



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**HIGH COURT CIVIL CASE NO.103 OF 1998**

**LAWRENCE KINYUA MWAI.....APPLICANT/PLAINTIFF**

**VERSUS**

**NYARIGINU FARMERS COMPANY LIMITED.....1<sup>ST</sup> DEFENDANT**

**FLORENCE WAIRIMU MUITA.....2<sup>ND</sup> RESPONDENT/DEFENDANT**

**RULING**

**Inordinate delay**

[1] By a Ruling delivered by this court on 24<sup>th</sup> November 2015, this court rendered itself as follows:-

*“That kind of service cannot be said to be have given Notice to the Applicant of the impending dismissal of his suit. Therefore, there is a glaring omission or irregularity on our part as a court of law which renders the order of dismissal of suit a candidate for setting aside ex debito justitiae. Accordingly, I set aside the order dismissing this suit on 6<sup>th</sup> July, 2015. The suit is thus resurrected. However, after perusal of the file, I should not leave the Applicant off the hook as fast as this is an old matter which should have left the shelves for active files to the archives if indeed the plaintiff was a diligent and keen litigant. I will, therefore, direct that the Applicant is now under notice under Order 17 rule 2 of the Civil Procedure Rules to appear before this court on the 2nd day of February 2016 and show cause why this suit should not be dismissed for want of prosecution. The delay in prosecuting this case calls for satisfactory account by the Applicant. He shall file an affidavit to that effect and serve it within 7 days of today. That is the reasons why I have not evaluated all the other explanations that have been offered in this case by the Applicant as they need to be properly evaluated in light of a proper notice to show cause. It is so ordered.*

[2] Accordingly, the Plaintiff was given Notice under Order 17 Rule 2 of the Civil Procedure Rules to appear before court and show cause why this suit should not be dismissed for want of prosecution. When the matter came up for mention on 3<sup>rd</sup> March 2016, the Plaintiff confirmed to court that he had filled an affidavit detailing the reasons why he had taken such long period of time without prosecuting his case. The Respondents did not file anything in court. Nonetheless, I should ask: Has the Plaintiff shown sufficient cause why he has not prosecuted his case? In other words should this case be dismissed for want of prosecution?

## Contentions by the Plaintiff

[3] The Plaintiff contended that he had severally complained to a person he described as “Registry Officer”, and the Executive Officer about the delay herein but his complaints were never resolved. He said that, on all these occasions, the Executive Officer did nothing except to tell him “*I will look into the problem*”. He further contended that after realizing that his problems were not being resolved, he lodged his queries to the Deputy Registrar who promised to deal with the problem; but no action was taken. He did not stop there. He further alleged that there are a myriad of causes of delay in this case, *inter alia* that “the file was missing” which he stated was just but a creation of the registry clerks. Some other times, he said that he was told that the court dairy is full. In others, that he could not get a date because he was unrepresented and he was not from Meru. He offered other reasons for the delay; that counsel for the defendant was not available on several occasions; and that the Judge in conduct of this matter was away several times attending seminars thus necessitating the matter to be taken out of the cause list.

[4] I am acutely aware that this is a consideration by the court as to whether this suit should be dismissed for want of prosecution under Order 17 Rule 2 of the Civil Procedure Act which provides that:

***“In any suit in which no appearance 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.”***

I am also quite alive to the fact that summary dismissal of a suit without hearing the merits is most draconian a judicial act, comparable only to the proverbial drawing of the sword of the Damocles. However, despite the unpleasant nature of the dismissal order, if it is the only appropriate measure to take in a proceeding, the court should not hesitate to take it. See what was stated in **Allen v Sir Alfred Mc Alpine [1968] All ER 543**:

***“To put right this wrong, we will in this court do all in our power to enforce expedition; if need be we will strike out actions where there has been excessive delay. This is a stern measure, but it is within the inherent jurisdiction of the court, and the rules of the court expressly permit it. It is the only effective sanction that they contain.”***

The question is: What are the facts of this case?

