



**REPUBLIC OF KENYA**

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

**ELC CIVIL SUIT NO. 125 OF 2009**

**RICHMOND MWANGI & 259 OTHERS ..... PLAINTIFF**

**VERSUS**

**LEE MWATHI KIMANI..... DEFENDANT**

**RULING**

The Defendant has filed a Notice of Motion dated 26<sup>th</sup> September 2012 brought under Order 17 rule 2 (1) of the Civil Procedure Rules, seeking orders that the suit filed herein be dismissed for want of prosecution, and that he be awarded the costs. The grounds for the application are that the Plaintiffs have not taken any steps to prosecute the suit herein for over one year from the last court appearance, and that the Defendant is suffering irreparable loss and damage for non-user of the suit-property.

These grounds are attested to in a supporting affidavit sworn by the Defendant on 25<sup>th</sup> September 2012, wherein he stated that the matter herein has been set for hearing only once and was last in court in 2010. Further, that the Plaintiffs obtained *ex parte* injunctive orders which they continue to enjoy to his detriment.

The Plaintiffs opposed the application in a replying affidavit sworn by the 1<sup>st</sup> Plaintiff on 22<sup>nd</sup> October 2012, and in which they deny that this matter has only been set down for hearing. The deponent stated that the suit herein has come up for hearing on numerous occasions notably on 23<sup>rd</sup> March 2009, 1<sup>st</sup> March 2010, 14<sup>th</sup> June 2010 and 27<sup>th</sup> October 2010. Further, that the matter herein was last fixed for hearing on 22<sup>nd</sup> June, 2012, on which date the Plaintiffs were ready to proceed with the hearing of the matter but the same was not listed, and the Plaintiffs annexed a copy of the Hearing Notice. The Plaintiffs further stated that they have every intention of prosecuting their claim which is well founded in law, and that they are relying on the court diary to fix a hearing date.

The Plaintiffs' and Defendant's Advocates relied on their respective written submissions during the hearing of the Notice of Motion on 19<sup>th</sup> June 2013. The Defendant's Advocate in submissions dated 18<sup>th</sup> June 2013 argued that it is the Defendant who fixed the matter for hearing on 22<sup>nd</sup> June 2012 and not the Plaintiffs, and that the Plaintiffs have taken no steps to prosecute the suit for more than one year. Further, that in the event that the suit herein is not dismissed, the court should make such orders as it thinks fit to obtain its expeditious hearing.

The Plaintiffs' Advocate filed written submissions dated 8<sup>th</sup> May 2013 in which they reiterated the arguments made in the foregoing and set out the various steps taken in this suit. The counsel submitted that there has been no inordinate delay in prosecuting the suit, and urged the court to invoke the provisions of Article 159 of the Constitution and disallow the technicalities raised by the Defendant.

I have read and carefully considered the pleadings and submissions made by the parties to this application. The main issues are whether the suit filed herein should be dismissed for want of prosecution, and if so, which party should bear the burden of costs of the suit. The law on dismissal of a suit for want of prosecution is set out in Order 17 Rule 2 of the Civil Procedure Rules which provides 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.”**

There are two tests to be satisfied under Order 17 rule 2 of the Civil Procedure Rules for the dismissal of a suit for want of prosecution. The first one is whether the threshold of one year’s delay in prosecuting a suit has been met. The second test is that the delay must be inexcusable.

I have perused the court file and note that the last step taken before the filing of the Defendant’s Notice of Motion on 27<sup>th</sup> September 2012 was a hearing of a Notice of Motion dated 26<sup>th</sup> October 2009 filed by the Plaintiffs, which was held on 15<sup>th</sup> November 2011. There was a period of slightly over 10 months between 15<sup>th</sup> November 2011 and 27<sup>th</sup> September 2012, and the one-year delay threshold set by Order 17 rule 2 of the Civil Procedure Rules had therefore not lapsed. There was thus no culpable delay by the Plaintiffs and the Defendant’s application is premature. I also note that the injunctive orders complained about by the Defendant were agreed to by consent of the parties herein on 15<sup>th</sup> November 2011.

Despite these findings, I will however heed the Defendant’s plea for expeditious hearing of the suit herein, and hereby order as follows:

1. The Defendant’s Notice of Motion dated 26<sup>th</sup> September 2012 is hereby denied.
2. The Defendant shall meet the costs of the said Notice of Motion.
3. The Plaintiffs shall set the Originating Summons filed herein and dated 24<sup>th</sup> March 2009 for pretrial conference within 3 months of the date of this ruling, and in default the injunction orders granted herein shall lapse.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_30<sup>th</sup> \_\_\_ day of \_\_\_September\_\_\_, 2013.

**P. NYAMWEYA**

**JUDGE**