



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 2022 OF 2007**

**JACINTA NJERI MWANGI.....1<sup>ST</sup> PLAINTIFF**

**DAVID WANGANGA MWANGI.....2<sup>ND</sup> PLAINTIFF**

**VERSES**

**MUNICIPAL COUNCIL OF THIKA.....1<sup>ST</sup> DEFENDANT**

**KENYA POWER & LIGHTING COMPANY.....2<sup>ND</sup> DEFENDANT**

**RULING**

**The Application**

The application before this Court for determination is a Notice of Motion dated 19<sup>th</sup> July 2011 and filed on 21<sup>st</sup> September 2011, which application is brought by the 2<sup>nd</sup> Defendant pursuant to sections 1A, 1B and 3A of the Civil Procedure Act, Order 17 Rule 2 of the Civil Procedure Rules and Order 51 of the Civil Procedure Rules. The 2<sup>nd</sup> Defendant is seeking an order that this suit be dismissed for want of prosecution, and that the costs of the application and suit be provided for.

The grounds for the application are that the pleadings herein were closed on 13<sup>th</sup> March 2012, and that the Plaintiffs have failed and or neglected to prosecute the suit herein for an inordinately long time, and have not set down the matter for hearing for more than 2 years. The 2<sup>nd</sup> Defendant claims that he will be prejudiced should the matter remain indefinitely pending before this Court.

The application is supported by a supporting affidavit and supplementary affidavit sworn on 19<sup>th</sup> July 2011 and 8<sup>th</sup> December 2011 respectively by Fredrick Okeyo, the 2<sup>nd</sup> Defendant's Advocate. The deponent averred that pleadings in this matter closed on 8<sup>th</sup> August 2007, and that this matter was last in court on 4<sup>th</sup> March 2009, and that since then the Plaintiffs have not taken any step to prosecute this case. The deponent admitted that there were negotiations between the parties but that the same collapsed in 2008.

Further, that on 20<sup>th</sup> of August, 2008, the previous counsel for the Plaintiffs did write a letter to both Defendants' counsel, stating that even after the parties had agreed on 14<sup>th</sup> August 2008 to call in surveyors, the Plaintiffs attended his offices on 18<sup>th</sup> August 2008 and negated the agreements by the parties. A copy of the said letter was annexed.

The deponent averred that the Defendants severally reminded the Plaintiffs, and tried to prompt them to

file their list of documents so that the matter could be heard, but in vain. He attached copies of letters by both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants dated 2<sup>nd</sup> and 5<sup>th</sup> February 2009 respectively.

### **The Response**

The Plaintiffs opposed the application in a replying affidavit sworn on 6<sup>th</sup> December 2011 by the 1<sup>st</sup> Plaintiff, who stated that she had the authority of the 2<sup>nd</sup> Plaintiff to swear the affidavit on her behalf. The 1<sup>st</sup> Plaintiff gave an account of the proceedings since the filing of this suit on 2<sup>nd</sup> October 2006, and stated that when the suit came up for hearing on the 16<sup>th</sup> July 2008, the parties were given time to negotiate an amicable out of court settlement.

However, that the parties were unable to settle the matter conclusively at a meeting held on the 13<sup>th</sup> August, 2008. Further, that the parties agreed to appoint an independent surveyor and a letter was done to the Institute of Surveyors of Kenya to avail an independent surveyor, which Institute responded and appointed a Mr. Kagu David Gachanja to assist the parties in the survey work. Letters to this effect dated 14<sup>th</sup> August, 2008 and 25<sup>th</sup> August 2008 were annexed.

The Plaintiffs stated that subsequently on 29<sup>th</sup> August 2008 the firm of G. N. Gichuhi Ngari & Company Advocates withdrew from acting on their behalf, and that the firm of Thuita Kiiru & Company Advocates subsequently filed their Notice of Appointment on the 29<sup>th</sup> January 2009 to act for them. The Plaintiffs further stated that their advocate on record did send out an invitation to fix this matter for hearing on 3<sup>rd</sup> March 2010 and the hearing was confirmed for 14<sup>th</sup> June 2010. However, that the matter was taken out when it wasn't confirmed at the call over, an act that was beyond the Plaintiffs' control. The Plaintiffs annexed a copy of a letter dated 24<sup>th</sup> February 2010 inviting parties to fix hearing dates.

It was the Plaintiffs' averment that they have endeavored to prosecute this matter despite the fact that the hearing was on a few occasions taken out to enable parties negotiate a settlement, and that if there was a delay in having this matter fixed for hearing the same was never contributed to by the Plaintiffs. Further, that they were waiting for the opening of the 2012 court diary to have the matter fixed for hearing and/or proceed with the negotiations that stalled.

Furthermore, that in any event, the firm of advocate of Thuita Kiiru & Company Advocates failed to act on the Plaintiffs' instructions thus keeping the file inactive for only one year and the same should not be visited on the Plaintiffs. The Plaintiffs stated that they had now appointed a new firm of advocates who sent out invitations for the fixing of the matter for hearing when the court diary for 2012 opened, and a copy of the invitation letter dated 5<sup>th</sup> December 2011 was attached.

