REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
Civil Case 59 of 2009

MURUNGI M'TWARUCHIU ……...….1ST PLAINTIFF

BAITURU BARON INVESTMENTS LTD.....2ND PLAINTIFF

VERSUS

EQUITY BANK LTD…….……1ST DEFENDANT

ZAIN KENYA LIMITED..……...…2ND DEFENDANT

ROBERT KINYUA GACHAU.....…….…3RD DEFENDANT

R U L I N G

The 1st defendant/applicant through an application dated 8th March, 2012 brought under Order 40 Rule 6 and 7 of Civil Procedure Rules and under Order 51 Rule 1 of the Civil Procedure Rules seeks the following orders:-

1. That the interim orders granted to the plaintiff on 27th May, 2009 be set aside, vacated and/or varied.

2. Costs of the application be borne by the respondent/plaintiff

The application is supported by annexed affidavit of Purity Kinyanjui, the Head of Debt Recovery of the 1st defendant/applicant. It is further grounded on the following grounds:

1. The plaintiff instituted this suit and obtained interim injunction on 27/5/2009.

2. The suit has not been set down for hearing since the last ruling made on 26/11/2010 by Justice Lesiit on applications challenging the suit.

3. The plaintiff is not eager to prosecute the case at the expense and detriment of the applicant.

4. Justice require matters to be disposed expeditiously according to law.

On the other hand the 2nd defendant /applicant filed an application dated 26th March, 2012 under Order 17 Rule 2(3) and Order 51 Rule 1 of the Civil Procedure Rules seeking the following Orders:

1. That this suit be dismissed for want of prosecution.

2. That costs of the suit and application be borne by the plaintiffs.

The 2nd defendant/applicant's application is supported by an affidavit of Aldrin Ojiambo an Advocate appearing for the 2nd defendant/applicant. The application apart from that is based on the following grounds:-

(a) On 26/11/2010 the court ordered the plaintiffs to set down the matter for trial within 30 days.

(b) The 30 days lapsed on 26/12/210 without any action on the part of the plaintiffs;

(c) It is about 14 months and the plaintiffs have not taken any further steps;

(d) The plaintiffs remain under duty to prosecute their suit expeditiously.

When the applications came up for hearing counsel for applicants and the respondent agreed that the two applications be argued together. The 1st defendant/applicant in seeking that the interim orders of injunction granted to the plaintiffs/respondents to be set aside, vacated and/or varied has relied on the affidavit of Purity Kinyanjui who has in her affidavit stated as follows:- That she is the Head of Debt Recovery of the 1st defendant/applicant and is conversant with issues of this suit and competent to swear this affidavit. The 1st defendant was sued by the plaintiff stopping it from selling their property against which a loan advanced to the plaintiff/respondent was in default. That the plaintiff/respondent applied for interim orders of injunction which were successfully granted on 27th May, 2009; which orders the deponent averred as per her advocates advice have since elapsed by operation of law. The deponent has further averred that the plaintiff since obtaining the interim orders of injunction have lost vigor in prosecuting the case and in support where of the deponent referred to annexture "PK2" and "PK3","PK2" being letters addressed to the plaintiff's counsel M/S B. Gitonga and Company Advocates dated 19th February, 2010 requesting the advocate to move court for hearing of the matter. "PK3" is a reply from M/S Basilio Gitonga & Company Advocates stating that the court's orders were issued after interpartes hearing. The counsel letter added that the plaintiffs were meanwhile making an application for appropriate amendments to the pleadings to enable them to proceed with the suit. The deponent has further stated that the plaintiffs have failed or refused to take a hearing date. That it is further averred that despite the plaintiffs being requested by the 1st defendant/applicant counsel to continue servicing the loan which is not in dispute they have failed to do so. The defendant referred to annexture "PK1" attached to the affidavit being a letter by M/S F. K. Gitonga & Co. Advocates addressed to M/S Basilio Gitonga & Co. Advocates which letter stated as follows:

" The Deputy Registrar

Meru High Court

P. O. Box 118

MERU

Dear Sirs,
RE: MERU HCCC NO.59 OF 2009

MURUNGI M'TWARUCHIU & ANO VS EQUITY BANK

LTD & 2 OTHERS

Kindly do place this file before the Judge for mention as it should be heard on priority basis in view of the interlocutory interim orders granted to the plaintiff's and with regard to the provision of Order 40 of the Civil Procedure Rules 2010 and for the purposes of the overriding objective of Section 1A and 1B of the Civil Procedure Act(Cap.21) L.O.K.

