



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENTAL & LAND DIVISION**  
**ELC CASE NO. 258 OF 2006**

**WAMUHU**

**JOYCE**

**P. NJOKI**

**E. GITAU.....PLAINTIFFS**

**-VERSUS-**

**THE COMMISSIONER OF LANDS.....1<sup>ST</sup> DEFENDANT**

**RUTH KALEYKE.....2<sup>ND</sup> DEFENDANT**

**RULING**

Before me is the 2<sup>nd</sup> Defendants Notice of Motion dated 21<sup>st</sup> December, 2012 but filed in court on 14<sup>th</sup> January, 2013. The application is brought under Order 17 Rule 2(1) and (3) of the Civil Procedure Rules, Section 1A, 3A and all other enabling provisions of the Law and seeks the following orders:-

1. That this suit be dismissed as against the 2<sup>nd</sup> Defendant for want of prosecution.
2. That costs of this application be provided for;

The application is principally grounded on the following grounds:-

- a. That the plaintiffs have not taken any step to prosecute their case for over one year.
- b. That the plaintiffs do not have a reasonable or any cause of action against the 2<sup>nd</sup> Defendant.
- c. That there is no prejudice which shall be caused to the plaintiffs' if this suit is dismissed as against the 2<sup>nd</sup> defendant.

The application is further supported on the grounds set out in the supporting affidavit sworn by Rustam Hira on behalf of the 2<sup>nd</sup> defendant on 2<sup>nd</sup> December, 2012. The 1<sup>st</sup> Plaintiff Joyce Mamuhu Gutau has sworn a replying affidavit dated 11<sup>th</sup> March, 2013 in opposition to the 2<sup>nd</sup> Defendants application and the parties have filed written submissions in support of their respective position in regard to the application.

A brief background to put the matter in context will in order. The plaintiffs filed the instant suit on 18<sup>th</sup>

March, 1997 in Resident Magistrate's Court at Nairobi (Sheria House) as RMCC No. 2004 of 1997. An interim order of injunction was granted in favour of the plaintiffs on 26<sup>th</sup> March, 1997 pending the hearing and final determination of the suit with the direction that the suit be heard on a priority basis. The suit was on 3<sup>rd</sup> March, 2006 ordered transferred to the High Court as the lower court did not have jurisdiction to hear and determine the case. From the record of the court file precious little happened in the matter between 2007 and 2011. On 12<sup>th</sup> July, 2011 Honourable Justice Mbogholi Msagha directed the parties to comply with Order 11 of the Civil Procedure Rules and directed a mention of the matter on 19<sup>th</sup> September, 2011.

As at 19<sup>th</sup> September, 2011 both the plaintiff and the 2<sup>nd</sup> defendant had made compliance with Order 11 of the Civil Procedure prompting the judge to order that a pre-trial conference be held on 18<sup>th</sup> October, 2011 for directions on hearing. The court record shows no party attended the court on 18<sup>th</sup> October, 2011 and the judge directed the file to be taken back to the court registry.

Nothing else happened on the file until 14<sup>th</sup> January, 2013 when the 2<sup>nd</sup> defendant filed the instant application.

The 2<sup>nd</sup> defendant vide the affidavit in support of the application states that the plaintiff vide a letter dated 28<sup>th</sup> October, 2011 invited parties to attend court to fix a date for hearing of the suit on 9<sup>th</sup> November, 2011 but as per the court record nothing happened on the date scheduled for fixing. The 2<sup>nd</sup> defendant states the delay in prosecuting this case by the plaintiff has been inordinate and that the plaintiff has no interest in prosecuting the suit. The 2<sup>nd</sup> defendant further contends that she has a good defence to the plaintiffs' claim and in the interest of justice the plaintiffs' suit ought to be dismissed as the matter has remained in indefinite abeyance.

The 1<sup>st</sup> Plaintiff in reply states that sometimes on 28<sup>th</sup> January, 2010 she was involved in a road accident that affected her mobility and that she has not been able to attend her advocate's office to execute the necessary documents to make compliance with Order 11 of the civil Procedure Rules. The 1<sup>st</sup> plaintiff contends that she has been eager to have the case finalised but her incapacity has hampered her and urges the court to allow the matter to proceed to be heard and determined on merits.

