



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 100 OF 2014**

**MOHAMED ABOUD SWALEH**

**ABDURAHMAN SALIM SAID NAJI**

**ALI BIN MARIE AHMED**

**ABDALLA ABEID SALIM**

**MOHAMED ABEID SALIM**

**SAIDA SWALEH**

**ANISA NASSOR**

**BHUDIA CONSTRUCTIONCO. LIMITED.....PLAINTIFFS**

**-VERSUS-**

**KENYA POWER & LIGHTING CO. LIMITED.....DEFENDANT**

**RULING**

1. The defendant has moved this Court under the provisions of Order 17 Rule 2 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Act. Through the motion, the defendant prays for orders:

**a) That this Court be pleased to dismiss the plaintiffs' suit for want of prosecution.**

**b) The cost of the application and the suit be provided for.**

2. The application is supported by the grounds on the face of it *inter alia* that the plaintiffs have not taken any steps to prosecute this suit. That it is the defendant who has been vigilant in setting this suit down for hearing. The motion is supported further by the affidavit deposed to by Mr Joseph Munyithya advocate.

3. Mr Munyithya deposes that the last step that was initiated by the plaintiff was on 11<sup>th</sup> May 2004 when they filed a replying affidavit. That the defendant proceeded to comply with order 11 after the Court determined the last interlocutory application on 21<sup>st</sup> February 2012. That it is now close to 3 years since the matter was last in Court demonstrating that the plaintiffs are not interested in this matter.

4. The application is opposed by the plaintiffs through a replying affidavit sworn by the 1<sup>st</sup> plaintiff. On behalf of the 2<sup>nd</sup> – 7<sup>th</sup> plaintiff the, 1<sup>st</sup> plaintiff explained the reason for the delay is because of a series of interlocutory applications that were filed. Secondly that he was in contact with his advocate until 2011 when he changed his postal address. That his advocate tried to contact him in vain.

5. The other reason given is on account of illness which illness he deposed he had to be taken to India for treatment on 20<sup>th</sup> June 2014 for heart surgery. That it is only recently he visited his advocate's offices. He denied that they have lost interest in this case and pleaded that the dismissal order will greatly prejudice them as their houses are likely to be demolished illegally and unlawfully.

6. The parties filed their rival written submissions. The defendant gave a narrative of what has taken place since the suit was filed. The defendant relied in case law of **Utalii Transport Co. Ltd & 3 others vs NIC Bank Ltd & Another (2014) eKLR** which according to their submissions has provided the checklist of the principles for dismissal i.e.

**i) Whether there is inordinate delay**

**ii) If the delay is intentional and therefore inexcusable**

**iii) Whether the delay gives rise to substantial risk to a fair trial**

**iv) Whether the dismissal will occasion the plaintiff any prejudice**

7. The defendant further submitted that there was no authority to swear the Replying affidavit filed on behalf of the other plaintiffs as required under Order 1 rule 13. That when the plaint was filed, each of the plaintiffs swore verifying affidavits. Consequently the issue of indisposition and change of address by the 1<sup>st</sup> plaintiff cannot be considered in isolation. The defendant accused the plaintiffs of indolence given that even after being served with the present application on 12.02.2016, it was not until 9<sup>th</sup> May 2016 when the plaintiffs filed their reply. He urged to Court to rely on the decision of **Ceres Estate Ltd vs Krerian Day & 4 Others (2013) eKLR** and proceed to dismiss this suit.

8. The plaintiffs submitted that it is not true they have not taken any steps since the suit was filed on 14<sup>th</sup> April 2004. The plaintiffs also stated that four (4) interlocutory applications have been heard and determined since the inception of the suit with the last decision rendered on February 2012. The plaintiffs also highlighted the principles to be considered while dismissing a suit and cited case law of **Lee Waigwa Waruingi vs HFCK (2005) eKLR**. In this decision, Azangalala J (as then he was) outlined the said principles as:

**i) Inordinate delay which depends on the circumstance of each case**

**ii) If the delay is inexcusable**

**iii) Whether the defendants are likely to be prejudiced**

9. The plaintiffs also quoted **Ivita vs Kyumbi (1984) eKLR 441** where the same test was applied. Similar to the decision in **ET Monks & Co Ltd vs Evans (1985) eKLR 584**. The 1<sup>st</sup> plaintiff avers that he has authority to file pleadings on his behalf and on behalf of the other plaintiffs and that he was taken ill. It is their submission that the defendant has not shown that he has suffered any prejudice as a result of the delay. Further the defendant being a limited liability company, its records can be produced by any person who has authority to appear in Court on its behalf. The plaintiffs submitted that justice can still be done despite the delay by this matter proceeding to hearing on its merits. He urged the Court to dismiss the motion.