Kindly assist.
Yours faithfully,

FOR M/S F. K. GITONGA & CO. ADVOCATES

The applicant deponed that due to the interim orders of injunction, which the applicant believe have lapsed, the applicant continue to incur economic loss as they cannot realize their loan from the collateral given by the plaintiffs. It is further deponed if the orders are set aside the plaintiffs may be motivated to have the case heard expeditiously. That the plaintiffs it is averred, had ample time to prosecute the case or pay the loan which they have failed to utilize at the prejudice of the applicant.

The 2nd defendant/applicant's application seeking dismissal of the plaintiffs' suit is supported by an affidavit by Aldrin Ojiambo. The affidavit states as follows: That the deponent is an Advocate of the High Court of Kenya working as such in the firm of M/S Ojiambo & Co. Advocates, which firm has conduct of this suit on behalf of the 2nd defendant/applicant and duly authorized to swear the affidavit in support of the application. That plaintiffs/respondents were granted interim orders of injunction on 27/05/2009.

That the 2nd defendant after service with the application for injunction appointed the firm of M/S Ojiambo & Co. Advocates and the firm came on record on 11th June, 2009. That M/S Ojiambo & Co. Advocates wrote to the plaintiffs' Advocates on 26th May, 2009, seeking a copy of the plaint to enable them prepare defence as per copy of letter annexed to the affidavit marked "AOI". That a reminder was issued on 29th June, 2009 as per annexed copy of the letter marked "AO-2". That the said letters were not replied to, consequently the advocate's clerk travelled to court and made copies of the pleadings from the court file. That M/S Ojiambo & Co. Advocates filed defence on 24th August, 2009 and the same was served upon the plaintiffs'' advocates the same day. That pleadings closed on or about 7th September, 2009 and since then the plaintiffs have not taken any steps to prosecute their claim. That on 24/6/2010 the 2nd defendant filed an application to dismiss the suit for want of prosecution, as per annexed copy marked "AO-3". That the 1st defendant filed a similar application, as per annexed copy marked "AO-4". That the applications were heard together and a ruling was delivered on 26/11/2010 in which the court declined to dismiss the suit but ordered the plaintiff to take necessary steps within 30 days. The advocate averred that no action has been taken by the plaintiffs since the order was issued. That the 2nd defendant continues to suffer prejudice as a result of delay in prosecuting the suit by the plaintiffs. That the advocate averred that the plaintiffs' demonstrates litigants who have lost interest in their claim and as such their claim should be dismissed with costs since litigation must come to an end.

The plaintiffs/respondents in reply to the 1st defendant/applicant and 2nd defendant/applicant applications filed three replying affidavits, two through Mr. Murungi M'Twaruchiu, 1st plaintiff dated 18th April,2012 and two Replying Affidavits through Basilio Gitonga dated 18th April, 2012.

Mr. Murungi M'Twaruchiu in his affidavit stated as follows: That it is true court granted interim orders of injunction in favour of the plaintiffs as the 1st defendant/respondent was in the process of disposing by sale the respondent's properties that is to say LR. Nos. Chuka/Township/269, Karingani/Ndagani/1621 and Karingani/Ndagani/2113. That the orders were to the effect that the injunction orders remain in force pending the hearing and determination of the suit, the copy of order is attached and marked BB1(a) to the respondent's affidavit. The respondent has deponed that he has made various efforts to contact his advocate on record with a view to have this matter fixed for hearing but have received information from his said advocate that the court had given directions that the hearing dates are only available for Civil cases filed from the year 2007 downwards. He averred that he had been duly informed by his Advocate that he had made efforts to get directions on the way forward to no avail as per attached copies of correspondences marked BB 1(b), being letters addressed to Deputy Registrar to have the file placed before the Judge for the purposes of getting directions concerning hearing the matter dated 18/3/2011 and 28/2/2011 and received at court registry on the respective dates. The respondent therefore deponed it is not true he has lost vigour in the prosecution of the matter and that his interest has remained as alive as it was when he filed the case.

