



**REPUBLIC OF KENYA**

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

**AT NYERI**

**ELC CASE NO. 246 OF 2013**

**FRANCIS MURIUKI MURAGORI .....PLAINTIFF/RESPONDENT**

**-VERSUS-**

**EPHANTUS WACHIRA NGOCHI .....1<sup>ST</sup> DEFENDANT/APPLICANT**

**CONSOLIDATED BANK OF KENYA LTD .....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**OFFICE OF GOVERNOR, NYERI COUNTY ..... 3<sup>RD</sup> DEFENDANT/RESPONDENT**

**DISTRICT LANDS REGISTRAR..... 4<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

- 1.The Notice of Motion dated **23<sup>rd</sup> February, 2016** brought under **Order 17 Rule 2** of the Civil Procedure Rules, seeks an order from this court to dismiss the suit for want of prosecution and costs thereof.
2. The application is anchored on a supporting affidavit sworn on **23<sup>rd</sup> February, 2016** by **Gathii Irungu**, counsel for the 1<sup>st</sup> defendant. He depones that the last action taken in this matter was on 29<sup>th</sup> May, 2014 when his firm filed a notice of change of advocates; that since then, the plaintiff has not set down the matter for hearing. It is his contention that the plaintiff has lost interest in the suit. This offends the overriding objective of the court for expeditious disposal of a suit. He urges the court to dismiss the suit to meet the interest of justice.
3. The same position was expressed in the replying affidavit of **Gitibi Rukioya**, counsel for the 3<sup>rd</sup> defendant who prayed that the case be dismissed for lack of interest on the part of the plaintiff. He deponed that the matter was last in court on 1<sup>st</sup> April, 2014 when parties failed to take a hearing date because the court's diary was full. He contends that the plaintiff's delay is inordinate and inexcusable prejudicing his client.
4. The plaintiff filed a replying affidavit sworn on **18<sup>th</sup> May, 2016** opposing the application and disputing loss of interest in the matter. He blamed the delay on his former counsel. He stated that he only learnt that the suit had been set down for hearing on 18<sup>th</sup> May, 2016 when he visited the court registry on 2<sup>nd</sup> March, 2016.
5. He further deponed that he immediately embarked on trying to reach his former advocate **Mr.**

**Maatwa.** Failing to get him on telephone, he proceeded to the firm of S.S Malonza & Co. Advocates in Nairobi only to discover that the aforesaid firm had received the instant application but were unable to get in touch with him because they did not have his contact.

6. He was also informed by the said firm of advocates that Mr. Maalwa had left the firm more than a year ago. The firm of Malonza advised him to retain the services of another counsel to avoid his suit being dismissed since his former advocate could not be traced. He heeded the advise and engaged the firm of Wachira Wamuhii & Co Advocates who filed a notice of change of advocates on 13th May, 2016. He urges the court not to dismiss his suit but instead hear and determine this matter on merit.

7. When the application came for hearing on 18<sup>th</sup> May, 2016 the parties sought to rely on the grounds on the face of the application and the affidavits on record.

8. Counsels for the 2<sup>nd</sup> and 4<sup>th</sup> defendants did not oppose the application.

9. Courts have always been in agreement that a case can be dismissed if there is inordinate delay which is not explained. So, the question I must now pose is this, is this delay so inordinate as to warrant dismissal of the suit? In my view delay of two years is excessive. Having said that, I then turn to whether there are sufficient reasons offered by the plaintiff as to why no step was taken to set down the matter for hearing for a period of 2 years. The plaintiff has explained that the delay was occasioned by loss of contact with his counsel, whom he later discovered had left the firm which was handling the matter. Further, the advocate did not leave any forwarding address with the firm, thus the firm had no way of tracing him.

10. Having regard to all the circumstances of the case and the explanation given by the plaintiff on why he was unable to set the matter down for hearing, I find that dismissing the suit will deny the plaintiff an opportunity to prosecute his claim. For the reasons given, I decline to dismiss the suit and order that the plaintiff sets down his suit for hearing within 90 days from the date hereof failure of which the suit will stand dismissed.

11. Costs for the application are awarded to the applicant and the 3rd defendant.

**Dated, signed and delivered at this 4th day of October, 2016.**

**L N WAITHAKA**

**JUDGE**

In the presence of:

Ms Wanjira h/b for Mr. Gititu for 3rd defendant/applicant

Mr. Gacheru h/b for Mr. Wamuhii for the plaintiff/respondent

Ms. Wambui for the 2nd respondent

N/A for the 3rd and 4th respondents

Court assistant - Lydia