10. The 1<sup>st</sup> plaintiff swore a replying affidavit for himself and on behalf of the 2<sup>nd</sup> – 7<sup>th</sup> plaintiff. This implies that the 8<sup>th</sup> plaintiff has not filed any response to oppose the application. The 1<sup>st</sup> – 7<sup>th</sup> plaintiffs in

their reply admits there is delay but explains the delay was occasioned by two reasons i.e the change of address of the 1<sup>st</sup> plaintiff and his illness.

11. The defendant took issue with this explanation that the 1<sup>st</sup> plaintiff did not have authority to swear the replying affidavit on behalf of his co-plaintiffs. The defendant pointed out and it is true that each of the plaintiffs swore a verifying affidavit which accompanied the plaint. However I note from the record that this is not the first time the 1<sup>st</sup> plaintiff has sworn an affidavit on behalf of his co-plaintiffs. For instance he swore affidavits on 14<sup>th</sup> April 2004 and a supplementary affidavit on 11<sup>th</sup> May 2004 on behalf of his co-plaintiffs without filing authority. This may be in breach of the provisions of Order 1 rule 13 but I will consider the motion on its merits.

12. The question this Court shall seek to answer is whether the delay is justiciable. Each of the plaintiffs had their separate parcels of land although they had a similar cause of action as against the defendant. The only explanation given for the delay is on the part of the 1<sup>st</sup> plaintiff. The 1<sup>st</sup> plaintiff said he changed his address from **121 32 – 80100 to 81080 – 80100** in the year 2011. He has not told this Court why between 2011 to 2014 he did not contact his advocates whose physical address has not been indicated to have changed to notify him of this change. There is also no evidence of any correspondence addressed to him by his advocate through the old address which is marked **“return to sender”** for the Court to take this as a valid reason.

13. The duty of taking steps to prosecute the case laid upon the plaintiffs and not on their advocate to trace them. Each of the plaintiffs gave their respective address in their verifying affidavits filed in Court on 14<sup>th</sup> April 2004. No disposition has been made that letters were sent to these plaintiffs using the addresses given and returned. I find the explanation for change of address as occasioning the delay as inexcusable in the circumstances.

14. The second reason is that the 1<sup>st</sup> plaintiff was taken ill. Like I have pointed out, this is not a representative suit therefore the illness of one plaintiff ought not to have stagnated its progress. However if I proceed on the assumption that the 1<sup>st</sup> plaintiff was the one with authority to swear documents, the Court is not told why the 1<sup>st</sup> plaintiff did not endeavour to delegate this authority once he realised he was of ill-health to any of his co-plaintiffs.

15. The 1<sup>st</sup> plaintiff also annexed medical reports from the Madras Medical Mission regarding his treatment. The reports are for the period January 2014. One of the documents certifies the 1<sup>st</sup> plaintiff as discharged on 31<sup>st</sup> January 2014 and is fit to travel by air. If the 1<sup>st</sup> plaintiff returned in the country by the end of January 2014, there is no explanation for his inaction say from January 2014 to May 2015 when the present application which is a period of over one year. The plaintiffs have not even endeavoured to file documents and witness statements in compliance with Order 11 to demonstrate to this Court that they are keen to prosecute their case.

**16. Order 17 rule 2 (1) of the Civil Procedure Rules states that 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 ... and where no cause is shown to the satisfaction of the Court, it may dismiss it. Rule 2 (3) allows any party to apply for dismissal under 2 (1).** The defendant moved the Court shifting the burden on the plaintiffs to give satisfactory explanation why their suit should not be dismissed. Only the 1<sup>st</sup> plaintiff has attempted to show cause. Although he deposed that he was swearing the affidavit on behalf of the 2<sup>nd</sup> – 7<sup>th</sup> plaintiffs, he did not state why his co-plaintiffs did not take any steps to prosecute this suit from February 2012 to date.

17. The Court was also not satisfied with the explanation he gave on his own behalf. The defendant has therefore satisfied this Court that the plaintiffs are no longer interested in prosecuting this case. The delay from February 2012 to May 2015 is ordinate and the reasons given are inexcusable. The fact that the defendant is a body corporate with perpetual succession is no reason for the parties to have gone slumber. The result is I find merit in this application and proceed to grant orders dismissing the suit for want of

prosecution. The costs of the suit and the application is awarded to the defendant.

**Ruling signed and delivered at Mombasa this 18<sup>th</sup> day of October 2016**

**A. OMOLLO**

**JUDGE**