The respondent in support of his assertion that it is not easy to get hearing date at the court registry annexed copy of letter dated 29/11/2011 marked BB1(c) being a letter by M/S F. K. Gitonga & Co. Advocates to M/S B. Gitonga & Co. Advocates over HCCC 59 of 2009 and in which letter dated 29.11.2011 sought to know the steps taken by the plaintiffs towards a speedy hearing of the matter and/or servicing the loan account. The respondent further averred that it cannot be said there is no loan which is not in dispute as according to the respondents the applicant was indeed substantially responsible for financial woes which according to the respondent culminated into this cause of action. The respondent further averred that the applicant alluded to suffering economic loss due to the illegalities and malice substantially authored and perpetuated by itself. The respondent has averred that he is ready and willing to prosecute this matter immediately he is able to secure a hearing date in the registry.

The respondent in reply to application for dismissal of the suit for want of prosecution has stated in his affidavit as follows: That he has always been interested in prosecuting this matter and at no time has he lost interest in the prosecution of the suit. He further averred that the failure to take a hearing date has been caused by court diary being full and court's direction that matter of up to the year 2007 downwards were only matters to be fixed for hearing till further directions. The respondent further averred that contrary to 2nd applicant's assertion that the respondents were ordered to fix down the case for hearing within 30days from the date of injunction, the court only directed that the respondent to serve plaint on the defendant if the same had not been done within 30 days from 26/11/2010. The respondent further averred that his advocate had been making efforts to take hearing dates upon the respondents' instruction and it cannot be said that the respondent has been indolent. The letter written to Deputy Registrar by respondents' advocate seeking hearing dates are annexed and marked "MMB". The respondent has further averred the application dated 24/6/2010 alluded to in the said applicant's application was conclusively determined and cannot be invoked in the current application.

The respondent has further averred that he has not lost interest of this matter since the subject matter is a parcel of land upon which his home stands wherein he and his family resides. He has further deponed that he has been informed and verily believe that it is still not possible to secure a hearing date for the substantive hearing of this matter since the court diary is full.

The counsel for the respondents in his affidavit dated 18th April, 2012 stated briefly as follows: That he is an advocate of the High Court of Kenya and is in conduct of this matter and facts deponed in his affidavit are under his knowledge and he can prove them as deponed. He deponed that interlocutory orders of injunction were granted to the respondents on 27th May, 2009 pending hearing and determination of this suit. That the orders have not been vacated nor varied. That the application giving rise to the injunctive orders was brought under the old Civil Procedure Rules putting into consideration that the current Civil Procedure Rules came in force in September, 2010(the correct position is that the new Civil Procedure Rules came into force in December, 2010). He averred that the current Civil Procedure Rules are not expressed to operate retrospectively. He also averred that he is aware there has been difficulties in securing dates in the High Court registry particularly in respect of matters that were filed after January,2007. The advocate has deponed that he has personally visited the High Court Civil Registry on a number of occasions and have been informed by the registry staff that there was a directive in force that only Civil Cases(including appeals) filed before the year 2007 were only being fixed for hearing due to congestion of the diary. He further averred that he learnt from the same registry staff that there was a further directive that dates were also available for Judicial Review matters that were filed from the year 2010 and below. That he averred that he has no reason to doubt the High Court Registry staff regarding those directives. The advocate deponed that he had written to the Deputy Registrar to have the matter placed before a Judge for directive in view of the nature of the matter and annexed copies of the letters marked BG1(a) &2(b) being letters dated 28/2/2011 and 18/3/2011.

