REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

LAND AND ENVIRONMENTAL DIVISION

ELC CIVIL SUIT NO. 41 OF 2014

JOHN NGARUIYA…….....1ST PLAINTIFF

ROSEMARY NJERI NDENDERU..…….... 2ND PLAINTIFF

VERSUS

N.S.S.F BOARD OF TRUSTEES…….……..…...… DEFENDANT

R U L I N G

The Defendant's Notice of Motion application dated 4th July 2012 under Order 17 rule 2 (3) and order 40 rule 7 of the Civil Procedure Rules seeks orders that:-

(i) That the plaintiff's suit be dismissed with costs for want of prosecutions and or

Alternatively,-----

That the interim orders granted herein on 21st September 2005 and extended from time to time be discharged forth with and the Defendant be at liberty to take vacant possession of the suit premises, **L.R.NO.12948/172** and **L.R.NO. 12948/173** Mountain View Nairobi and in the event of resistance by the plaintiffs, their agents, servants, tenants and/or their employees, then the Defendant be at liberty to instruct a licensed auctioneer to undertake the repossession.

(ii) That the costs of this application and of the main suit be awarded to the Defendant/Applicant.

The application is based on the grounds set out in the body of the application as follows:-

(a)That for a period exceeding five (5) years now, the plaintiffs have not made any application nor taken any step towards prosecution of this suit.

(b) That the plaintiffs have apparently lost interest in their suit.

(c) That the continued pendency of this suit when no active steps are being taken to prosecute it is prejudicial to the Defendant in view of the subject matter of the suit herein which was sold to the plaintiffs by the Defendant on Tenant Purchase basis.

(d) That the arrears due and owing and still accumulating from the plaintiffs to the Defendant on account of the Tenant Purchase Agreements entered between the plaintiffs and the Defendant with respect to **L.R.NO. 12948/172** and **L.R.NO.12948/173** Mountain View Nairobi respectively as at 5th March 2010 stood at **Kshs.27,259,687.70/-** and **Kshs.13,635,206/-** respectively for each of the properties.

(e) That the effect of the pendency of the injunction orders earlier granted to the plaintiffs is that they have enjoyed interim injunction orders in perpetuity and without meeting any of their obligations under the Tenant Purchase Agreements signed earlier between the plaintiffs and the Defendant.

(f) That the injunction application dated 20th September 2005 and filed on 21st September 2005 has never been argued inter partes yet the plaintiffs continue to enjoy interim orders granted Ex Parte ad infinitum.

(g)That it is mete and just for the Defendant's application and the prayers sought therein to be granted as prayed.

The Application is further supported on the grounds of the affidavit sworn in support thereof by **Margaret Osolika** Legal Officer of the Defendant on 4th July 2012. The Defendant avers that the plaintiffs instituted the instant suit vide a plaint dated 20th September 2005 which plaint was filed simultaneously with an injunction application on the same date. On the 21st September 2005 the plaintiffs were granted an interim injunction exparte which interim order of injunction has been extended from time to time. The application was consequently heard interpartes and the injunction granted by **Hon. Lady Justice Mugo** on 31st July 2007 on terms that the injunction was to last until the hearing and determination of the suit.

The Defendant states that since the court ruled on the injunction application on 31st July 2007 the plaintiffs have not taken any further steps to prosecute the suit and avers that the plaintiffs are guilty of inordinate delay in preparing the suit for trial and appear to have lost any interest in prosecuting the same. The Defendant further avers that the continued pendency of this suit and particularly the interim order of injunction granted pending the hearing and determination of the suit is prejudicial to the interests of the Defendant. The Defendant states that the delay by the plaintiffs to prosecute and finalise the suit has resulted in the escalation of the tenant purchase installments due from the plaintiffs to the Defendant which as at 5th June 2012 stood at Kshs.30,986,631.00 in respect of **L.R.NO.12948/172** while in respect of **L.R. NO. 12948/173** the arrears were Kshs.5,509,442/90 as per the annexed copies of statements of account marked "**MO3(a) & (b)".**

The Defendant states that the plaintiffs have used the existence of the suit and the interim injunction as reason not to meet their obligations under the Tenant purchase Agreement and have occupied the houses for a period of over 4 years since the grant of the injunction free of charge to the utter prejudice of the Defendant.

