



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**ELC CIVIL SUIT NO. 501 OF 2009**

WILSON K. KIPKOTI ..... 1<sup>ST</sup> PLAINTIFF  
UFANISI AUTO SERVICE LTD ..... 2<sup>ND</sup> PLAINTIFF

VERSUS

TIMOTHY NDUVI MUTUNGI ..... DEFENDANT

**RULING**

The dispute in this suit involves a parcel of land known as LR No. 25799/3 said to have been purchased by the 2<sup>nd</sup> plaintiff from the defendant. The 1<sup>st</sup> plaintiff owns 50% shares in the 2<sup>nd</sup> plaintiff. The defendant was required by an express term of the sale agreement between him and the 2<sup>nd</sup> plaintiff to transfer the suit property to the 2<sup>nd</sup> plaintiff. Although the defendant signed the transfer of the suit property to the 2<sup>nd</sup> plaintiff, the same was not registered owing to failure to pay stamp duty. It is the plaintiffs' case that the defendant intends to transfer the suit property to a third party whereas he has received full payment of the purchase price, and is bound to transfer the property to the purchaser, who is the 2<sup>nd</sup> plaintiff.

In this suit therefore, the plaintiff seeks a permanent injunction to restrain the defendant or his agents, servants or any party claiming under him from selling and or disposing, constructing or wasting and or transferring the suit property to any other person. There is also an order sought for mandatory injunction compelling the defendant to transfer the suit property to the 2<sup>nd</sup> plaintiff.

The defendant denied the plaintiffs' claim and filed a lengthy statement of defence to that effect, the bottom line of it being that, at no time did he transfer his land to the 2<sup>nd</sup> plaintiff. There is now before me an application by way of Notice of Motion seeking an order that this suit be dismissed for want of prosecution. There is an alternative prayer that this suit brought by a plaintiff dated 2<sup>nd</sup> October, 2009 be struck out.

The order sought for dismissal for want of prosecution is based on the fact that from 26<sup>th</sup> January, 2010 when the suit was last in court, which added up to 15 months as at the time of filing this application, no action had been taken by the plaintiff to prosecute the suit. Even after the plaintiffs obtained an ex-parte injunction they failed to prosecute the application which was subsequently discharged by the court. It is also the defendant's position that the plaintiffs have no cause of action or reasonable cause of action and lack *locus standi* to sue the defendant and therefore the suit is incompetent.

The application is opposed and both learned counsel have filed written submissions to address the said

application. I have gone through the record before me. I observe from the outset that some of the arguments advanced by both learned counsel relate to issues drawn from the pleadings and which can only be canvassed at a full trial.

The material before me shows that on one or two occasions the case could not proceed because of non-listing in the cause list. This omission cannot be blamed on either the plaintiffs or their counsel. This is the responsibility of the court registry. There is also evidence that the original record went missing and the file had to be reconstructed following an order made by the deputy registrar. Again, the plaintiffs and their counsel, and I hasten to add the defendant or his counsel, are not the custodians of the court files and once again this cannot be blamed on the parties.

Unpleasant correspondence coached in hard language has been exchanged between counsel. This is unfortunate. That notwithstanding, I have looked at the plaint. The plaintiff's suit, with profound respect, cannot be said to be frivolous or vexetious in view of the pleadings contained therein. However weak a party's suit may be, a party should have their day in court. To dismiss or to strike out the suit would be to drive a party out of judgment seat. Courts should endeavour to maintain a suit rather than dismissing or striking it out so that the issues involved can be addressed at a full hearing.

I am inclined therefore to dismiss the defendant's application dated 20<sup>th</sup> April, 2011 with costs to the plaintiffs. I note that the pleadings herein are closed. The parties should move to the next stage in line with Order 11 of the Civil Procedure Rules so that this suit is listed for hearing on merit.

Orders accordingly.

***Dated, signed and delivered at Nairobi this 22<sup>nd</sup> day of September, 2011***

**A. MBOGHOLI MSAGHA  
JUDGE**