



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Suit 1678 of 2007**

**ELUID LOONTASATI.....1ST PLAINTIFF/APPLICANT  
LIKAM OLE SHUNGELA.....2ND PLAINTIFF/APPLICANT  
KORINGO KIANO.....3RD PLAINTIFF/APPLICANT  
MOLONGO SAYO.....4TH PLAINTIFF/APPLICANT  
TUKEI METEN TEFANYIA.....5TH PLAINTIFF/APPLICANT  
KINUTHIA ROIMENT .....6TH PLAINTIFF/APPLICANT**

**VERSUS**

**THE DISTRICT LAND REGISTRAR  
KAJIADO DISTRICT.....1ST DEFENDANT/RESPONDENT  
SINKEEN OLE KAMAU PARSAYO.....2ND DEFENDANT/RESPONDENT  
WANJIKU KARURI KUBITHA.....3RD DEFENDANT/RESPONDENT  
SARAH WAIRIMU.....4TH DEFENDANT/RESPONDENT  
NJERI KARURI.....5TH DEFENDANT/RESPONDENT  
NYAMBURA KARURI MBUTHIA.....6TH DEFENDANT/RESPONDENT  
MUTHONI KARURI.....7TH DEFENDANT/RESPONDENT  
JOSEPH MOPEL KISENYA.....8TH DEFENDANT/RESPONDENT  
NTAKAI LELIT.....9TH DEFENDANT/RESPONDENT  
KARATUI SALASH.....10TH DEFENDANT/RESPONDENT  
MUKANA SALASH.....11TH DEFENDANT/RESPONDENT  
WAMBUI TININA OLE KAMAU.....12TH DEFENDANT/RESPONDENT  
HANANA TITININA OLE KAMAU.....13TH DEFENDANT/RESPONDENT  
JOSEPH KISENYA.....14TH DEFENDANT/RESPONDENT  
LEMINDO WAUMA .....15TH DEFENDANT/RESPONDENT**

**RULING**

1. By the Notice of Motion application dated 17/08/2009, the 2<sup>nd</sup> -14<sup>th</sup> Defendants are praying that the Plaintiff's suit herein be dismissed for want of prosecution. They also pray for costs of the application and of the suit. The application which is expressed to be brought under Order 16 Rule 5 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the law is premised on grounds that since the 23/05/2007 when this matter was last in court whereby it was adjourned and the Plaintiffs were ordered to pay the Defendant's advocates adjournment fees of Kshs.1000/=, and the Court Adjournment Fees of Kshs.400/=,

the Plaintiffs have failed, refused, neglected and or abandoned to prosecute their suit.

2. The application is also supported by the affidavit of **Clara Anne Nandwa** dated 17/08/2009. The deponent says that unless this suit is dismissed at this stage, the 2<sup>nd</sup> – 14<sup>th</sup> Defendants will continue to suffer prejudice. The deponent beseeches the court to use its unfettered power and discretion to dismiss this suit for want of prosecution.
3. The application is opposed. The Plaintiffs contend that it is not true that the Plaintiffs have gone to sleep as in fact the suit was fixed for hearing on 30/06/2009 but counsel says it is not clear from the record why the case did not proceed to hearing on the said date. The Defendants also urge the court to consider that dismissal of suits is to be taken as a last resort and that in the instant case, there are no clear circumstances in which the court can order dismissal of the suit.
4. This application was served upon the Plaintiff's counsel on 21/10/2009 but to date no Replying Affidavit has been filed.
5. The history of this suit is as follows. The Plaintiffs filed their plaint together with their Chamber Summons application for injunction under Certificate of Urgency on the 27/10/2005. On 22/09/2006, the Applicants herein filed their Replying Affidavit. On the 23/05/2007, the matter was in court on the Plaintiffs' injunction application but the same was adjourned at the instance of the Plaintiffs who were then ordered to pay the Defendant's advocates adjournment fees of Kenya Shillings One Thousand (Kshs.1,000/=) and also the court's adjournment fees of Kenya Shillings Four Hundred (Kshs.400/=). No further action was taken in the matter until 5/01/2009 when the Defendants' advocates invited the Plaintiff's advocates for fixing of a hearing date of the Plaintiff's injunction application. The Plaintiff's counsel have acknowledged in their submissions that they received this letter inviting them to fix the suit for hearing. The Defendants contend that when the matter came up on 12/01/2010 for fixing of the hearing date, the Plaintiffs representatives failed to appear but Defendant's counsel proceeded to fix the Plaintiff's injunction application for hearing on 30/06/2009, and a hearing notice duly was served upon the Plaintiffs counsel. The matter could not be listed for hearing on 30/06/2009 because the Plaintiffs had not paid both the Defendants' and court adjournment fees as ordered on 23/05/2007.
6. By a letter dated 30/06/2009, the Defendants' advocates wrote to the Plaintiffs' advocates informing them that unless they (Plaintiff's counsel) paid the court adjournment fees forthwith and the Defendants fees of Kshs.1000/=, and at any rate within a period of 7 days from the date of the said letter, the Defendant's Counsel would pay the court adjournment fees and thereafter make an application for the Plaintiff's application for injunction to be dismissed, hence the present application. The Defendants aver that despite such correspondence and threats from the Defendants to the Plaintiffs, the Plaintiffs have failed, refused and or abandoned to prosecute their case.
7. During the hearing of this application, learned counsel Mr. Machira urged the court to find that the Plaintiffs have lost interest in their case and to dismiss the same for want of prosecution. Learned counsel relied on the following authorities to buttress the Defendants' plea for dismissal of the Plaintiffs' suit:-

