



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**ELC NO. 135 OF 2013**

**KIPROTICH KORIR & ANOTHER.....PLAINTIFFS**

**-VERSUS-**

**SHIYOTOR HOLDINGS LIMITED.....DEFENDANT**

**RULING**

1. The defendant moved the Court vide his application dated 13<sup>th</sup> August brought under Order 17 rule 2(1) of the Civil Procedure Rules and the overriding objectives of the Civil Procedure Act. In the application, the defendant (herein after called the Applicant) has sought an order that the plaintiff's suit be dismissed with costs to it.
2. The application is supported by 12 grounds on the face of it and an affidavit deposed by Jaideep Singh Vohra. The applicant avers that the plaintiffs have lost interest in the case or they do not have evidence since it has taken more than a year without any steps taken in the case.
3. The application was served on the plaintiffs' advocates on record on 26<sup>th</sup> August 2015 through courier. The plaintiffs' advocates acknowledged service but did not file a reply to the application within reasonable time. I already made an order which refused the plaintiffs adjournment/time to put in their responses. I will say no more on the matter.
4. The advocates for the parties rendered oral submissions for and against the application. Mr Mwenesi for the applicant submitted that article 159 of the Constitution has directed that cases should not be delayed. That this case came to Court on June 2013 as a "fast track". He submitted that dismissal under this order is at the discretion of the Court. He cited the case of **Agip (K) Ltd vs Highlands Tyres Ltd (2001) KLR 630**.
5. Mr Mwenesi continued that there was no explanation for the delay and if the Respondent wanted the property, they would not have been indolent. He cited several cases inter alia; **Kitale Mobil Service Station vs Mobil Oil (Kenya) Ltd & Another (2004) 1 KLR 1** where the suit was dismissed. The Applicant to find that the delay herein is inexcusable and grant the orders sought.
6. Mr Gikandi for the 2<sup>nd</sup> plaintiff and holding brief for Mr Mogaka for the 1<sup>st</sup> plaintiff submitted that the Applicant is aware of the ruling which require this matter to be heard on merits. Secondly that it is the duty of both parties to undertake pre – trial conference. He cited the case of **Peter Ngugi vs Esther Wangari (2015) eKLR** where the Court stated that striking out is done only in very clear cases.
7. The plaintiffs submitted that the Applicant has not indicated that witnesses have died or left jurisdiction of the Court. That development if any quantifiable is and can be compensated. It is their argument that this Court has discretion to disallow the application and set time lines for the plaintiffs to meet. He urged the Court to take notice of the fact that land is an emotive issue and a dismissal would not help determine who is the genuine owner of the suit property. He prayed for

the dismissal of the motion.

8. Under Order 17 rule 2 (1) provides that in any suit in which no application is made or step taken by either party for one year, the Court shall give notice to the parties in writing to show cause why the suit should not be dismissed and if cause is not shown the Court may dismiss the suit.

17 rule 2 (3) provides that any party to the suit may provide for dismissal as provided in sub – rule 1.

9. In the case of **Agip (K) Ltd vs Highland Tyres (2001) KLR 630 Visram J.** (as he then was) held that the principles governing dismissal for want of prosecution which must be shown are :-

**i. The delay is inordinate**

**ii. The inordinate delay is inexcusable or**

**iii. The defendant is likely to be prejudiced by the delay.**

The explanation for delay is to be determined on a case by case basis. In this instance, that explanation is lacking since the plaintiffs did not file a replying affidavit to set forth the facts explaining the delay.

10. It is on record that after the trial Judge delivered his ruling on 14.2.2014, no steps had been taken by either of the parties to move the case. When this application was filed, one year had already lapsed hence the case qualified to be dismissed under Order 17 rule 2 (1) and (3). The issue for this Court to determine is whether the delay is inexcusable and is prejudicial to the defendant.

11. In explaining his prejudice, the defendant stated in their skeleton submissions that the suit does stand in their way for their commercial operations. In the further affidavit, the applicant deposed that it continues to pay land rent and rates as the property owner. It also urged the Court to dismiss the suit to relieve them of unnecessary anxiety and expense. The applicant does not in its affidavits and or grounds on the face of the application specify the nature of prejudice other than payment of rates and the costs incurred in defending this suit. The nature of the commercial operation as intended is also not disclosed. If they win the case, the costs will be awarded to them. If they loose, this Court shall order the plaintiffs to refund them all monies paid for rates and rents.

12. The suit property has two titles held by each of the parties herein. At the time of filing this suit, the plaintiff had filed his list of documents and statements of witnesses. If they have chosen to proceed with the case as it is without amending the name of the defendant, it is upto them. Given the plaintiff had complied with Order 11, it is in this Court's view that this matter should proceed to full trial so that the matters in issue are determined on merit.

13. An order for dismissal for want of prosecution will only result into multiple litigation. Consequently basing my reasoning on the overriding objectives of the Civil Procedure Act of just determination of proceedings and to make such orders as may be necessary for the ends of justice, I disallow the application with no order as to costs. I direct that parties do fully comply with order 11 within 30 days of this date and thereafter set the suit down for directions within 60 days of the date of this ruling.

**Ruling dated and delivered in Mombasa this 12th day of February, 2016**

**A. OMOLLO**

**JUDGE**