**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**Civil Suit 1303 of 2000**

**MERCY N. MWANGI .....PLAINTIFF**

**VERSUS**

**TIMA OLE PUSHATI……..……...…….....……..1ST DEFENDANT**

**OLKEJUADO COUNTY COUNCIL ……..……..2ND DEFENDANT**

## RULING

By a Motion brought on Notice dated 25th August, 2011 expressed to be brought under the provisions of Order 17 Rule 2, Order 51 rule of the Civil Procedure Rules, 2010, Sections 1A, 1B and 3A of the Civil Procedure Act and all enabling provisions of the law, the 2nd defendant herein seeks orders that this suit be dismissed for want of prosecution as well as the costs both of the application and the suit. The application is supported by an affidavit sworn by **Sankale Ole Kantai**, the 2nd defendant's advocate. However, the copy filed in court was not dated. In the said affidavit, it is deposed that the matter was filed in 2000 and was last in Court on 22nd October, 2008. Since that time the plaintiff has not bothered to take any step whatsoever to prosecute the suit. The deponent accordingly believes that the plaintiff has lost interest in the matter and it is only just and equitable that the suit be dismissed with costs for want of prosecution.

The plaintiff opposed the application by way of a replying affidavit sworn by **James Mwaura Ndungu**, her advocate on 6th December 2011 in which it is deposed that after the suit was taken out of the hearing list in 2008, they invited the defendants' advocates on 23rd April 2010 to fix a hearing date but the file could not be traced. Since the suit revolves around a plot of land whose ownership is claimed by two parties, it is the plaintiff's position that it is only fair and just that the plaintiff be allowed to prosecute her case to its logical conclusion.

The 2nd defendant submits that the plaintiff has not taken any step whatsoever to prosecute the suit for

over 3 and half years and hence has lost interest in the matter. Since the plaintiff, it is submitted, has not sworn any replying affidavit in opposition to the application, the application is not opposed and no explanation has been offered hence she has lost interest in the case and it is therefore in the interest of justice that the suit be dismissed with costs for want of prosecution.

In her submissions the plaintiff reiterates what is stated in the replying affidavit and contends that the plot in question belonged to her late husband and that it is only fair and just that the issue of ownership be resolved by the Court once and for all. It is further submitted that the plaintiff is ready to prosecute this suit to its logical conclusion and if there is a mistake on the part of her counsel, the same should not be visited on the plaintiff.

I have considered all the matters raised in this application and this is the view I form of the matter.

**The decision whether or not to dismiss a suit is purely discretionary. However, like any other exercise of discretion, the same must be based on reason and should neither be based on sympathy nor exercised capriciously. Each case must ultimately be decided on its own facts and it must always be kept in mind the court should strive to sustain the suit where possible rather than prematurely terminating the same. In the case of Sheikh vs. Gupta and Others Nairobi HCCC No. 916 of 1960 [1969] EA 140 Trevelyan, J stated as follows:**

**"The purpose of rule 6 of Order 16 is to provide the court with administrative machinery whereby to disencumber itself of case records in which parties appear to have lost interest…In this matter the claim is now eight years, less four months, old and the plaintiff, so far as the court is concerned, has done nothing for more than three years to say the least. There is a prima facie negligence on the part of the lawyers or inexcusable delay on the part of the plaintiff or both, on his own say so. In deciding whether or not to dismiss a suit under rule 6 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 the instant case there has been both culpable and flagrant inactivity on the part of the plaintiff in respect of his smallish claim and he cannot bring himself within the set of circumstances as stated...It is the duty of the plaintiff's adviser to get on with the case. Public policy demands that the business of the courts should be conducted with expedition. It is of the greatest importance in the interest of justice that these actions should be brought to trial with reasonable expedition".**

The defendants have not claimed that they have been prejudiced by the delay. The only reason given in the supporting affidavit is that the plaintiff has lost interest in the matter and hence it is in the interest of justice that the suit be dismissed. As indicated above, the supporting affidavit was sworn by the advocate rather than the client. It has not been alleged that the witnesses are dead, or that the documents are lost or that the memory has faded. Clearly the supporting affidavit does not mention the impracticability of holding a fair trial as the prejudice to be suffered. It has been said time and again that counsel should not swear affidavit on disputed matters or matters that are likely to be disputed when the client is available and can depose to the said facts. The rationale for the said principle is not far-fetched. It is meant to insulate the advocate, an officer of the court, from the vagaries of litigation which, on occasions may be very unpleasant. By swearing an affidavit on such issues an advocate exposes himself to the process of cross-examination thus removing him from his role of legal counsel to that of a witness, a scenario which should be avoided by counsel at all costs. In my view, however innocent an averment may be, counsel should desist from the temptation to be the mouthpiece through which such an averment is transmitted. In this case, whereas the defendants blame the plaintiff for not swearing any affidavit, it is lost on the court that the defendants have similarly not sworn any. Both parties have left the matter in the hands of their advocates to get themselves embroiled in the arena of litigation. Prejudice is a factual matter and not a matter of law although courts do take judicial notice of the fact that nobody enjoys the fact of litigation hanging over their heads indefinitely and that a prolonged delay in prosecuting cases invariably causes unnecessary anxiety on the part of the persons who are to defend the suits hence the need to expeditiously get on with the suit. In my view, in matters where the defendant alleges prejudice resulting from long delay in prosecution a suit, it is prudent that the defendant himself or an authorised officer thereof swears the affidavit explaining the reasons why a fair trial cannot be expected after such a long delay.

In this case, the cause of action revolves around a plot of land in **Ongata Rongai** which was purportedly purchased by the plaintiff's late husband. Although it is not expressly indicated whether the plaintiff has obtained letters of administration to enable her sue on behalf of the estate of her late husband or the

capacity in which the suit is otherwise brought, that is a matter that cannot be decided at this stage. Suffice to say that the dispute is in respect of a parcel of land and taking into account that land is a very emotive feature in this country, Courts should as much as possible ensure that such disputes are determined on merit. This is not to say that in land disputes, the rules of procedure take a backseat. In this case it is alleged that when attempt was made in 2010 to fix the matter for hearing the file could not be traced. Whereas I have not seen any evidence to support that contention, I am prepared to give the benefit of doubt to the plaintiff in line with the overriding objective in sections 1A and 1B whose aims *inter alia* include the just determination of proceedings.

In the circumstances of this case I adopt the wise words of **Chesoni, J** (as he then was) in the case of **Ivita vs. Kyumbu[1984] 441**, that the test to be applied by the courts in an application for the dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and, if it is, whether justice can be done despite the delay and that 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 since it is a matter in the discretion of the Court.

Accordingly, I decline to dismiss the suit at this stage but direct the plaintiff to, within the next 30 days, complete all the pre-trial procedures and list the matter for hearing in default of which this suit shall stand dismissed with costs to the defendants. The defendants will have the costs of this application.

**Ruling read, signed and delivered in court this 5th day of July 2012**

**G.V. ODUNGA**

**JUDGE**

**In the presence of:**

No appearance for the Plaintiff

No appearance for the 1st defendant

Mr. Kamere for Mr. Kinyanjui for the 2nd defendant