



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO 345 OF 2010

JOHN GACHOKA WAIRAGU.....PLAINTIFF

VERSUS

MUNICIPAL COUNCIL OF LIMURU.....DEFENDANT

R U L I N G

1. This is an application by the Defendant (**notice of motion dated 16th September 2013**) under **Order 17, rule 2 (3)** of the **Civil Procedure Rules, 2010** (the **Rules**) seeking dismissal of the Plaintiff's suit for want of prosecution.

2. The grounds for the application appearing on the face thereof include –

- (i) That the Plaintiff has not taken any active steps or at all towards prosecution of the suit since it was last in court on 6th April 2011.
- (ii) That pendency of the suit indefinitely has caused unnecessary anxiety to the Defendant, besides adding to the backlog of cases in the **Judiciary**.

There is a supporting affidavit sworn by the Defendant's advocate, **Lydia Kinyanjui-Ciera**.

3. The Plaintiff has opposed the application by **replying affidavit filed on 30th January 2014** sworn by him. He has explained the delay in prosecuting his case as follows, *inter alia* –

- (i) That the **Judiciary** has been experiencing a shortage of judges, which cannot be blamed on him.
- (ii) That the 2013 diary of the **Civil Division** closed before 2nd April 2013, and no hearing dates were available since then.
- (iii) That he is “very eager” to prosecute his case.

The Plaintiff has also deponed –

- (i) That the present application is intended to delay the matter further as the court diary for 2014 was to be opened in late September or early October 2013, and it is not possible to take a hearing date with the present application pending.

(iv) That the Defendant should have set the suit down for hearing instead of filing the present application.

4. I have considered the submissions of the Defendant's learned counsel and those of the Plaintiff who was unrepresented. I will state at the outset that the Defendant cannot be faulted for duly exercising his right granted by the Rules to seek dismissal of the Plaintiff's suit for want of prosecution.

5. There is no satisfactory explanation for the inactivity of the Plaintiff from 6th April 2011 when a ruling on the application to strike out the suit was delivered. The present application was filed on 16th September 2013. That is a delay of 2 years and five months, which is inordinate. The Plaintiff has not exhibited any letter to show that he ever invited the Defendant to fix a date for hearing; nor has he demonstrated that he has prepared the suit for trial by meeting the mandatory requirements of **Order 11** of the Rules.

6. But even without satisfactory explanation for delay, the court will not dismiss a suit if it is satisfied that a fair trial of the action will still be possible. See the case of **Njuki Gachugu –vs- Githi [1977] KLR 108**. There is no allegation that a fair trial will no longer be possible, or that the delay has resulted in undue injustice to the Defendant. See **Ivita –vs- Kyumbu [1984] KLR 441**.

7. Dismissal of a suit unheard is a drastic remedy; the court's inclination should be to preserve the suit for a hearing on the merits, if that is still possible without undue prejudice to the Defendant. In the present case a fair trial of the action is still possible. I must therefore refuse the application upon the following conditions –

(i) The Plaintiff must take demonstrable steps within thirty (30) days of delivery of this ruling towards prosecution of the suit. In this connection there shall be liberty to apply

(ii) The Plaintiff shall pay the Defendant's costs of this application, hereby assessed at KShs 15,000/00, within 14 days of delivery of this ruling. In default the Defendant may execute for the same.

7. Those shall be the orders of the court.

DATED AT NAIROBI THIS 18TH DAY OF MARCH 2014

H P G WAWERU

JUDGE

DELIVERED THIS 21ST DAY OF MARCH 2014