He averred the unavailability of dates in the High Court Civil Registry is not only unique to this particular matter since it affects various other cases. That he averred it was upon this background that the Meru Bar Association(an organization of Advocates practicing in Meru) organize a Bar-Bench meeting on 15/2/2012 of which part the agenda was to discuss issues of fixing hearing date in the High Court registry, as per copy of invitation letter and agenda attached and marked BGII. The Advocate averred that the respondent has visited his office on a number of occasions seeking to have the case fixed for hearing but

he has advised him on the circumstances prevailing in the registry. That the advocate has averred that it was not until after the meeting that he got verbal information from the Secretary(Meru Bar Association) one Mr. Mwanzia that matters could now be fixed for hearing subject to availability of dates. The advocate averred further that it would be wrong to personalize the respondents by dismissing or lifting of injunction orders, for eventualities that are beyond its control.

When the matter came up for hearing Mrs. F. K. Gitonga Advocate appeared for the 1st defendant/applicant, Mr. Awiti Advocate for 2nd defendant/applicant, Mr. Isaboke Advocate for 3rd defendant and Mr. B. Gitonga advocate for the respondents.

Mrs. F. K. Gitonga in her oral submission reiterated the contents of the affidavit by the 1st defendant/applicant and added that under Order 40 Rule 6 of Civil Procedure Rules an injunction life span is 12 months and that according to her understanding of the Order, an order of injunction automatically lapses after 12 months from the date of issuance. She argued in the instance case court granted an order of injunction till determination of the suit and that is why in her application they have cited Order 40 Rule 7 of Civil Procedure Rules which gives court power to dismiss such an order where a party is dissatisfied with such an order. The counsel argued that the respondent has been indolent and in the day has abused the court process. She argued that an injunction being an equitable relief, the respondent who sought equity, must do equity to the other party. She submitted that the respondents in this case have sat on their rights. That they have continued to enjoy the order issued to the prejudice of the other party. The counsel referred to Oxygen principle under Section 1A, and 1B of Civil Procedure Act. The counsel supported the application by 2nd defendant/applicant as it confirmed the prejudice suffered by the defendants and also as it serves the interest of 1st defendant/applicant.

Mr. Awiti Advocate in his oral submissions he relied on the affidavit in support of the 2nd defendant/applicant application. He associated himself with submissions made by Mrs. F. K. Gitonga Advocate. He argued that to date the 2nd defendant/applicant has not been served with the plaint. That the clerk had to take photocopy of the plaint to enable them to file their defence which they filed on 24/8/2009.

He argued that their previous application to have suit dismissed for want of prosecution were dismissed and as such the 2nd defendant/applicant continues to suffer prejudice due to delay caused by the respondents.

Mr. Isaboke Advocate in his oral submission, he associated himself with the submissions by counsel for 1st defendant/applicant and 3rd defendant/applicant. He argued that the 1st and 2nd defendants are the main players in this suit. He asked the court to look at the plaint as there is no cause of action against 3rd defendant.

Mr. B. Gitonga Advocate for the respondent in his oral submissions he reiterated that he was relying on the two affidavits by 1st plaintiff and an affidavit by himself. He added that it is true injunctive orders were issued on 27/5/2009 which orders were expressive that they were to be in force till the suit was heard and determined. He argued the orders were issued under the old Civil Procedure Rules before the new Civil Procedure came into effect on 17/12/2010. He argued that under Order 54(2) of Civil Procedure Rules dealing with revocation and Transitional provision, it is stated that the orders issued under the old Civil Procedure would be applicable and won't be invalidated by coming into force of the New Civil Procedure Rules. He argued Orders issued on 27/5/2009 would continue to be in force till suit is heard and determined.

