



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI**

**ELC CASE NO. 225 OF 2011**

**JULIUS OCHIENG OLOO.....1<sup>ST</sup> PLAINTIFF**

**FLORENCE THIRA OCHIENG.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**LILIAN WANJIKU GITONGA..... DEFENDANT**

**RULING**

**The Application**

The application before this Court for determination is a Notice of Motion dated 3<sup>rd</sup> February 2014, brought by the Defendant pursuant to sections 1A, 1B and 3A of the Civil Procedure Act and Orders 51 and 17 Rule 2 of the Civil Procedure Rules. The Defendant is seeking an order that this suit be dismissed for want of prosecution and that the costs be borne by the Plaintiffs.

The grounds for the application are that the pleadings herein were closed on 13<sup>th</sup> March 2012, and that the Plaintiffs have not taken any step to fix this matter for hearing or for pre-trial directions, and have lost interest in prosecution their suit. Further, that it is fair and just that the suit be dismissed for want of prosecution, and that this is the second suit filed by the Plaintiffs against the Defendant over the same subject matter.

The Defendant in her supporting affidavit dated 3<sup>rd</sup> February 2014 gave a detailed account of the events that took place after the filing of this suit by the Plaintiffs, and stated that in a ruling given by this Court on 17<sup>th</sup> November 2011 on an application by the Plaintiffs for injunctive orders, the said application was dismissed and that the Plaintiffs were directed to join City Council of Nairobi as a necessary party to the suit to enable it effectively determine the issue in dispute.

Further, that a period of more than two years has since passed, but the Plaintiffs have not applied to join the City Council of Nairobi or its successor in these proceedings as a necessary party in compliance with the courts directions. The Defendant also averred that the pleadings herein closed on 13<sup>th</sup> March, 2012 when she filed her statement of defence, and that the Plaintiffs have never taken any step to list this matter for pre-trial directions or for hearing since then. The Defendant also gave details of the earlier suit filed by the Plaintiffs namely Nairobi J.R Case No. 1355 of 2001 which she stated was dismissed in a judgment delivered on 1<sup>st</sup> April 2011.

**The Response**

The Plaintiffs opposed the application in a replying affidavit sworn on 12<sup>th</sup> May 2012 by Elisha Z. Ongoya, the Plaintiffs' Advocate, who stated that during his tenure at the firm of Asiema and Company Advocates he got instructions to act for the Plaintiffs in this matter, and took the steps of preparing, filling and serving the Plaint and the Summons to enter appearance, as well as filling and prosecuting an application for interim injunctive orders which did not succeed. However, that in the year 2012 he left the firm of Asiema and Company Advocates and that this file was one of the matters that were affected by the long process of client sharing and culminated in the delay in prosecuting this matter. Further, that he was also involved in litigating a number of election petitions at presidential and parliamentary levels, and the law required that these matters be prioritized over all other matters, and that this had the consequence of slowing down even further the conclusion of the process of sharing files and clients with his previous firm. He averred that that it is not in the interest of justice to drive the plaintiff out of the seat of judgment due to a process for which he was not in control of, and that it is a trite principle in law that a litigant should not be visited with mistakes for which is advocates are wholly responsible.

### **The Issues and Determination**

The parties were directed by the court to canvass the Defendant's application by way of written submissions. The Defendant's advocate filed submissions dated 6<sup>th</sup> June 2014, while the Plaintiffs' advocate filed submissions dated 13<sup>th</sup> November 2014. I have carefully considered the pleadings filed and submissions made by the Plaintiffs and 1<sup>st</sup> Defendant. The issue for determination is whether there has been inordinate delay in prosecuting the suit herein for which no reasonable explanation has been offered, to render the suit liable for dismissal.

The Plaintiff submitted in this regard that it had explained that the reasons for the delay in prosecuting this suit were not as a result of failure on the part of the litigants, and that they should be given an opportunity to proceed with expeditious hearing of the suit. The Defendant on the other hand argued that no sufficient reasons had been given by the Plaintiff for the delay in not prosecuting this suit, and that under sections 1A and 1B of the Civil Procedure Act, parties and their advocates have a duty to assist the Court in achieving the overriding objectives therein of expeditious disposal of cases. The Defendant relied on the decisions in **Sitarani Hiralal Shorilal Luthra vs Loresho Gardens Ltd & Another, (2013) e KLR** and **Duale Maryan Gurre vs Aminal Mohamed Mahmood & Another, (2014) e KLR** in this regard.

The Defendant further submitted that she had to stop construction on the suit property for over 10 years after the Plaintiff first filed the suit in Nairobi J.R Case No. 1355 of 2001 until 2011 when the said suit was dismissed, and after the Plaintiff filed the present suit.

The Court notes that Order 17 Rule 2 of the Civil Procedure Rules provides for dismissal of a suit for want of prosecution as follows:

**"2. (1) 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 to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.**

**(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.**

**(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.**

**(4) The court may dismiss the suit for non-compliance with any direction given under this Order."**

The decision in the case of **Ivita vs. Kyumbu [1984] KLR 441** set out the test to be applied by the courts in an application for the dismissal of a suit for want of prosecution. This is firstly, whether the delay is prolonged and inexcusable, and, secondly if the delay is excusable, whether justice can still be done to the parties despite the delay.

A perusal of the court record in this suit shows that the last step taken herein before the filing of the Defendant's application was the Defence filed by the Defendant on 13<sup>th</sup> March 2012. Therefore, at the time of the filing of the Defendant's Notice of Motion on 3<sup>rd</sup> February 2014, the threshold of a delay of more than one year in prosecuting the suit had been met to render this suit amenable to dismissal under Order 17 Rule 2 of the Civil Procedure Rules.

I have considered the reasons for the delay in prosecuting this suit given by the Plaintiffs' Advocates. However, despite these reasons it is notable that this is the second suit filed by the Plaintiffs with respect to the suit property after first filing Nairobi J.R Case No. 1355 of 2001 which was dismissed, and the Defendant has shown the prejudice the suits by the Plaintiff have occasioned in terms of the developments she had started undertaking on the suit property. In addition express directions were given by this Court to the Plaintiffs to join the Nairobi City Council as a party to this suit which have not been complied with, and as a result there is likely to be a further delay if this suit proceeds to hearing.

Lastly, even though the Plaintiffs' Advocate has taken the blame for the delay in prosecuting this suit, the Plaintiffs did not indicate their interest in continuing with this matter or the actions taken following up with the same, and in the circumstances both the Plaintiffs and their advocate must equally shoulder the blame for the delay in prosecution of the suit.

This Court will therefore allow the Defendant's Notice of Motion dated 3<sup>rd</sup> February 2014 for the foregoing reasons, and accordingly dismisses the suit filed herein for want of prosecution. The Plaintiff shall bear the costs of costs of this suit.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_27<sup>th</sup>\_\_\_ day of

\_\_\_January\_\_\_, 2015.

**P. NYAMWEYA**

**JUDGE**