



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

**HCCC NO. 107 OF 2010**

**PETER BARASA RAJABU ::::::::::::::::::::::::::::::::::::::: PLAINTIFF**

**=VERSUS=**

**UNIVERSITY OF EAST AFRICA BARATON ::::::::::::::::::::::::::::::: DEFENDANT**

**RULING**

The Defendant prays that the Plaintiff's suit be dismissed for want of prosecution. By a notice of motion dated 6th December, 2013, it is pleaded that the Plaintiff is disinterested in prosecuting the suit. It is averred that the suit has never been set down for hearing since the year 2010. It is also two years since the matter was last in court on 5th December, 2012. the Defendant submitted that it is prejudiced by the suit. Lastly, the Defendant submitted that this is a proper case for dismissal under order 17 rule 2 of the Civil Procedure Rules 2010.

The motion is contested. There are filed grounds of opposition dated 18th June, 2014 and a replying affidavit of the Plaintiff sworn on 18th June, 2014. In a Synopsis, the Plaintiff states that he changed advocates who filed a notice of change of advocates dated 25th May, 2013 and served on the Defendant's on 25th November, 2013. Accordingly, a year has not lapsed as envisaged by order 17 of the Civil Procedure Rules 2010. It is deposed that the Plaintiff 's counsel is now in the process of complying with Order 11 of the Rules. As the matter revolves around the rights of a student at the Defendant university, I was urged not to dismiss the suit. Furthermore, my attention was drawn to the overriding objective of the Court and Article 159 (2) (d) of the Constitution. In a nutshell, the Plaintiff pleads to remain on the throne of justice.

I have heard the rival submissions. Facts can be very stubborn. The fact is that this suit was filed on 13th August, 2010. The High Court is a Court of record. That records shows that the last time the parties appeared before the Judge was on 5th December, 2012 when the Plaintiff's motion dated 7th September, 2011 was dismissed. To date, the Plaintiff has never moved the registry for a date. The Plaintiff has never complied with order 11 of the Civil Procedure Rules on discovery or settlement of issues for trial. The suit is over four years old and has lain dormant for the last two years. True, the suit is over the rights of the Plaintiff as a student at the Defendant university: but it then believed the Plaintiff to be even more diligent in prosecuting the matter. True, the Plaintiff appointed new counsel, Wachakama & Co. Advocates way back on 25th March, 2013, They have not set down the suit for hearing or taken concrete steps in that direction. Their notice of change of Advocates was served late on 25th November, 2013 upon the Defendant's Counsel. Time under order 17 rule 2 does not run from the date of that service of a notice of change of advocates. It runs from the last step taken. I am afraid that no step to *prosecute* the suit or even to *prepare* it for trial has been taken since 5th December, 2012, over two years ago.

Granted those circumstances, the motion for dismissal is well anchored upon Order 17 rule 2 of the

Civil Procedure rules 2010. It is the Plaintiff's duty to get on with the case. There is a pattern of delays that have not been well explained or at all. When delay is established, unless it is explained, it is deemed to be inexcusable. See *Ivita -V- Kyumbu* [ 1984] KLR 441. The Defendant is prejudiced by the inert grip of the Plaintiff. The Defendant is held in abeyance. The Defendant has elected to move for dismissal of the Suit. Order 17 rules 2 and 3 entitle it to do so. This Court is satisfied that a period of two years has lapsed without any step being taken to prosecute the suit. In such circumstances, the court is entitled to dismiss the suit for want of prosecution. See **Fitspartrick -v- Batger & Company Limited** [1967] 2 All ER 657, **Mukisa Buscuit Manufacturing Company -v- Westend Distributors Limited** [1969] E.A. 696.

I am alive to the Overriding Objective. Article 159 (2) (d) of the Constitution does not mean that procedural rules will be completely disregarded. It only calls upon the Court to give them undue regard. In this case, there is no plausible or good reason for the delay. From the nature of the case, the Plaintiff should have been more diligent. I am thus minded to dismiss the suit for want of prosecution. The suit is dismissed. Considering the circumstances of the Plaintiff, and that the Defendant could itself have fixed a date for hearing, and in the interest of justice, I decline to order costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET IN OPEN COURT THIS 19TH JUNE, 2014.**

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**G.K. KIMONDO,**

**JUDGE.**

**Ruling read in open Court In the presence of:-**

Mr. Omusundi : for Plaintiff  
Mr. Momanyi : for Defendant  
Mr. Weyama, : Court/clerk.

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**G.K. KIMONDO**

**JUDGE**

**19/06/2014**