### **The Issues and Determination**

The parties were directed by the court to canvass the 2<sup>nd</sup> Defendant's application by way of written submissions. The 2<sup>nd</sup> 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 2<sup>nd</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 2<sup>nd</sup> Defendant relied on Order 17 Rule 2(1) and (3) of the Civil Procedure Rules and cited several judicial decisions for the position that it was incumbent upon the Plaintiff to prosecute the suit herein, and the Plaintiff had been inactive for over three years making this suit liable to dismissal. The cases cited in this regard included **Century Oil Trading Compnay Ltd vs Gerald Mwaniki Mbogo & Another**, HCCC No. 367/01, **Awil A. Ogle vs Lutheran World Federation**, HCCC No. 23 of 2001, **Dipak Prechand Shah vs Akiba Bank Limited** HCCC N0. 34 of 2003 and **Ventures Capital and Credit Ltd vs Consolidated Bank of Kenya Ltd (2006) eKLR**. The 2<sup>nd</sup> Defendant also urged the Court to consider

the anxiety and mental torture he has had to suffer with this suit hanging over his head.

The Plaintiffs on their part relied on Article 159 (1) of the Constitution that justice should be administered without undue regard to procedural technicalities, and submitted the discretion granted to this Court by Order 17 Rule 2 of the Civil Procedure Rules should be exercised judicially. Further, that the principles to guide the Court are firstly, whether there has been inordinate delay which is to be determined by the circumstances of each case.

Secondly, whether the inordinate delay is inexcusable, and that the issues to be considered in this regard are whether the delay is intentional and contumelious, and whether the delay is an abuse of the process of court. Lastly, that the Defendants are likely to be seriously prejudiced by the delay. The Plaintiffs relied on the decisions in Agip (Kenya) Ltd vs Highlands Tyres Limited, (2001) KLR 630 and Utalii Transport Company Limited and Others vs NIC Bank Ltd & Another, HCCC 32 of 2010 in this regard.

The Plaintiffs submitted that they tried to set the suit down for hearing, and should not be punished for the mistakes of their previous advocates for not setting the matter for hearing after it was taken out on 14<sup>th</sup> June 2010. Further, that the Defendants have failed to demonstrate the prejudice they will suffer if this suit proceeds to full hearing, whereas the importance of the suit to the Plaintiffs cannot be overstated as the suit property belongs to them, and they have suffered losses and damage as a result of the Defendants' encroachment thereon.

This 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 substantive step taken herein before the filing of the 2<sup>nd</sup> Defendant's instant application was the taking out of the matter on 16<sup>th</sup> November 2009, and parties were then directed to take out fresh hearing dates at the registry. Therefore, at the time of the filing of the Defendant's Notice of Motion on 21<sup>st</sup> September 2011, 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, and note from a perusal the court record that indeed there were various attempts to take out hearing dates for the suit herein. The first attempt is recorded on 3<sup>rd</sup> March 2010 when a hearing date of 14<sup>th</sup> June 2011 was given, and the second on 9<sup>th</sup> February 2011 when another hearing date of 6<sup>th</sup> April 2011 was given. However, the suit does not appear to have listed and/or proceeded to hearing on those dates.

This Court therefore finds that the Plaintiff did take steps to set the suit for hearing, and that the delay in

prosecuting the suit is excusable. In addition justice can still be done as between the parties despite the delay as no tangible prejudice was shown to have been suffered by the Defendants as a result of the delay. The mental anguish and torture pleaded by the 2<sup>nd</sup> Defendant is part and parcel of the vagaries of litigation, and can be adequately compensated by way of damages.

The Defendant's Notice of Motion dated 19<sup>th</sup> July 2011 therefore fails for the foregoing reasons. These findings notwithstanding, this Court is alive to the requirements under the law as to the expeditious disposal of suits, and accordingly orders as follows pursuant to the provisions of sections 1A, 1B and 3A of the Civil Procedure Act and Order 11 of the Civil Procedure Rules:

1. The prayers sought in the 2<sup>nd</sup> Defendants' Notice of Motion dated 19<sup>th</sup> July 2011 and filed on 21<sup>st</sup> September 2011 are hereby denied.
2. The Plaintiffs shall file a bound, consolidated, indexed and paginated bundle of the pleadings, list and bundle of documents and witness statements to be relied upon during the full hearing of this suit within 60 days of service by the 2<sup>nd</sup> Defendant of the orders herein.
3. The Defendants shall file a bound, consolidated, indexed and paginated bundle of the list and bundle of documents and witness statements to be relied upon during the full hearing within 60 days of service of the Plaintiffs' bundle.
4. The Plaintiffs shall thereafter set this suit for pre-trial conference within 6 months of the date of this ruling. Upon default the suit herein shall stand dismissed for want of prosecution.
5. Parties shall be at liberty to apply.
6. The costs of the 2<sup>nd</sup> Defendants' Notice of Motion dated 19<sup>th</sup> July 2011 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 12<sup>th</sup> day of February , 2015.

**P. NYAMWEYA**

**JUDGE**