The 1st Plaintiff, **John Ngaruiya,** swore a replying affidavit on 19th June 2014 in opposition to the Defendant's application. The 1st plaintiff admits the tenant purchase agreement with the Defendant and states that two other suits have been instituted relating to the suit property and refers to **HCCC NO. 786 of 2007 (Plaint annexed and marked "JNI**"). This suit did not involve the Defendant as a party. The plaintiff states that during the pendency of the suits there had been informal and formal negotiations to settle this matter amicably and annexes a letter dated 3rd November 2009 marked "**JN2**" to illustrate this fact. The 1st plaintiff further attributes delay in prosecuting the suit to his previous Advocate of the firm of **Muriuki Njagagua & Co. Advocates** is no longer in practice as he joined politics and is now a member of Parliament. The plaintiff further avers that his present firm of Advocates have taken the requisite steps in compliance with Order 11 of the Civil Procedure Rules and points to a letter dated 28/3/2014 marked **"JN3**" where the Advocates request the matter to be allocated a date for pretrial conference ostensibly to take pretrial directions. The plaintiff claims that has invested heavily in the suit

property and has ploughed all his savings into the property and any adverse orders as prayed for by the Defendant would be devastating. The plaintiff urges the court to preserve the property until the suit is heard and determined.

The parties filed written submissions to canvass and articulate their respective positions.

The Defendant's submissions dated 11th July 2012 were filed on 16th July 2014 while the plaintiffs submissions dated 19th January 2015 were filed on 21st January, 2015. The Defendant in his submissions took the position that the delay in prosecuting the suit on the part of the plaintiffs was inordinate and inexcusable and that it was in the interest of justice for the suit to be dismissed as its continued existence was prejudicing the Defendant in that the Defendant is unable and/or not free to deal with the suit properties as it wishes. The amounts owing by the plaintiffs on the suit property have continued to escalate owing to application of interest and the principle sum and interest very likely may outstrip the value of the properties to the prejudice of the Defendant.

The Defendant further submits that the interim order of injunction that was slapped over the suit property has afforded the plaintiffs a comfort zone since they have since 2007 continued in possession of the properties without any hindrance and yet make no payment to service the debt. The plaintiffs have in other words continued in occupation and possession of the suit properties without paying for them and continue to do so courtesy of the interim order of injunction granted herein. The Defendant in the premises seek a discharge of the order of injunction.

The plaintiffs in the submissions reiterate the facts as set out in the filed replying affidavit. The plaintiffs submit they were still in negotiations with the Defendant when the Defendant filed the instant application. The plaintiffs further submit that they have through their current advocates on record taken the necessary steps to comply with the provisions of order 11 of the Civil Procedure Rules to facilitate the setting down of the suit for hearing and in that regard the plaintiffs applied for the case to be fixed for mention for pretrial directions. The plaintiffs state there is a multiplicity of suits respecting the suit properties which fact the Defendant failed to disclose and this coupled with the fact that the plaintiffs have taken positive steps to have the matter progressed to hearing should disentitle the Defendant to the orders it seeks in the instant application.

The issue for determination in this application is whether the plaintiff has explained the delay in prosecuting the suit or shown reasonable and/or sufficient cause why the suit should not be dismissed for want of prosecution under the provisions of Order 17 Rule 2 (1) and (3) of the Civil Procedure Rules:

Order 17 Rule 2(1) provides:-

> **17. 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 and if cause is not shown to its satisfaction, may dismiss the suit.**
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> **(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.**

It is not the court that took the initiative to invite the parties to show cause why the suit should not be dismissed for want of prosecution though in the circumstances of this case the court could have properly done so given that from the court record the last action in the case before the filing of the present application on 4th July 2012 was when the court delivered its ruling in the application for injunction on 31/1/2007. Thus for well over 5 years there was no action or step taken to prosecute the matter. The Defendant took the initiative to make the instant application as it is entitled to do under Order 17 Rule 2 (3) and having done so the burden to show that the delay was not inordinate and was excusable shifted to the plaintiffs who all along had the obligation to ensure that their suit was prosecuted expeditiously.

In the case of **Ivita –vs- Kyumbu (1984) KLR 441 Cheson, J** laid down the principles upon which a court ought to proceed in considering an application for dismissal of a suit for want of prosecution. The court in that case inter alia held:-

"The test 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. 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".

The **Hon. Justice Cheson in the same Ivita –vs- Kyumbu case (supra**) went on to state thus:-

"Where the defendant satisfies the court that there has been prolonged delay and the plaintiff does not give sufficient reasons for the delay the court will presume that the delay is not only prolonged but it is also inexcusable and in such case the suit may be dismissed. To put in the words of Salmon LJ in Allen –vs- MC Alphine (1968) IALL ER at page 561, as a rule, when inordinate delay is established until a credible excuse is made out, the natural inference would be that it is inexcusable. It is an all time saying, which will never wear out however often said that justice delayed is justice denied".

