



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 510 OF 2013**

**VENESSA JEPCHUMBA RONO .....PLAINTIFF/RESPONDENT**

**VERSUS**

**EQUIP AGENCIES LIMITED .....DEFENDANT/APPLICANT**

**RULING**

1. The defendant herein has filed a notice of motion dated 10<sup>th</sup> January, 2017. It seeks to dismiss the plaintiff's suit for want of prosecution. The motion is supported by the affidavit of Zehrabanu Janmohamed. She contended that the plaintiff has, since the filing of this suit not taken any necessary steps to fix this matter for hearing or any steps towards disposing of the same. It was stated that the said delay is for a period of over three (3) years and is inordinate, unreasonable and inexcusable. That the defendant continues to suffer prejudice by the pendency of the suit which is an old matter that needs to be finalized.

2. In response thereto, the plaintiff filed grounds of opposition that; the application is premature pursuant to the provisions of **Order 11 of the Civil Procedure Rules, 2010**; that the defendant has not satisfied the conditions to be met to warrant the grant of the orders sought and that the application is misconceived and bad in law.

3. I have given due consideration to the rival depositions and submissions. The substantive law on dismissal of suits is **Order 17 rule 2 of the Civil Procedure Rules**. The said provision stipulates as follows:

***"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.***

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

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

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

4. The principles governing dismissal of a suit for want of prosecution are that; delay must be inordinate, the inordinate delay is inexcusable and the defendant is likely to be prejudiced by the delay. Chesoni, J. [as he then was] applied these principles in the case of ***IVITA V KYUMBU, [1984] KLR, 441***. He stated as follows in the said case:

*“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 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.”*

5. The decision was also cited in the case of MOSES MURIIRA MAINGI & 2 OTHERS V MAINGI KAMURU & ANOTHER, NYERI CA NO. 151 OF 2010 where the learned judge said:

*“The power of the court to dismiss a suit for want of prosecution is discretionary power, but which should be exercised judicially.”*

The plaintiff has submitted that the suit is not ripe for dismissal as pre-trial directions have not been given under **Order 11 of the Civil Procedure Rules** and in support of this contention, he has relied on the case of SISO TUTA RAWAMBA V KABANSORA CO LTD & ANOR, CIVIL CASE NO. 31/2006. The plaintiff has also submitted that the defendant has also contributed to the delay by its failure to file list of witnesses and witness statements.

6. This court has noted that the plaintiff filed her list of witnesses together with the statements way back in the year 2013 but thereafter, no other action has been taken in the matter. The fact that the defendant has not filed list of witnesses and their statements is not a reason for the plaintiff not to comply on her part and move the court for directions. It is the plaintiff’s duty to prosecute the case and not the defendants.

7. The delay of three years is in my view, inordinate and the plaintiff did not even attempt to explain the reasons for the delay but instead heaped blame on the defendant for failing to comply with **Order 11** and thus delaying the matter. This is notwithstanding the fact that the defendant submitted that it will not be calling any witnesses in the matter and hence no need on its part to file witness statements and list of witnesses.

8. However, in the interest of justice, the application dated the 10<sup>th</sup> January, 2017, is hereby dismissed but with no order as to costs. In view of the age of the matter, the court further orders that the same be prosecuted within 6 months from today, failing which, it shall stand dismissed.

**Dated, signed and delivered at Nairobi this 20<sup>th</sup> day of April, 2017.**

.....

**L. NJUGUNA**

**JUDGE**

**In the presence of:**

.....**for the Applicant**

.....**for the Respondent**