

9. From the foregoing account, it is plain that the Plaintiff made numerous attempts to prosecute this matter. Indeed, the attempts were frustrated on numerous occasions for reasons beyond the Plaintiff's control. However, the last time an action was taken on this matter seems to be **16th January 2013**. This is when the Plaintiff filed a hearing notice which was scheduled for **11th February 2013**.
10. It is averred for the Plaintiff that upon serving the Defendant's Advocates with the hearing Notice, the said Advocates informed the Plaintiff's that the Defendant had taken out a receiving order. The Defendant's Advocates further informed the Plaintiff's that they were unable to represent the Defendant and were making the requisite application to cease acting. This was via a letter dated **30th January 2013**.
11. According to the deponent, the Plaintiff is yet to be served with the application to cease acting. He also states that the Plaintiff has not received any notice of the receiving order as against the Defendant. This begs the question, for how long is the Plaintiff going to wait for an action from the Defendant before getting on with its case?
12. In ***Fitzpatrick Vs Batger & Co. Ltd [1967] 2 ALL ER 657*** Lord Denning, citing his decision in ***Reggentine Vs Beecholme Bakeries Ltd [1967] 111 Sol. Jo. 216***, said as follows;

"It is the duty of the plaintiff's advisers to get on with the case. Public policy demands that the business of the courts should be conducted with expedition . . . the delay is far beyond anything we can excuse. This action has gone to sleep for nearly two years. It should now be dismissed for want of prosecution".

13. In view of the above case it is common ground that it is upon the Plaintiff to move or prosecute its case. The Plaintiff's reason for not doing anything about the matter in Court for over one year is that they were waiting for some sort of actions from the Defendant. The actions being to be served with an application to cease acting and a Receiving Order by the Defendant.
14. There is no indication that the Plaintiff attempted to pursue the performance of the said actions by the Defendant. Further, it is uncertain as to when the Defendant will undertake such actions for the Plaintiff to get on with its case.
15. In short, I am not convinced that the Plaintiff has given substantive reason(s) for the failure to take an action on this matter for over one year. As regards Notice To Show Cause, **Order 17 rule 2 (1)** of the **Civil Procedure Rules** states thus:-

(1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit. Underlining supplied

The reading of the above section shows that the said rule is not drafted in mandatory terms. It therefore means that the Judge has discretion to either dismiss a suit or allow the party to prosecute it, notwithstanding that sufficient cause has not been shown.

16. In light of the above, I am inclined to exercise my discretion in favour of the Plaintiff. I take note of the fact that the Plaintiff on several occasions strived to prosecute the suit with no success for reasons beyond them. I also take note of the fact that the Plaintiff filed an affidavit and attempted to give reasons why no step had been taken on the matter for over a year. I cannot therefore hold that the Plaintiff has been lethargic in prosecuting its case.
17. In the upshot, I allow the Plaintiff to prosecute its case and to fix a date for hearing within thirty days of this ruling.

DATED, READ AND DELIVERED AT NAIROBI

THIS 13TH DAY OF JUNE 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Osoro holding brief for Ndirangu for Plaintiff

No appearance for Defendant

Teresia – Court Clerk