The determination of whether the period of delay is inordinate or not is dependent on the particular circumstances of each case and the court ought to consider and evaluate the circumstances in every case to determine whether the delay is inordinate, and if so, whether the delay is inexcusable and whether having regard to the circumstances it is in the interest of justice that the suit be dismissed. See the case of **Utalii Transport Company Ltd & 3 others –vs- NIC Bank Ltd & Another (2014)**

eKLR where **Gikonyo Judge** in considering what constitutes inordinate delay observed thus:-

"Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case, the subject matter of the case, the nature of the case, the explanation given for the delay, and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs, the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate, and therefore inexcusable".

Applying the test outlined in the **Ivita –vs- Kyumbu (Supra)** and the guide provided by **Gikonyo Judge in the Utalii Transport Co. Ltd & 3 others –vs- NIC Bank Ltd & Another case (Supra**) to the circumstances in the present case my view is that the delay on the part of the plaintiff to prosecute the case was inordinate. Having been granted an interim order of injunction on 31st January 2007 it was incumbent on the plaintiffs to see to it that the suit was timeously prosecuted particularly because the property was subject to payment of tenant purchase installments and interest was bound to escalate if no payments were made . The order of injunction was granted in favour of the plaintiffs on the basis that the plaintiffs were tenants in possession and had demonstrated a purchasers interest and that it was essential to preserve that position until the suit was heard and determined.

The Defendant has referred this court to a ruling delivered by **Hon. Lady Justice Gacheru** on 21st October 2014 in **ELC NO. 1136 of 2004 Joseph Kotonya Aketch –vs- NSSF Board of Trustees & John Ngaruiya** (the latter as an interested party) As per the said ruling **ELC NO. 1136 of 2014** the plaintiff had sought to restrain the Defendant in the present suit from levying distress for rent arrears arising from the Tenant purchase Agreement the Defendant had entered into with the plaintiff in the present case. The plaintiff in the present case apparently had let out the premises to the plaintiff in **ELC NO. 1136 of 2004** and had further entered into an agreement to sell the property to the said Joseph **Kotonya Aketch,** the plaintiff in **ELC 1136 of 2004.** As per the ruling by **Gacheru ,J** the suit **ELC NO. 1136 of 2004** was dismissed for want of prosecution and the same had not been reinstated for hearing. The net effect of the ruling by **Gacheru, J** is that NSSF Board of Trustees the Defendant in that suit and the defendant in the present suit was granted orders to take vacant possession of the suit premises which are the same suit premises in contest in the present suit. The plaintiffs in the present suit clearly are not the persons who were in possession of the suit properties as the 1st plaintiff in his application for

joinder as an interested party in **ELC NO. 1136 of 2004** claimed the plaintiff, **Joseph Kotonya Aketch**, was his tenant and not a tenant of NSSF Board of Trustees as alleged.

I have made reference to **ELC 1136 of 2004** to illustrate the rather casual manner the plaintiffs herein have dealt with the matters attaching to the suit premises. In the present case, although the injunction application was determined on 31st January 2007 the plaintiffs have not in my view demonstrated that they took any steps to prosecute the matter until the Defendant filed the present application more than 5 years later. The claim that there were negotiations with the Defendant are not supported and the letter dated 3rd November 2009 marked "**JN2**" from the 1st plaintiff to the Defendant was nothing more than a proposal by the plaintiff which does not appear to have been responded to. It cannot support the plaintiffs assertion that they were negotiating an out of court settlement. As it appears there was no response to the letter by the Defendant what did the plaintiffs do? From the date of the letter to the date the instant application was filed a period of more than 2 ½ years had elapsed. There does not appear to have been any follow up on the alleged out of court negotiations. My view is that there were no such negotiations.

Considering all the circumstances of this matter I am persuaded and satisfied that the plaintiffs delay in prosecuting the suit was inordinate and inexcusable. The plaintiffs have not offered any viable explanation for the delay and I find no basis upon which I can exercise my discretion to sustain the suit. The Defendant in my view have demonstrated that the continued pendency of the suit and the interim order of injunction is prejudicial to them as they have not been able to recover the purchase price of the suit property in terms of the tenant purchase agreement. The Defendant has averred that the principal sum together with accrued interest arrears have grown such that they have outstripped the value of the suit properties and thus any further delay continues to prejudice their interests.

When parties come to court for the resolution of their disputes they ought to be determined to have their cases prosecuted and determined at the earliest possible moment. The primary obligation to have the case prosecuted rests with the party who brings the case to the court and in the instant case it is the plaintiffs who had the burden to move the court, they do not offer any acceptable explanation for their failure to do so. I find the application by the Defendant merited and I accordingly grant the same in terms of prayer 1 of the Notice of Motion. I order the plaintiffs suit dismissed with costs to the Defendant.

The Defendant is also awarded the costs of the application.

Ruling dated, signed and delivered this…**15th**….day of…**May….**2015.

J. M. MUTUNGI

JUDGE

In the presence of:

…….. for the Plaintiffs

…….. for the Defendants