



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 434 OF 2005**

**SIMON PETER NJERU GICHUKI.....PLAINTIFF**

**VERSUS -**

**P. WAMBUGU KARIUKI t/a**

**WAMBUGU KARIUKI & ASSOCIATES  
ADVOCATES.....DEFENDANT**

**RULING**

1. The defendant has asked the court to dismiss the suit for want of prosecution.
2. It is the defendant's case that the Plaintiff has not taken any steps to prosecute the suit for over 16 months, by the time the application was filed.
3. The Plaintiff is said to have failed to offer any proper explanation for the failure to prosecute the suit.
4. By failing to prosecute the suit, the plaintiff is said to have failed to discharge his primary duty, which was to prosecute the case that he had lodged against the defendant.
5. There is no doubt that parties are expected to facilitate the expeditious, just and affordable disposal of suits. That means that the defendant was expected to desist from placing hurdles in the pathway along which the plaintiff was moving along the case.
6. However, as the case was one instituted by the Plaintiff, it is the plaintiff's primary duty to move the case forward.
7. On his part, the defendant may either take steps to move forward the case or he may, if there is inordinate delay, apply for the dismissal of the suit for want of prosecution.
8. Mr. Ndambiri, the learned advocate for the defendant, submitted that the interest of justice could be served by the dismissal of the suit.
9. In answer to the application, Miss Mumbi, the learned advocate for the plaintiff, submitted that the plaintiff had taken steps to fix the case for hearing.
10. The reasons way the court did not fix a hearing date it because the diary for 2014 was already full, by the time the parties attended at the Registry, for the purposes of fixing a trial date.

11. The plaintiff alluded to another attempt which was allegedly made in 2015, with a view to fix the case for hearing. However, as the plaintiff had not filed any affidavit to answer to the application, the court did not have proof of that step which was allegedly taken in 2015.

12. When a plaintiff delays inordinately in the prosecution of his suit, the defendant may be prejudiced. Secondly, it is possible that both parties may be prejudiced due to factors such as loss of memory on the part of witnesses.

13. In this case, the defendant said that the delay was exposing him to endless anxiety of defending a suit which the plaintiff was not prosecuting.

14. Perhaps the message which the defendant intended to relay, did not reach me clearly. I say so because for as long as the plaintiff was not prosecuting his case, the defendant would not have to respond to the inaction.

15. Nonetheless, I believe that the very fact that a case was pending against the defendant, does give rise to anxiety.

16. In this case the defendant had filed a Defence and counterclaim. It is the defendant's claim that he gave to the plaintiff, the sum of Kshs.100,000/= out of the money which the defendant had received under the professional undertaking to the law firm of **G. J. MAINYE & COMPANY ADVOCATES**.

17. The defendant also claimed that the plaintiff had not settled his professional fees, for the services which the defendant had rendered to the plaintiff prior to 23<sup>rd</sup> March 2005. Consequently, the defendant indicated, (*in his counter claim*) that he would be seeking orders for the taxation for this advocate/client costs.

18. In the light of the counter claim, I hold the considered view that the said counter claim was so intertwined with the plaintiff's claim, that the only way to have the defendant's claim adjudicated, would be by making a cross-reference to the Plaintiff's claim

19. In effect, the interests of justice dictate that the Plaintiff's claim be sustained.

20. This decision was also influenced by the fact that the court had already certified the case as being ready for trial. Therefore, it was possible to move forward the case, to trial, without any further delay.

21. Accordingly, the application dated 15<sup>th</sup> March 2016 is dismissed. I order that the costs of the said application shall be in the cause. I so order because although the application was not successful, there can be no justification in ordering the defendant to pay costs to the plaintiff. As the preservation of the suit serves the interest of both parties, it was only fair and just that whoever was ultimately successful at the trial should also be awarded the costs of the application herein.

**DATED, SIGNED and DELIVERED at NAIROBI this 29 day of June 2016.**

**FRED A. OCHIENG**

**JUDGE**

**Ruling read in open court in the presence of**

Miss Mumbi for the Plaintiff

Miss Omari for Ndamburi for the Defendant

Collins Odhiambo – Court clerk.