Mr. B. G. Gitonga advocate further argued that the plaintiffs are being blamed for having not set suit down for hearing. He asked is the matter ready for hearing? He argued a lot it has not been done to enable suit to be set down for hearing. He pointed out that the parties have now been caught by provisions of Order 11 of the Civil Procedure Rules which they have not complied with. He argued the parties have not even drawn, filed and exchanged witness statements. He argued the pleadings have not been closed. He

pointed out that the third defendant even filed his defence on 23/4/2012. The counsel further argued in view of Order 3 rule 2 of Civil Procedure Rules direction of the court would be necessary suit having been filed before the new Civil Procedure Rules having come into force, they could not file witnesses statements. He argued further by virtue of Order 3 Rule 2 Civil Procedure Rules there is a question of court's leave before filing witnesses statements which according to the counsel ought to be sought and granted. He argued that Order 11 Rule 6 of Civil Procedure Rules is clear that the question of setting suit down is not preserve for the plaintiff alone as the defendants have a role to play. The counsel argued that Order 40 Rule 6 of Civil Procedure Rules is couched in a very permissive term contrary to averment by the counsel for the 1st applicant/defendant. That the court has discretion to say the order has not lapsed. Mr. B. Gitonga Advocate argued that the loss said to be suffered by the applicants is economic in nature in that the injunction orders is restraining them from exercising their right of sale, however, as the security is intact, if the applicant were to succeed in this matter they would be able to recover their financial loss. He argued the persons who would suffer excessive prejudice are the plaintiffs/respondents if the orders of injunction are set aside.

Mrs. F. K. Gitonga advocate in her reply, she submitted that order 54 of old Civil Procedure Rules do not give a blanket power that allows a party to abuse a court process. She argued the principle behind an injunction is that the property ought to be preserved till the rights of parties are determined, but according to the respondent they seem to say it does not matter how long the matter takes as long as there is an Order of injunction.

She sought the orders to be set aside as she felt the respondents had abused the court process by failing to set suit down for hearing 3years down the line.

I have considered the submissions by Mrs. F. K. Gitonga for 1st defendant/applicant, Mr. Awiti for 2nd defendant/applicant, Mr. Isaboke for the 3rd defendant and Mr. B. Gitonga for the respondents/plaintiffs.

The first issue for consideration in this application is whether the temporary injunction granted to the plaintiffs on 27th May, 2009 should be set aside, vacated and/or reviewed.

The instance application is brought under Order 40 Rule 6 and 7 of the new Civil Procedure Rules. The injunction Order of 27/5/2009 was issued under OXXXIX Rule 1(a),2 and 3 of Civil Procedure Rules of the old Civil Procedure Rules. The order was issued on 27/5/2009 to the effect that there was to be temporary injunction restraining the 1st defendant, its agents, servants or assign's or any one acting under it from advertising or selling the parcel No.Chuka Township/269 and Karingani/Ndagani/1621 and 2113 pending the hearing and determination of this suit.

Under Order 40 Rule 6 Civil Procedure Rules it is provided:

"6. Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise."

Under the above Order where in a suit in respect of which an interlocutory injunction has been granted is not determined within a period of 12mohts from the date of the grant, the injunction shall lapse unless court orders otherwise for any sufficient reason.

This order means that the interlocutory injunction ought to automatically lapse unless court injects life to it for any sufficient reason.

Under Order 40 Rule 7 of Civil Procedure Rules it is provided:-

"7. Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order."

In the 1st applicant/defendant application the court is being moved to set aside, vacate and vary the Temporary injunction orders issued on 27th May, 2009 on the grounds that the suit has not been set down for hearing since 26/11/2011 when the same was last before the Hon. Lady Justice Lesiit and for the reason that the plaintiffs are not eager to prosecute the case at the expense and detriment of the applicant and that the interim orders are over 12 months in force and have lapsed and ought to be set aside.

In the case of **Ragui – Vs – Barclays Bank of Kenya Ltd(2002) I KLR 647** Hon. Justice Ringera as he was, held:-

"It is settled law that if an interlocutory injunction has been obtained by means of misrepresentation or concealment of material facts, the same will on the application of the party aggrieved be discharged.

The injunction was granted because of non-service of the statutory notice of the exercise of the power of sale on the administrators of the estate, which was the true position hence it would not be unjust or inequitable to maintain the interlocutory injunction issued in force."

In the case of **Mobile Kitale service Station V Mobil Oil Kenya Limited & Another(2004)** 1 KLR 1

Hon. Justice Warsame held:-

"An interlocutory injunction is given on the court's understanding that the defendant is trampling on the rights of the plaintiff.

