

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 83 OF 2016

ERNEST MANGALA AYUGI ::::::::::::::::::::PLAINTIFF/RESPONDENT

VERSUS

JULIUS OMONDI OGOLA ::::::::::::::::::::DEFENDANT/APPLICANT

RULING

This application is dated 19th May 2017 seeking the following orders;

1. THAT the plaintiff's suit be dismissed for want of prosecution.
2. Costs be provided for.

It is based on the following grounds; that the plaintiff/respondent has never taken the initiative to list this suit for hearing. The suit has been pending for the last (7) months.

The applicant/defendant submitted that this suit was instituted in this court by the plaintiff/respondent herein on 24th May 2016. That since the time of filing this suit the plaintiff has never taken any step to have the suit listed for hearing. That if at all any one time the suit was once listed for hearing then the step was taken by himself when he listed the suit for hearing on 12th October 2016. That it is now seven (7) months since he last listed the case for hearing and the plaintiff and/or his advocate has not made any effort to have the case listed for hearing. That it appears that the plaintiff is not keen to have this suit heard. That it also appears that the plaintiff only filed this suit to delay justice as there is a Succession Cause pending confirmation.

The plaintiff/respondent submitted that the application is premature as directions on how to proceed with the suit have not been given and they relied on the grounds of opposition filed in court on the 17th November 2017.

This court has carefully considered both the applicants and the respondent's submissions. It is based on the following grounds; that the plaintiff/respondent has never taken the initiative to list this suit for hearing. The suit has been pending for the last (7) months.

In the case of **Utalii Transport Company Ltd & 3 Others v NIC Bank & Another (2014) eKLR**, the court held that it is the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court. The decision on whether the suit should be reinstated for trial is a matter of justice and it depends on the facts of the case. In **Ivita v Kyumbu (1984) KLR 441**, Chesoni J as he then was, stated that the test is whether the delay is prolonged and inexcusable and if justice will be done despite the delay. Justice is justice for both the plaintiff and the defendant. The applicant in the instant case submitted this suit was instituted in this court by the plaintiff/respondent herein on 24th May 2016. That since the time of filing this suit the plaintiff has never taken any step to have the suit listed for hearing. That if at all any one time the suit was once listed for hearing then the step was taken by himself when he listed the suit for hearing on 12th October 2016. That it is now seven (7) months since he last listed the case for hearing and the plaintiff and/or his advocate has not made any effort to have the case listed for hearing. I find that this is a land matter and 7 months delay is excusable. This application has no merit and I dismiss it on condition that the plaintiff/respondent takes a hearing date in the registry within the next thirty (30) days from today's date. Costs of this application to be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 14TH DAY OF
DECEMBER 2017.**

N.A. MATHEKA

JUDGE