



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 86 OF 2008 (0S)**

**IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY**

**IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN'S PROPERTY ACT**

**SWN.....RESPONDENT/PLAINTIFF**

**VERSUS**

**NG.....APPLICANT/DEFENDANT**

**RULING**

1. This is a ruling on the Notice of Motion dated 29/10/2014 seeking to dismiss this suit for want of prosecution. The grounds supporting the application are contained in the supporting affidavit and on the face of the application.
2. The applicant/defendant states that the respondent/ plaintiff has failed to take any steps towards the hearing of this case for over a period of one year. It is contended that this laxity demonstrates lack of interest in the suit and this delay is causing prejudice and inconvenience to the applicant.
3. The respondent opposed the application relying on her replying affidavit filed on 11/05/2015. She states that she filed this suit seeking for orders of division of property accompanied by an application for injunction to restrain the applicant from selling, transferring or disposing of the subject matter, Plot No. M.I.S. 2326. properties. At that time, she was represented by an advocate namely Kinyua Kiama & Co. The court dismissed her application for interlocutory orders on grounds that she had not obtained orders for dissolution of the marriage.
4. The respondent then filed a suit for dissolution through her advocate but it took too long to be given a hearing date. The matter is still in the hands of her advocate but has not been heard and determined. In the process, she discovered that the applicant had already transferred the subject matter to one MNN his new wife. The applicant has also been trying to evict her from her home and has made it extremely difficult for her to prosecute this suit.
5. She prays that the court should not grant the orders sought but goes on to say that if the outcome of this application favours the applicant, each party should be ordered to meet her own costs of the suit.
6. The parties argued this application by way of written submissions. Both parties filed their submissions. The applicant is represented by Wambugu Kariuki & Co. Advocates. The counsel on record for the respondent is S.G. Wachira & Co. having taken over from another counsel.
7. The submissions have generally explained the contents of the pleadings. The applicant argues that the

respondent has admitted neglecting her suit for failure to take any action. Further that she has not made any attempts to prosecute the dissolution of the marriage suit at Wang'uru court. Finally, it is submitted that the respondent has no problem should the suit be dismissed provided that she is not condemned to pay the costs.

8. The respondent's submission is that the delay in prosecuting the suit was occasioned by her advocate's mistake and that the mistake should not be visited on her. She prays that her suit be preserved so that she can pursue her property.

9. It is not in dispute that since 17/05/2012, the respondent had not taken any steps to fix the case for hearing. This was a period of over one year before this application was filed. The question is whether the reasons given for delay are sufficient for this court to find in favour of the respondent.

10. The respondent depones that her advocate made a mistake and filed a division of property suit directly without seeking to dissolve the marriage first as required by the law. The respondent's application for injunctive orders against the applicant was dismissed for that reason. She was advised to do the right thing.

11. The respondent filed the suit for dissolution of marriage. Wang'uru court PMCC No. 133 of 2013 which too has not been prosecuted for a period of four years. The reason given is that her advocate told her that hearing dates were not available in the court registry. I take judicial notice that dates may not be available in a court registry for sometime but this situation cannot go on for more than a year since new court diaries are introduced every year.

12. A small court like Wang'uru though busy will be more accommodative in giving hearing dates than courts of higher jurisdiction. I am not convinced that the respondent has failed to get a hearing date for four (4) years at Wang'uru court.

13. Order 17 Rule 2 provides:-

*2(1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed.*

*2(2) If cause is shown to the satisfaction of the court it make such orders as it thinks fit to obtain expeditious hearing of the suit.*

*2(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.*

*2(4) The court may dismiss the suit for non-compliance with any direction given under this Order.*

14. As for this case, the respondent says that she is waiting for the conclusion of the Wang'uru case to come and prosecute this suit. It goes without saying that the respondent has not taken any steps to prosecute the Wang'uru case. It is incredible that this case has delayed because of the Wang'uru case. I am of the considered opinion that delay has not been explained why the respondent has failed to prosecute this suit.

15. I find that the applicant has satisfied the court as to the grounds supporting this application. The respondent has failed to explain the reasons for the delay. This application must therefore succeed.

16. As for costs, it is noted that from the pleadings that the parties were husband and wife or were cohabiting as such for a number of years. The respondent was misled by her advocate to filing the wrong suit. It can be rightly inferred in the replying affidavit and in the submissions that she is no longer interested in this suit due to the predicament she finds herself in. It would therefore be inappropriate to condemn the respondent to meet the costs of this suit.

17. I reach a conclusion that the application is merited. The suit is hereby dismissed for want of prosecution. I direct that each party meets their own costs.

18. It is hereby so ordered.

**DATED, DELIVERED AND SIGNED THIS 7TH DAY OF FEBRUARY, 2017.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Mr. Nabutete for Wachira for plaintiff**

**Ms. Ndorongo for W. Kariuki for Defendant**

**Plaintiff present**