An interlocutory injunction, being an equitable remedy, would be taken away(discharged) where is shown that he person's conduct with respect to matters pertinent to the suit does not meet the approval of the Court which granted the orders which is the subject matter.

The orders of injunction cannot be used to intimidate and oppress another party. It is a weapon only mean for a specific purpose-to shield the party against violation of his rights or threatened violation of the legal rights of the person seeking it."

The applicant in its application wants the interlocutory injunction issued to the respondents set aside, or discharged or varied due to plaintiffs/respondents delay in setting the suit down for hearing and further on the ground that 12 months have since the grant of the orders passed and the order has lapsed. The injunction order issued on 27th May, 2009 were issued on the court's understanding that the plaintiffs/respondents rights were being violated by the defendants/applicants who were threatening to dispose of the plaintiffs/respondents properties by sale in exercise of their statutory power of sale. The 1st applicant/defendant has not in the application to set aside, vacate or vary the injunctive orders alleged the orders were obtained by means of misrepresentation or concealment of material facts but is concerned with the delay in the plaintiffs/respondents delay in setting this matter down for hearing.

The plaintiffs/defendants and their counsel in their affidavits dated 18th April,2012 have deponed that there has been difficulties in getting dates in the High Court registry particularly in respect of matters that were filed after the year 2007. That the advocate had personally visited the High Court registry and was informed of a direction in force that only civil cases filed before the year 2007 were only being fixed for hearing due to congestion of the diary. That the advocate in his affidavit deponed that he had written to Deputy Registrar requesting that the file be placed before the Judge for directions in view of the nature of the matter and also attached copies of the correspondences. He further deponed that unavailability of the dates in the High Court registry is not only unique to this matter since it affects various other cases. That even Meru Bar Association had to organize a Bar-Bench meeting on 15/2/2012 to discuss the issue of fixing dates at the High Court registry. He attached copies of the invitation letter and agenda. The advocate deponed that the plaintiff/respondent has been to his office on a number of occasions seeking to have the case fixed for hearing.

The plaintiffs/respondents on their part deponed that they have made various efforts with a view to have

the suit fixed for hearing but have received information from their advocate that court had given directions that hearing dates are only available for civil cases filed from the year 2007 downward. The plaintiffs deponed that it is not true they had lost vigor in the prosecution of this matter as their interest have remained as alive as it was when they filed the suit.

The matters raised herein-above in the affidavit of the plaintiffs/respondents and that of their advocate have not been controverted by the applicants. Indeed what the plaintiffs and thier advocate have deponed is true, that getting dates at Meru High Court for matters filed after 2007 has been a nightmare for the litigants due to volumes of cases pending coupled with the number of Judges.

In the circumstances of the instance case I find that it would be wrong and unjust to penalize the respondent by setting aside, vacating or varying the orders of 27th May, 2009 as by doing so would amount to exposing the party to violation of his rights or expose him to threat of violation of the legal rights he is seeking pending hearing and determination of this suit.

In view of the foregoing I hold that though the period of 12 months since interlocutory injunction were granted has expired, I have discretion for sufficient reason to order that the injunction orders shall continue to be in force as default of hearing and determination of this suit has not been due to plaintiffs/respondents fault but due to nonavailability of hearing date at the registry.

The other issue for determination is whether this suit should be dismissed for want of prosecution. The principles that should be considered and applied when considering an application for dismissal of suit for want of prosecution has been set out in several cases.

In the case of **NILANI – VS – PATEL AND OTHERS(1969)** EALR 340 it was stated at page 342 as follows:

"The principle on which we go is clear: When the delay is prolonged and inexcusable, and is such as to do grave injustice to one side or the other, or to both, the court may in its discretion dismiss the action straight away, leaving the plaintiff to his remedy against his own solicitor who has brought him to this plight."

