**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**CIVIL SUIT NO. 55 OF 2012**

**WILSON A. CHEPKWONY….....PLAINTIFF**

**VERSUS**

**JAMLECK MWANGI KARIUKI….....DEFENDANT**

## R U L I N G

1. The applicant herein Jamleck Mwangi Kariuki brought a notice of motion dated 22/10/2013 seeking to have the suit herein dismissed for want of prosecution.
2. The motion is brought under the Provisions of Order 17 Rule 2(1) and (3) of the Civil Procedure Rules and section 3, 3A, 1A and 1B of the Civil Procedure Act.
3. The applicant contends that it has been over one year since the matter was last in court and that the plaintiff/respondent has not taken any step towards prosecuting the same.The applicant therefore contends that the plaintiff/respondent has lost interest in his case and that it should therefore be dismissed.
4. The application is opposed by the plaintiff/respondent based on a replying affidavit filed in court on 17/1/2014.The plaintiff/respondent contends that he has been desirous of prosecuting his case. He depones that he was informed by his lawyers that when the land court was put in place, his lawyers went to the registry with a view to fixing a date for hearing but were informed that the diary was already full and that they had to wait for opening of the 2014 diary before taking a date.
5. The plaintiff/respondent contends that if his suit is dismissed, he will be prejudiced as he is likely to loose his land.
6. Order 17 Rule 2 (1) and (3) under which the applicant has moved the court provides that in any suit in which no application has been made or step taken by either party for one year, any party to the suit may apply for its dismissal.The suit herein was filed on 18/4/2012. An application for temporary injunction was filed under certificate of urgency on the same date. When the application was placed before the trial judge on the same day, he directed that the applicant takes a date for the application at the registry and serve for inter-partes hearing.
7. The plaintiff took 11/6/2012 for the hearing of the application. On that day, the application was withdrawn and the main suit fixed for hearing on 9/10/2012. This being a land matter and the Environment and Land court had been put in place, the case was adjourned pending fixing a hearing date before the new court.
8. The plaintiff/respondent never took any step until the present application was filed seeking to have the suit dismissed. The application herein was filed soon after end of one year from the time the case was last in court.
9. The plaintiff/respondent has explained that he could not take a date as the diary for 2013 was

already full. This is not the position. The matter was last in court on 9/10/2012. The plaintiff should have at least taken a date at the beginning of 2013. He never did this.

10. The question which I pose is this; should this case be dismissed merely because no step has been taken for one year? The answer is I think no. The provisions under which the application was brought provides that if the respondent gives explanation to the satisfaction of the court then the suit may not be dismissed. I am not convinced by the explanation which has been given by the respondent for not making a step for one year. Even the counsel for the respondent was casual in his submissions. He stated that even if the suit is dismissed for want of prosecution, the respondent can bring another suit and that this will only escalate costs.
11. Notwithstanding the fact that the respondent's explanation is not convincing, there are other factors which should be considered. In the ***case of Ivita -Vs- Kyumbu (1984) 441, Chesoni J,*** as he then was stated that the test applied by courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time. It is a matter in the discretion of the court.
12. In the present case, the delay is not inordinate. The delay is for only one year. It will be unfair to dismiss the suit even if the explanation by the respondent is not convincing. Justice will only be done if the parties are given opportunity to be heard. It is apparent that the applicant was waiting for one year to lapse before coming to court. This explains why he moved to court a few days after the lapse of one year from the time the case was last in court.
13. I find that the interest of justice dictate that the applicant'sapplication be disallowed. The respondent will however bear the applicant's costs for the application. It is ordered that the plaintiff moves to fix the case for hearing within 21 days from the date hereof. For avoidance of doubt, it is a date for hearing which should be taken within 21 days. The case may be heard any date after the 21 days.The case shall stand dismissed if the order herein is not complied with.

It is so ordered.

**Dated, signed and delivered at Kitale on this 24th day of February, 2014**

**E. OBAGA,**

**JUDGE**

**In the presence of M/S Arunga for Mr Rabera for Respondent.**

**Mr Chebii for Mr Kaosa for Defendant – Present**

**Court Clerk – Kassachoon.**

**E. OBAGA,**

**JUDGE**

**24/02/2014**