I have considered the arguments and counter arguments advanced on behalf of the parties and reviewed the affidavits, annexures and submissions filed on behalf of the parties and now I have to decide upon the merits and/or demerits of the application before me. The 1<sup>st</sup> plaintiff states she got involved in an accident on 28<sup>th</sup> January, 2010 which to some extent immobilized her such that she could not attend her advocates office to sign the necessary documents. The medical report by Dr. Vincent Muoki Mutiso prepared on 12<sup>th</sup> July, 2010 marked "JW1" in the replying affidavit of the 1<sup>st</sup> Plaintiff states the 1<sup>st</sup> plaintiff was admitted for 5 days and that she walks with a crutch in her right hand. From the record the 1<sup>st</sup> plaintiff signed her witness statement dated 16<sup>th</sup> September, 2011 and the same was filed in court on the same date. As at 19<sup>th</sup> September, 2011 the parties had made compliance with Order 11 of the Civil Procedure Rules and the pre-trial conference scheduled for 18<sup>th</sup> October, 2011 which no party attended was to give directions on the hearing of the case.

The responsibility to prosecute a suit always remains with the plaintiff particularly where the defendant has not filed any counterclaim where there is lapse or delay on the part of the plaintiff in taking action towards the prosecution of the suit the plaintiff stands the risk that the defendant will apply for the dismissal of the suit for want of prosecution. In the event such an application is made by the Defendant as in the instant matter the plaintiff has to explain any delay in prosecuting the suit to the satisfaction of the court. The court has been referred to the cases of **RAJESH RUGHANI VS. FIFTY INVESTMENTS LTD & ANOTHER (HCCC No. 3038 of 1996)**, **E.A PORT LAND CEMENT CO. LTD VS. TAUSI ASSURANCE CO. LTD & ANOTHER (HCCC No. 1946 of 1994 – Milimani Commercial)**; and **IVITA VS. KYUMBU [1984] KLR 141**. All these cases lay the principles that a court needs to consider in an application seeking the dismissal of a suit for want of prosecution.

The general principle is that where there is a good reason for the delay and the delay is not inordinate the court should exercise its discretion in favour of sustaining the suit.

However as observed in the **IVITA VS. KYUMBU case (Supra)**

***“Where the Defendant satisfied the court that there has been prolonged delay, and the plaintiff does not give sufficient reason for the delay the court will presume that the delay is not only prolonged but it is also inexcusable, and in such case, the suit may be dismissed.”***

The present case was filed way back in 1997 and as observed earlier in this ruling there appears to be periods of time when hardly anything was happening (2007 to 2011). Nonetheless when the parties woke up from their slumber and virtually had the suit ready for trial (19<sup>th</sup> September, 2011) the parties once again went back to sleep until the 2<sup>nd</sup> Defendant awakened the plaintiff with the instant application in January, 2013. The 1<sup>st</sup> Plaintiff’s attempt at explaining the delay flies on the face as the plaintiff was even after the accident on 28<sup>th</sup> January, 2010 able to prepare and sign her witness statement in September, 2013. This leads me to believe and accept that the plaintiff did not in fact have any good reason to explain the delay. The 1<sup>st</sup> Plaintiff was not confirmed as indicated the accident was in January 2010 and as per the medical evidence she was able to move about in July, 2010 albeit by use of a clutch and was in fact able to sign her the affidavit in September, 2011 case such as this one which has been pending now for over 15 years doing justice may indeed be a mirage.

In the words of Honourable Justice Chesoni (as he then was) in the **IVITA VS. KYUMBU case (supra)** it is easy to see how prejudice may arise as per the said judge’s observation therein as follows:-

***“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 the disappearance of human memory resulting from lapse of time”.***

The 2<sup>nd</sup> defendant has alluded to the fact that the suit property has since been transferred to a 3<sup>rd</sup> party (though no evidence has been tendered). While I attach no significance to this averment I nonetheless take the view that the lapse of time can affect the quality of the evidence at the parties disposal owing to the passage of time and faded memory.

Under Order 17 Rule 2(3) any party is given the liberty to apply for the dismissal of the suit where in any suit no application has been made or step taken by either party for one year. In the instant application I am satisfied that as at the time the 2<sup>nd</sup> defendant filed its application no party had taken any step in the prosecution of the suit for at least one year and considering the totality of the circumstances I find and hold the delay on the part of the plaintiffs was inordinate and inexcusable and I accordingly grant the 2<sup>nd</sup> defendants notice of motion dated 21<sup>st</sup> December, 2012 and grant the following orders:-

- a. That the plaintiffs suit as against the 2<sup>nd</sup> Defendant be and is hereby dismissed.
- b. That the plaintiff’s/Respondents do pay the 2<sup>nd</sup> Defendant/Applicant the costs of this application and the costs of the suit.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11<sup>TH</sup> DAY OF JUNE 2013.**

**J. M. MUTUNGI**

**JUDGE**

In the presence of:

..... for the Plaintiffs

..... for the Defendants