



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**

**HCCC NO. 131 OF 2007**

**JOSEPH KOBIA.....1<sup>ST</sup> PLAINTIFF**  
**ZAKAYO IMAANA.....2<sup>ND</sup> PLAINTIFF**  
**EDWARD MWITI.....3<sup>RD</sup> PLAINTIFF**  
**JEREMANO MUTUMA.....4<sup>TH</sup> PLAINTIFF**  
**SILAS AUNGA.....5<sup>TH</sup> PLAINTIFF**  
**CELINA KARIMI.....6<sup>TH</sup> PLAINTIFF**  
**MUKARIA BIRITHIA.....7<sup>TH</sup> PLAINTIFF**  
**RAEL NKIROTE.....8<sup>TH</sup> PLAINTIFF**  
**PETER KANG'ENTU.....9<sup>TH</sup> PLAINTIFF**  
**AGATHA M. FRANKLIN.....10<sup>TH</sup> PLAINTIFF**

***(ALL OF KIEGOI FARE TRADE PREMIMUM COMMITTEE).***

**VERSUS**

**J. K. MUBEA.....DEFENDANT**

**RULING**

The applicant J. K. MUBEA through an application dated 6<sup>th</sup> May, 2013 brought pursuant to Order 17 Rule (1),(3) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeks that the plaintiffs suit herein be dismissed for want of prosecution. The application is premised on the grounds on the face of the application inter alia: that more than 4 years had lapsed without the plaintiffs setting the suit down for hearing, that the plaintiff have depicted a lack of willingness to prosecute the suit herein and litigation must come to an end and that no prejudice shall be occasioned on the plaintiffs upon dismissal of this suit. The applicant further relied upon a supportive affidavit of Mr. Kaberia Arimba, learned Advocate who was by then acting for the defendant/applicant. He deponed that the suit was filed through a plaint dated 4.6.2008 and the plaintiffs have not demonstrated interest in prosecuting the suit and the

suit should be dismissed as the dismissal will not occasion any loss to the plaintiffs.

The plaintiffs/respondent filed a replying affidavit through their then advocate Mr. V. P. Gituma, learned Counsel, who made spirited arguments before this court on 5.4.2014 the day on which he met his death, this court gives condolences to his family, members of Law Society of Kenya and his friends.

The late Counsel deponed that he had authority from the respondents to file the affidavit in opposition of this application. That the suit was set down for hearing on 17<sup>th</sup> November, 2010 whereby by consent of both counsel the suit was adjourned to enable parties comply with Order 10 Rule 1 of Civil Procedure Rules. That the applicant partially complied with court's order by filing list of documents but left out statements of witnesses and list of witnesses. That the plaintiffs invited the applicant to meet at the registry on 15/1/2013 to get a hearing date but the court file was unavailable.

When the matter came up for hearing on 5<sup>th</sup> March, 2013 Mr. Nyaga Nyamu learned advocate held brief for Mr. Omari learned advocate for the applicant whereas the late Mr. V. P. Gituma, learned advocate appeared for the plaintiffs.

I have carefully considered the pleadings, the application and grounds in support as well as the affidavit thereto, the replying affidavit on behalf of the plaintiffs and the annexures by the plaintiffs in support of their opposing position. I have also considered oral submissions by both counsel as well as their opposing positions.

The issue for determination in this application is whether the application has met the test applied by courts in an application for dismissal of a suit for want of prosecution.

In the case of **IVITA V KYUMBU (1984) KLR 441 Chesoni, J**, as he then was held that: -

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

In the instant suit on 17/1/2010 the trial court ordered parties to carry out discoveries, inspection of documents in compliance with Order X Rule (1) of the Civil Procedure Rules within 30 days.

Further upon coming into force of Civil Procedure Rules, 2010, the parties were in accordance with Order 3 Rule 3 of the Civil Procedure Rules required to file and exchange the list of witnesses list of exhibits and statement of witnesses. The parties were also before setting the matter down for hearing required to comply with Order II of the Civil Procedure Rules, 2010.

The plaintiffs filed list of documents on 22/2/2011. List of witnesses and witnesses statement on 8<sup>th</sup> December, 2011. The applicant/defendant filed list of documents on 7/9/2011 and nothing else. The applicant/defendant did not on his part comply with the provisions of Civil Procedure Rules which are mandatory before a suit can be set down for hearing. It is indeed the defendant who has delayed the hearing and determination of this matter by failing to comply with court's order and mandatory provisions of Order 3 Rule 2 and Order 11 of the Civil Procedure Rules. The suit as it stands is not and has not been ripe for hearing. The applicant is entirely to blame for the failure to have the plaintiffs suit set down for hearing. The applicant's application with all due respect is an abuse of the court process and intended to cause further delay in hearing and determination of the plaintiffs suit on merits.

The suit as it stands has not been prepared for hearing as per mandatory provisions of the Civil Procedure Rules and as such it cannot be set down for hearing unless court allows the plaintiffs who have complied with mandatory provisions to set the suit down for hearing notwithstanding non-compliance by the

defendant. I find no delay on part of the plaintiffs and as such the plaintiffs are under no obligation to give any explanation for the purported delay. In view of the above I find that delay is not due to the delay of the plaintiffs; I need not consider other tests that need to be considered in an application for dismissal of suit for want of prosecution.

Having considered the fact that the court ordered parties to file their respective documents on 17/1/2010 and the plaintiffs having complied whereas the defendant is yet to do, in the interest of justice and in compliance with Order II of the Civil Procedure Rules I direct that the plaintiffs do set this matter down for hearing if the defendant/applicant will not have complied within the next 30 days from today as this is an old matter and litigation has to come to an end in one way or the other.

The upshot is that the applicant's application dated 6<sup>th</sup> May, 2013 is without merits and the same is dismissed with costs to the plaintiff.

***DATED, SIGNED AND DELIVERED AT MERU THIS 9<sup>th</sup> DAY OF APRIL, 2014.***

**J. A. MAKAU**

**JUDGE**

**Delivered in open Court in presence of:**

1. Respondent - present

Mr. Omari for the applicant/defendant

**J. A. MAKAU**

**JUDGE**