*** as follows:

**“So the test is whether the delay is prolonged and inexcusable, and if it is, can justice be done despite such delay..... Thus even if delay is prolonged if the Court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties notwithstanding the delay, the action will not be dismissed.....”**

Even if this case was still alive, it would be difficult to justify its retention in our records. The plaintiff has offered no explanation as to why it has been pending for so long. It is said he has been un-well for long periods compounded with old age although no evidence of such illness has been availed nor any indication of when he became ill. Clearly, no satisfactory explanation is forthcoming from the plaintiff in the circumstances of this case.

However, from what I have stated above, this suit was dismissed with costs on 11<sup>th</sup> June 1981. There is therefore no pending suit that can be dismissed as a suit cannot be dismissed twice.

It is so ordered.

**B.N. OLAO**

**JUDGE**

**3<sup>RD</sup> NOVEMBER, 2017**

Ruling delivered, dated and signed in open Court at Kerugoya this 3<sup>rd</sup> day of November 2017

Mr. Muchira for Mr. Nduku for Plaintiff present

Mr. Magee for Mr. Kagio for the Defendant present

Plaintiff present.

**B.N. OLAO**

**JUDGE**

**3<sup>RD</sup> NOVEMBER, 2017**