Besides the above also in the case of **VICTORY CONSTRUCTION CO. A. N. DUGGAL(1962)** EALR 697, the Court of Eastern Africa held at page 698:

"However, in deciding whether or not to dismiss a suit under r.6 it is my view that, where the parties have been called upon to show cause against such an order, a court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay, that the defendant will suffer no hardship, and that there has been no flagrant and culpable inactivity on the part of the plaintiff. In regard to the latter two conditions, however, a defendant may find it difficult to persuade a court of hardship or of culpable inactivity in failing to take any step to protect himself under the provisions of r.5 of O.XVI, which gives him a remedy in the event of a plaintiff failing to prosecute his suit. Rule 5 in these terms:-

In addition to the above in the case of **IVITA –V-KYUMBU(1984) KLR 441** Hon. Chesoni J, as he then was, stated as follows:-

"So the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant; so both parties to the suit must be considered and the position of the judge to, because it is no easy task for the document, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that he will prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if 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

notwithstanding the delay the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time. Where the defendant satisfies 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. To put it in the words of Salmon LJ in Allen V McAlpine at P.561, as a rule, when inordinate delay is established until a credible excuse is made out, the natural inference would be that it is inexcusable. It is an all-time saying, which will never wear out however often said that, justice delayed is justice denied."

The issue for consideration is whether the delay is prolonged and inexcusable and is such as to do grave injustice to one side or the other or to both. This suit last came before court on 26th November, 2010 when court directed that the plaintiff to serve the plaint upon the defendant if the same had not been done within 30days of the day of the order. That since the order was issued up to the time of filing these two applications it is about 1 year 4months. The delay is prolonged but the plaintiffs/respondents have given explanation for the delay, in that there has been no dates available for matters filed after 2007 as per court's directions. The court is satisfied with the plaintiffs/respondents excuse for the delay and that the delay notwithstanding justice can be done to all parties. The plaintiff is eager to set the suit down for hearing at the earliest available time.

The 3rd defendant filed his defence on 23rd April, 2012. The pleading are not yet closed. The matter of concern for all is the way the parties have failed to prepare the necessary records since the new Civil Procedure Act came into force on 17th December, 2010. The parties have not complied with the provisions of Order 3 Rule 2 of Civil Procedure Rules. Equally the parties have not complied with Order II of Civil Procedure Rules or sought exemption from the requirement of the said order. The parties ought to have complied with order II Rule 7(2) and (3) of Civil Procedure Rules which provides:

"(2) It shall be the duty of every party and or his advocate to strictly comply with the provisions of rule 3(2) and to give such information as the judge may require, including but not limited to the number of the witnesses expected to be called and the nature of their evidence, to enable the court to consider and settle the length of time which will probably be required for the hearing of the suit.

(3). Any party or his advocate who willfully fails or omits to comply with the provisions of this Order shall be deemed to have violated the overriding objective as stipulated in Section 1A and 1B of the Act and the court may order costs against the defaulting party unless for reasons to be recorded, the court orders otherwise."

In the circumstances of this case I find that both applications dated 8th March, 2012 and 26th March, 2012 to be without merits. I therefore refuse to set aside, vacate and/ or vary the interlocutory injunction orders issued on 27/5/2009 similarly I find the circumstances of this case do not justify an order for dismissal of the suit.

I order that the plaintiffs and the defendants do within the next 21 days file and exchange all list of witnesses to be called at the trial, written statements signed by witnesses excluding expert witness and all copies of documents to be relied on at the trial.

I further order that parties do take steps within the next 45 days to comply with Order II of Civil Procedure Rules and set this case down for hearing.

Due to peculiar circumstances of this case costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT MERU THIS 24TH DAY OF MAY, 2012.

J. A. MAKAU
JUDGE

DELIVERED IN OPEN COURT IN PRESENCE OF:

1. **Miss Mutinda WB for Mrs. F. K. Gitonga for 1st defendant/applicant**

2. **Mr. Awiti for the 2nd defendant/applicant(absent)**

3. **Mr. Isaboke for 3rd defendant(absent)**

4. **Mr. Basilio Gitonga for plaintiff/respondent(absent)**

J. A. MAKAU
JUDGE