- *Fitzpatrick –vs- Batger & Co. Ltd. [1967] 2 All ER 657*

- *Ivita –vs- Kyumbu [1984] KLR 441;*

- *E.T. Monks & Co. Ltd. –vs- Evans [1985] KLR 584*
- *Airland Tours & Travel Ltd. –vs- National Industrial Credit Bank Ltd. (2006) e KLR.*

7. The highlight of these authorities is that where there has been such an inordinate delay without excuse, then the suit ought to be dismissed for want of prosecution. In the **Fitzpatrick** case (above) the court observed at p. 659 thereof, and I wholly agree with the said observations that –

*“It is of the greatest importance in the interests of justice that these actions should be brought to trial with reasonable expedition. It is not only in the interests of the Defendants that this should be done, but perhaps even more in the interests of the Plaintiffs themselves. It is said in this case that the action ought to be dismissed, because the Defendants might have taken out a summons to dismiss for want of prosecution much earlier than they in fact did. They no doubt however, were relying on the maxim that it is wise to let sleeping dogs lie. They had good reason to suppose that a dog which has remained unconscious for such long periods as this one, if left alone, might die a natural death at no expense to themselves, whereas, if they were to take out a summons to dismiss the action, they would merely be waking the dog up for the purpose of killing it at great expense which they would have no chance of recovering. I am not surprised that they did not apply earlier and I do not think that the Plaintiffs’ advisers should be allowed to derive any advantage from that fact.”*

8. In the instant suit, the Applicants are saying that the Plaintiffs have been unconscious since 23/05/2007 and that even when the Applicants attempted to arouse the Plaintiffs to consciousness, the Plaintiffs refused to be so aroused. Under Order 16 Rule 5 of the Civil Procedure Rules, all that the Applicants are required to show is that three (3) months have passed since the suit was last in court. In this case it is more than two (2) years since the matter was last in court on 23/05/2007 and the filing of the Applicants’ Notice of Motion dated 17/08/2009. I would agree with the Applicants that the Plaintiffs should now not be allowed to derive a benefit from their sleepiness.
9. In the **Ivita case** (above) the court set out the test to be applied in determining applications of this nature. The test to be applied 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.
10. In the instant case, the Plaintiffs have offered the explanation that there was an apparent conflict of interest between counsel appearing for the Defendants and the one appearing for Plaintiffs. It would however appear that even after the Plaintiffs filed their notice of change of advocate dated 3/02/2010 on the 4/02/2010, they did not as much as try to file either a Replying Affidavit or Statement of Grounds of Opposition to the Applicants’ application. In a matter of life and death such as this one, the Replying Affidavit should have been filed together with the Notice of Change of Advocate. The court noted on 4/02/2010, that the Plaintiffs notice of change had not even been served on other parties. The Plaintiffs counsel was therefore only allowed to proceed and oppose application on points of law.
11. Applying the above principles in this case, I am persuaded that the Plaintiffs have not adequately explained the prolonged delay in prosecuting this matter. I agree with Chesoni J (as he then was) in the **Ivita case** that “where

*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 --- so the overriding consideration is always whether or not justice can be done despite the delay.”*

12. In this case, justice cannot be done despite the delay. Accordingly, I allow the Applicants Notice of Motion application dated 17/08/2009. The Plaintiff's suit against the 2<sup>nd</sup> – 14<sup>th</sup> Defendants be and is hereby dismissed for want of prosecution. Costs of both the application and the suit shall be paid to the Applicants.

13. Orders accordingly.

**Dated and delivered at Nairobi this 26<sup>th</sup> day of March, 2010.**

**R.N. SITATI**

**JUDGE**

Read and delivered in the presence of:-

Mrs. B. Rashid for Machira (present) For 2<sup>nd</sup> – 14<sup>th</sup> Defendants/Applicants

Miss Olawe for Wanga (present) for the Plaintiffs/Respondents

No appearance for the 1<sup>st</sup> Defendant

Weche - Court clerk