



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC CASE NO. 1073 OF 2007**

**CHURCH COMMISSIONER FOR KENYA.....1<sup>ST</sup> PLAINTIFF**

**THE CHAIRMAN THE TREASURER AND THE VICE CHAIRMAN OF THE DIOCESE OF  
THIKA OF THE ANGLICAN CHURCH.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**REV. JOSEPH WAWERU.....DEFENDANT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 14<sup>th</sup> May 2015 brought under **Order 40 Rule 1, 2, 3 and 4 of the Civil Procedure Rules, 2010 and section 3A of the Civil Procedure Act** seeking for Orders that a temporary injunction do issue restraining the Defendant from encroaching and or developing the half portion of the suit premises fronting Thika Road as per the Deed Plan No. 169620 dated 26<sup>th</sup> January 1993 pending the hearing and determination of this application and that an order of this court made on 17<sup>th</sup> March 2015 dismissing this suit be set aside and this suit be reinstated.

This Application is premised on the grounds appearing on its face together with the Supporting Affidavit of Patrick Mbugua sworn on 14<sup>th</sup> May 2015 in which he averred that he is an advocate of the High Court specifically handling this matter on behalf of the Plaintiff. He averred that he was not aware that this suit had been dismissed by the Court until on 12<sup>th</sup> May 2015 when he received an order extracted by the Defendant's advocates to the effect that this suit had been dismissed. He averred further that at no time did his firm receive a Notice to Show Cause from the court as to why the suit should not be dismissed. He stated that prior to the dismissal of the suit, there were interim orders restraining the Defendant from encroaching and or developing the half portion of the suit premises fronting Thika Road as per the Deed Plan No. 169620 dated 26<sup>th</sup> January 1993, therefore it is imperative that after the suit is reinstated, temporary orders be granted restraining the Defendant from encroaching and or developing the half portion of the suit premises fronting Thika Road as per the Deed Plan No 169620 dated 26<sup>th</sup> January 1993.

This Application is opposed. The Defendant filed his Grounds of Objection dated 3<sup>rd</sup> June 2015 wherein he stated that this Application is bad in law and an abuse of the process of the court, that the Plaintiff is guilty of laches having not taken any steps to prosecute this case since the year 2013 and that the last time

this suit was adjourned was at the behest of the Plaintiff.

The Plaintiff filed its written submissions but the Defendants did not. The Plaintiff highlighted their submissions on 26<sup>th</sup> January 2016 wherein they stated that on the day of the main hearing on 9<sup>th</sup> December 2013 the Plaintiffs' advocates noticed that documents were missing from the court file and sought to adjourn the matter in order to file the said documents. They further submitted that subsequently, the court file went missing and after several attempts to trace the court file they wrote a letter to the Deputy Registrar requesting for assistance in tracing the file. He stated that two months after seeking the Deputy Registrar's assistance in tracing the court file, they received an order dismissing this suit for want of prosecution. He stated that they were not aware that there was a Notice to Show Cause why the suit should not be dismissed as this notice was not served on them. He contended that in both the lists of the High Court and Environment and Land Court this matter was not among those that had been listed. He stated that the suit should be reinstated for lack of notice. He relied on the case of **Ibrahim Athman Said-vs- Ibrahim Abdulla & Anor (2014) eKLR** where the court held that parties should be afforded an opportunity to show cause and that if it is shown that the affected party did not get an opportunity to show cause such an order will be set aside at the instance of the affected party. In that suit, the court went ahead to set aside the order dismissing the suit. Counsel further submitted that should the court insist that Notice was not needed, he relied on Order 17 Rule 2 of the Civil Procedure Rules, 2010 pursuant to which the order was given which empowers the court to reinstate this suit if the Plaintiff show that the steps had been taken with a view to prosecuting the suit. He stated that indeed they had taken steps to prosecute this suit and that it was unfortunate that the court file went missing. He stated that the delay in fixing this suit for hearing was only one year after pleadings had been filed. He pleaded the court to reinstate the suit and hear this matter on merit. The Defendant did not appear in court for the highlighting of the submissions and did not file his written submissions as directed by the court. Therefore, there was no rebuttal of the Plaintiffs' counsel's submissions in court.

I have considered the Application, the submissions and the authorities relied upon by the Plaintiffs.

The issue that arises in this Application for determination is whether or not to reinstate this suit which this court dismissed on 17<sup>th</sup> March 2015. 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.”*

One of the questions to consider is whether there was inordinate delay on the part of the Plaintiff in setting this matter down for hearing. It is my opinion that while there is no precise measure of what amounts to inordinate delay, the test is whether there is such a delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. Therefore, inordinate delay for purposes of dismissal for want of prosecution should be one which is beyond acceptable limits in the prosecution of cases. In the case of **Agip (Kenya) Limited –vs.-Highlands Tyres Limited [2001] KLR 630** the Court held that a delay of eight (8) months was not inordinate. The Plaintiffs' counsel submitted that this suit was ready for the main hearing on 9<sup>th</sup> December 2013 but they sought an adjournment in order to file their List of Documents. The court granted this prayer of adjournment but asked the parties to set this matter on priority so that the matter could be heard and disposed. Plaintiff's counsel has submitted that the court file was misplaced making it virtually impossible to set the matter down for hearing. They

also submitted that they sought the assistance of the Deputy Registrar to trace the said file without success. They stated that they were subsequently served with the order dismissing this suit on 7<sup>th</sup> May 2015 by the Defendant. This suit was last before the court on 9<sup>th</sup> December 2013 therefore the suit has been inactive for One year and five months before the Court dismissed it. Was the delay inordinate and inexcusable? Based on the submissions of the Plaintiff, I find that the delay of just under one and a half years in fixing this suit for hearing was excusable, there being a demonstration of an effort to set the suit down for hearing.

The other issue I wish to address is the issue of service of the Notice to Show Cause upon the Plaintiff's counsel. I have perused the court file and noted that there was no service of the Notice to show cause why this suit should be dismissed upon the Plaintiff. This Notice was dated 17<sup>th</sup> March 2015 but there is no affidavit of service to ascertain that this document was actually served upon the Plaintiffs. There is a document that indicated that the Plaintiffs' advocates vacated the premises which was their last address. I therefore arrive at the finding that the Plaintiff was not served with the Notice to Show Cause.

For the above reasons, I hereby allow this Application in terms of prayer no. 2 and further direct as follows:

***(a) The Plaintiffs shall file and serve all the necessary papers and pleadings, including witness statements and documents they intend to rely upon in this case within 21 days from today's date.***

***(b) The Defendant shall file and serve all the necessary papers and pleadings including witness statements and documents in support of their case within 21 days of receipt of the Plaintiff's documents.***

***(c) The Plaintiff shall pay costs of the Defendant amounting to Kshs. 5,000/- within 14 days of today's ruling.***

***(d) In default of the above by the Plaintiff the suit shall stand dismissed without the necessity of an application in that behalf.***

It is so ordered.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 19<sup>TH</sup> DAY OF AUGUST 2016.**

**MARY M. GITUMBI**

**JUDGE**