REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELC. CASE NO. 506 OF 2011

SITARANI HIRALAL SHORILAL LUTHRA …….…….....…..PLAINTIFF

VERSUS

LORESHO GARDENS LIMITED ……...….. 1ST DEFENDANT

LORESHO GARDENS MANAGEMENT LIMITED .....….2ND DEFENDANT

RULING

Coming before me for determination are two Notices of Motion. One is the Defendants' Notice of Motion dated 28th February 2013 seeking for the suit to be dismissed for want of prosecution with costs. The other one is the Interested Party's Notice of Motion dated 18th March 2013 seeking for the suit to be dismissed for want of prosecution with costs.

The Defendant's application is premised upon the grounds appearing on the face of it as well as the Supporting Affidavit of Noorali Mohan Manji sworn on 28th February 2013 in which he stated that the Plaintiff filed this suit on 22nd September 2011 in respect of the land parcel known as

L.R. No. 28146 Loresho (hereinafter referred to as the "Suit Property") wherein the Plaintiff sought an injunction against the Defendants from erecting a gate, a barrier, putting up a pole or post or in any way interesting with the Plaintiff's quiet enjoyment of her House No. 10. He also stated that the Plaintiff also filed an application seeking a temporary injunction against the Defendants, which application was by a ruling delivered by this court on 26th January 2012 dismissed. He further stated that since delivery of that ruling, the Plaintiff has not taken any steps to either appeal against it, neither has she sought to stay the proceedings or proceed to prosecute this suit for a period 13 months. He further indicated that the continued pendency of this suit is prejudicial to the Defendants who continue to incur legal fees. He further swore that the Plaintiff has failed to take out summons within the prescribed period of one month after filing suit which shows that the Plaintiff has no interest in this suit.

The Interested Party's application is premised on the ground that more than 1 year has lapsed and the Plaintiff has not set down the suit for hearing or taken any step to prosecute the suit. It is further premised on the Supporting Affidavit of George Gitonga Murugara sworn on 19th March 2013 in which he set out the history of this suit culminating with his statement that since the ruling on the Plaintiff's application was delivered on 26th January 2012, the Plaintiff has not taken any steps to fix the suit for hearing. He also stated that the Plaintiff appears to have lost interest in prosecuting this suit and that the same should be dismissed with costs.

The abovementioned Applications are contested. The Plaintiff filed her Replying Affidavit dated 18th April 2013 in which she stated that the delay in the prosecution of this suit has not been intentional but has been caused by her former lawyer, Messrs. Akoto & Akoto who failed to advise her on the next course of action after her application was dismissed on 26th January 2012 and that she being a lay person who spends her days indoors cannot be expected to know procedural knowledge in litigating suits. She further intimated that upon realizing the negligence on the part of her former lawyers, she has now appointed a new firm of lawyers to represent her in this case. She further stated that the dismissal of this

suit would prejudice her in that the peaceful, open and quiet enjoyment of her property will be affected by the construction of an extra gate that he deems unnecessary and an impediment.

What the court has to consider in determining whether or not to dismiss a suit for want of prosecution is not in dispute. The leading case is **Ivita vs. Kyumbu [1984] KLR 441**, where Chesoni, J. (as he then was) held as follows:

> ***"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 too, because it is no easy task for the documents, 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 be 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 the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."***

Having regard to this suit, it has emerged quite clearly that upon dismissal of the Plaintiff's Notice of Motion seeking an interlocutory injunction on 26th January 2012, the Plaintiff has taken no steps to set this suit down for hearing. While the Plaintiff attributes this delay to her then lawyers, I am not convinced that she can wholly escape blame. While she was entitled to rely on her lawyer's to advise her on the way forward with her case, it is clear that she was the one who was responsible to ensure that her lawyers were adequately instructed on the way she would like her suit handled. A delay in excess of one year in the context of a dismissed injunction application bearing in mind that the Plaint contains only one prayer being for an order of permanent injunction points to the fact that the Plaintiff most likely lost interest in this suit because of the low chances of success at the main trial. I am therefore not satisfied with her excuse for the delay. I also find that it is unfair to hold the Defendants to this suit any longer bearing in mind that they have issues of security to address at the Suit Property.

Arising from the foregoing, I hereby allow the two applications and award the costs to the Defendants and the Interested Parties.

SIGNED AND DELIVERED AT NAIROBI THIS 1ST DAY OF NOVEMBER 2013

MARY M. GITUMBI

JUDGE