



**IN THE HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**MISCELLANEOUS CIVIL CAUSE NO. 902 OF 2001**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**UNIVERSITY OF NAIROBI ..... RESPONDENT**

***EX PARTE***

**1. ANDREW B. OCHOLLA AYAYO & OTHERS**

**2. JOPLEY C. OYIENG'**

**RULING**

1. The Notice of Motion before the court is dated 21<sup>st</sup> December 2012 and it seeks to strike out the suit on the following grounds;
  - i. *There has been inordinate delay in setting the matter for hearing.*
  - ii. *That the application is fatally defective under Order 53 of the Civil Procedure Rules.*
  - iii. *That the application has been amended several times, parties added to the suit without leave and no notice issued to those parties.*
  - iv. *That the delay has caused the respondent undue prejudice.*
  - v. *That there has been an abuse of the court process.*
2. The application is supported by the affidavit of Prof. Peter M.F. Mbithi sworn on 21<sup>st</sup> December 2012 in which he sets out the history of the matter.
3. The cause of action in the matter is that the *ex parte* applicant was suspended from employment in the year 2000 hence he filed the suit seeking orders of certiorari and mandamus in respect of his subsequent dismissal from service. The respondent's main contention is that despite the matter being ready for hearing it has not been prosecuted since it was last in court on 7<sup>th</sup> June 2012. The application for consideration was filed on 16<sup>th</sup> January 2013.
4. The said application has been before the court several times namely; 20<sup>th</sup> September 2013, 22<sup>nd</sup>

October 2013, 3<sup>rd</sup> December 2013 and 17<sup>th</sup> December 2013. On 3<sup>rd</sup> December 2013, the *ex parte* applicant appearing in person requested for time to respond to the application and as a result the matter was adjourned to 17<sup>th</sup> December 2012. On that date, the *ex parte* applicant had not filed a replying affidavit but he stated it was ready. He also stated that he had not been served. I ordered that he files his affidavit since he was ready but he did not attend court after the matter was adjourned to enable him attend the registry.

5. When the matter came up today, 20<sup>th</sup> January 2014, the matter was called out at 9.00am, 11.00am and 11.45 am. The *ex parte* applicant was not present. Both counsel for the respondent and my clerk confirm that he was in court after the matter adjourned briefly but he left without explanation. In fact, my clerk called me on the ground that the *ex parte* applicant was in court.
6. In my view therefore, the matter is not opposed. I shall limit my decision to the delay in prosecuting or taking steps to prosecute the matter. The *ex parte* applicant has not taken any step to fix the matter for hearing since it was last adjourned on 7<sup>th</sup> June 2012. Likewise, he has not deemed it fit to explain the delay by filing an affidavit in opposition to the application. In my view, the fact that the cause of action arose in 2001 means that the respondent continues to suffer prejudice over the inordinate delay caused by failure to prosecute the suit.
7. In the circumstances and for the reasons I have stated, the Notice of Motion dated 8<sup>th</sup> March 2002 is dismissed for want of prosecution with costs to the respondent.

**DATED and DELIVERED at NAIROBI this 20<sup>th</sup> day of January 2014**

**D.S. MAJANJA**

**JUDGE**

**Ms Makobu instructed by Kilonzo and Company Advocates for the respondent.**