



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CIVIL CASE NO. 79 OF 2004**

**ERIC OCHIENG' WERE ..... PLAINTIFF**

**VERSUS**

**PAUL BIRECH ..... 1<sup>ST</sup> DEFENDANT**

**ABERCOMBIE & KENT (K) LIMITE..... 2<sup>ND</sup> DEFENDANT**

**AND**

**STEVEN KURI CHEBOI ..... 1<sup>ST</sup> THIRD PARTY**

**PAUL KIBIRECH RUTO ..... 2<sup>ND</sup> THIRD PARTY**

**RULING**

1. By a Notice of Motion dated 28<sup>th</sup> May, 2014, the 2<sup>nd</sup> defendant through its advocates *Ms. Obura Mbeche & Company Advocates* moved this court praying that this suit be dismissed for want of prosecution and that the costs of the application and the suit be awarded to the 2<sup>nd</sup> defendant.

2.The application is premised on grounds that the plaintiff/respondent has demonstrated lack of interest in prosecuting the suit since he has failed to take any step to prosecute the matter for nineteen (19) months; that the delay is unexplained and inordinate; that the delay is causing anxiety on the 2<sup>nd</sup> defendant (hereinafter the applicant) and that the interests of justice requires that the application be allowed.

The application is also supported by an affidavit sworn by *Harun Musyoki*, the applicant’s Operations Manager. He basically narrated the history of the suit and re-iterated the grounds anchoring the motion.

3. The application is opposed through a replying affidavit sworn by *Ms. Mercy C. Ruto*, counsel on record for the respondent. Counsel started by enumerating the many applications that have been filed by the applicant in the suit which in her view contributed to the delay in having the suit heard. She averred that the respondent had made efforts to fix the case for hearing on 9<sup>th</sup> March, 2011 but hearing could not take off owing to the pendency of the instant application; that the delay has not been deliberate and has mainly been caused by the fact that they lost touch with their client who in his last communication indicated that his health had deteriorated and he needed to have his foot amputated. The foot had been injured in the accident that is the subject matter of the suit. She implored the court to give the plaintiff another chance to prosecute the suit.

4. The application was canvassed before me on 15<sup>th</sup> February 2017. Learned counsel *Ms Orwa* argued

the application on behalf of *Mr. Obura* for the applicant while *Ms Ruto* represented the respondent. Both counsel made brief submissions buttressing their client's respective positions.

5. I have considered the application, the affidavits filed by the parties, the court record and the submissions made on behalf of the parties. Under *Order 17 Rule 2 and (3)* of the *Civil Procedure Rules*, this court is empowered to dismiss a suit for want of prosecution if no cause is shown why no step towards a suit's prosecution had been taken for a minimum of one year or on application by a party.

6. The test in applications of this nature was succinctly laid out in the case of *Ivita V Kyumbu (1984) KLR 441* which was adopted by the Court of Appeal in *Rajesh Rughan V Fifty Investment Limited & Another Civil Appeal No. 80 of 2007 (2016) eKLR*. The test is whether the delay is prolonged and inexcusable and if it is, whether justice can still be done despite the delay. In that event, instead of dismissal, the court may exercise its discretion and set down the suit for hearing at the earliest possible time.

7. In this case, the delay complained about is for nineteen months but the record shows that on two occasions after the instant application was filed, the respondent twice fixed the suit for hearing but on both occasions, hearing could not take off owing to the pendency of the instant application. I hasten to add that from the record, it would appear that the applicant has also contributed to the delay in having this matter prosecuted by taking their time before fixing the instant application for hearing.

8. *Ms. Ruto* has explained that the delay in question was not deliberate but was occasioned by circumstances beyond the respondent's control; that she has now regained contact with her client and had already complied with *Order 11* of the *Civil Procedure Rules*; and, that if given another chance, the respondent will be ready to prosecute the suit.

9. From the foregoing, it is clear that the respondent has demonstrated sufficient interest in prosecuting the suit. Dismissal of a suit is a drastic action which has the effect of removing a party from the seat of justice. In my view, it should be resorted to only as a last resort in the clearest of cases where there is no doubt that the delay is prolonged and unexplained and the plaintiff has completely lost interest in prosecuting the suit. In such a case, it would not make any sense to try and salvage the suit.

10. In this case, since the plaintiff has demonstrated interest in pursuing his claim, in the interest of administering substantive justice so that the case may be heard on its merits and considering that the applicant is also entitled to a speedy resolution of the dispute, I will balance the scales of justice by granting the respondent another opportunity to prosecute his case but on condition that the suit shall be fixed for hearing within the next three months in default of which it shall stand dismissed with costs to the applicant.

It is so ordered.

**C.W GITHUA**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 30<sup>th</sup> day of March, 2017**

In the presence of:

Mr. Owalla holding brief for Miss Ruto for the respondent

Mr. Isiji holding brief for Mr. Oburu for the applicant

No appearance for the 1<sup>st</sup> and 3<sup>rd</sup> party

Mr. Lobolia court clerk