



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**HIGH COURT CIVIL SUIT NO. 465 OF 2012**

**LN PROPERTY DEVELOPMENT CO. LIMITED ::::::::::: 1<sup>ST</sup> PLAINTIFF**

**LUORE NYOIRE COMPANY LIMITED ::::::::::: 2<sup>ND</sup> PLAINTIFF**

**- VERSUS -**

**FIDELITY BANK LIMITED ::::::::::: DEFENDANT**

**R U L I N G**

**I N T R O D U C T I O N**

1. The application before the court is a **Notice of Motion** dated and filed in court on **24th November 2014** by the Defendant. The application seeks for orders that the suit herein be dismissed with costs for want of prosecution, and also that the cost of this application be given to the Defendant.

2. The application is premised on the grounds that:-

***1. The Plaintiff has neglected and/or otherwise failed to set down the suit for hearing.***

***2. The Plaintiff has failed to take any steps to prosecute the same for a period of over two years now.***

***3. The main prayers sought in the suit are now spent in that the suit property has been disposed of in accordance with the court orders issued herein.***

***4. There is no pending cause of action against the Defendant herein.***

3. The application is supported by affidavit of **Stella Mbuili** dated **12th November 2012**.

4. The brief history of the application is that the suit herein was filed by the Plaintiffs who sought to prevent the Defendant from exercising its power of sale over the suit property **LR KAJIADO/KISAJU 1189 – KISAJU**. This court vide its Ruling delivered on 6th November 2012 dismissed the application, which in any event came to court late after the suit property was already sold and transferred to a Third Party. The court also observed that if the Plaintiffs were aggrieved they could be compensated by damages after the full hearing of the suit.

5. The Defendant now alleges that since the delivery of the said Ruling the Plaintiff has not taken any

steps to have this matter heard. The Defendant further states that having sold and transferred the suit property, and having discharged the second security and returned the title to the Plaintiff, there is no longer a surviving cause of action to sustain this suit, and hence this application.

6. On their part the Plaintiffs state that they have not neglected or failed to set down the matter for hearing. After the dismissal of their application on November 6, 2012, the Plaintiffs being aggrieved by the said decision filed Notice of Appeal together with a request for typed proceedings on November 15, 2012 to enable them file a record of Appeal. The typed proceedings have never been ready. The Plaintiffs have therefore not been able to prepare a record of Appeal. The Plaintiffs submitted that the preparation of the proceedings is a process beyond the control of the Plaintiffs, who ought not to be punished for the length of time that it takes. In the circumstances, the Plaintiffs believe that the delay in fixing the matter for hearing has not been unexplained, nor has it been inordinate. The Plaintiffs are still keen to prosecute the suit. They have filed a witness statement and bundle of documents. The Defendants have also filed their witness statements and bundle of documents. It is not true that the Plaintiffs' claim is extinguished by the Ruling of the Court on the interlocutory application. The Plaintiffs contend that the exercise of the power of sale was conducted illegally and have pleaded particulars thereof in the Plaint, and consequently pray for damages and for interest thereon. Indeed, at paragraph 9 of the Ruling of the Hon Justice Ogola on November 6, 2012, the Court stated that '**but should the Plaintiff succeed in its case, the Plaintiff will be properly compensated by way of damages.**' In these circumstances, the Plaintiffs plead that it is only fair and just that the matter be determined on its merits after full trial.

7. I have considered the application and submissions of the parties. It is true that there has been a delay in the prosecution of this matter. However, the same is explained by the Plaintiff as having been caused by delay by the court registry to provide typed proceeding for the purpose of appeal. Be that as it may, the intended appeal does not have to delay hearing of the matter since there is no stay of proceedings.

8. I have also noted that the Plaintiffs are still interested in the prosecution of this matter and to pursue damages since the suit property has now been sold and transferred to a third party. It is also on record that the Plaintiffs have substantially complied with pre-trial directions in this matter. In my view it is important to give parties a sense of justice. It would not be justice to dismiss the suit when there is a clear intention by the Plaintiffs to pursue the same.

9. Pursuant to the foregoing, I make the following orders:-

*a) The application before the court is dismissed with costs in the cause.*

*b) The Plaintiff shall set the matter for pre-trial direction within 30 (thirty) days.*

Orders accordingly.

**READ, DELIVERED AND DATED AT NAIROBI**

**THIS 15TH DAY OF MAY 2015**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

M/s Ndege holding brief for Mogere for the Plaintiffs

Mr. Kosgei for the Defendant

Teresia – Court Clerk