[5] I have carefully considered the explanations given by the Plaintiff on the delay in prosecuting this matter. I have also meticulously perused the record of the court and take the following view of this matter. The explanations for the delay as pleaded by the Plaintiff are that he had on several occasions complained to the Executive Officer and the Deputy Registrar about the delay in this case in vain. And that every time he tried to take a date at the registry he was told that the diary is full. In addition, he averred that on several occasions the Judge who was in conduct this matter had been away attending seminars. The record is abundantly clear; there is absolutely no iota of evidence that the Plaintiff had complained to the Executive Officer or the Deputy Registrar of this court about the delay in this matter. Similarly, there is no evidence whatsoever that the Plaintiff was told that the diary was full or that the Judge in conduct of this matter had been away attending seminars. Issues on discrimination by court officers in service delivery are serious matters of constitutional significance; but those allegations too were not backed by any evidence. The Plaintiff’s allegations, therefore, remained largely unsubstantiated and at very high level of generalization. But, is it still possible to do justice to the parties in this case despite the prolonged delay? See the test in the case of **IVUTI vs. KYUMBU (1984) KLR, 441, Chesoni, J. (as he then was)** that:-

***“The test applied by the courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and 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 time. It is a matter in the discretion of the court."***

[6] Doubtless, this case has been pending in court for 18 years now. And although there is no exact measure of what amounts to inordinate delay, certainly the delay in this case has been prolonged by the Plaintiff and is, therefore, inexcusable. Contrary to the Plaintiff's contentions, the delay in prosecuting this case- and this can be discerned from the record- has been occasioned by the plaintiff himself who has made applications after applications. I will, however, pick no bone with a party in a suit for embarking on numerous judicial journeys or for filing numerous applications as long as the plurality of those interventions is in earnest and legitimate quest for justice except where it is a mission to vex the other party or keep proceedings alive for reasons which only that party comprehends. That kind of conduct would be a source of injustice and injustice in its perfect form. I am not surprised Makau J in his ruling dated 18<sup>th</sup> March 2014 remarked inter alia that:

***"Before I come to the conclusion of this ruling, I wish to unfortunately note that this is a fairly old matter whose delay has been occasioned by myriad of applications that have been continuously filed by the plaintiff herein. That matter is also part heard having commenced hearing on 21/10/2014. I do not wish to comment on their merits or their necessity or otherwise but I have noted that they have continued to greatly delay the proceedings of this matter for both parties causing them a lot of anxiety and enormous costs and/or expense. I shall in view of Article 159 of the Constitution of Kenya 2010 bearing in mind justice delayed is justice denied, direct and order that all pending applications be set down for hearing within the next 30 days from today or be withdrawn for failure of setting them down for hearing or be deemed as abandoned and this matter be set down for hearing and determination on merits and on priority basis. That if any further application is to be filed in this matter it be filed with the leave of the court, so as to ensure this matter comes to its conclusion without further delay. Sixteen years of waiting is mockery of justice and unjustified to say the least. I find 16 years of waiting for hearing and determination of a suit of this nature to be a great injustice to the parties."*** (Underlining mine)

[7] I need not say more. This matter has never been set down for hearing despite the court's directions that the matter be set down for hearing so that it can be determined on priority basis. The reasons given for the failure to prosecute this case are not substantiated; they are not satisfactory at all. Therefore, taking into account the totality of the circumstances of this case, delay in prosecuting this case has not been explained. Accordingly, the delay is inordinate and inexcusable. I am minded to state that the old-age adage, justice delayed is justice denied, has now found expression as a principle of justice in article 159 of the Constitution. And where delay is contumelious as is the case, subsistence of the case becomes a source of prejudice to the other parties as well as to the process of court. Such temporizing of judicial proceedings in *ad infinitum* is much loathed by Equity. Now therefore, no cause has been shown to the satisfaction of the court as required under Order 17 Rule 2 of the Civil Procedure Rules, and with much trepidation, I dismiss the suit with costs to the defendants. This measure is quite unpleasant, but the most appropriate to take in these proceedings. It is so ordered.

**Dated, signed and delivered in open court at Meru this 28<sup>th</sup> day of April 2016**

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**F. GIKONYO**

**JUDGE**

**In the presence of:**

M/s. Mbaikiata advocate for Mr. Mutunga advocate for the 2<sup>nd</sup>  
respondent.

Applicant- absent

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**F. GIKONYO**

**JUDGE**