



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL SUIT NO. 116 OF 2011**

OLE KAJUADO COUNTY COUNCIL .....PLAINTIFF

VERSUS

ATHI STORES LIMITED ..... DEFENDANT

**RULING**

On 6<sup>th</sup> November, 2015 this court gave directions relating to the application dated 26<sup>th</sup> February, 2015 filed by the defendant herein for the dismissal of the suit. As the record of the court then appeared incomplete the defendant was required to avail a copy for the defence said to have been filed on 19<sup>th</sup> March, 2010. This has now been done.

Both parties filed submissions which I have read. The application is premised on the provisions of Order 17 Rule 2 (3) of the Civil Procedure Rules.

The pleadings were closed on 19<sup>th</sup> March, 2010 when the defence was filed. As at the time the application for dismissal was filed, it was more than 4 years yet no steps had been taken to prosecute the suit.

The plaintiffs' counsel has blamed the delay on misplacement of the file in the office and in the process of securing documents from his client precious time was lost.

As correctly submitted, the test is whether the delay is prolonged and inexcusable and whether justice can be done despite the delay. See **IVITA V. KYUMBU (1984) KLR 448 AT PG 440.**

I have related the application to the pleadings on record, the submissions by both learned counsel and the provisions of law ordinarily, courts should endeavour to sustain actions brought before them rather than dismissing the same. Where the interests of justice demand, every party in deserving cases should have his day in court.

Counsel for the plaintiff should have notified his colleague that he was having some challenges in his office and some indulgence was required. He did not do so. That notwithstanding, it would be wrong to blame that on the plaintiff. As often stated, the mistake of counsel should not be visited on the party.

The foregoing being the case, I am inclined to give the plaintiff an opportunity to advance its cause by taking appropriate steps to facilitate the hearing. In that regard, parties herein, shall comply with order 11 of the Civil Procedure Rules within 30 days from the date hereof.

The defendant shall be at liberty to move the court in the event there is laxity on the part of the plaintiff. That is to say, liberty to apply is reserved

The defendant shall have the costs of this application.

*Dated, signed and delivered at Nairobi this 15<sup>th</sup> day of March, 2016*

**A. MBOGHOLI MSAGHA**

**JUDGE**