



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

**CIVIL DIVISION**

**CIVIL CASE NO 311 OF 2004**

**GEORGE OTIENO SIRRO.....PLAINTIFF**

**VERSUS**

**1. SCHON NOORANI**

**2. JACK & JILL SUPERMARKET.....DEFENDANTS**

**R U L I N G**

1. This is an application by the Defendants (**notice of motion dated 25<sup>th</sup> November 2014**) 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. **Sections 1A and 1B** of the **Civil Procedure Act** (the **Act**) are also cited.

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

- (i) That the Plaintiff has not taken any step in the matter for over two years as it was last in the cause list on **27<sup>th</sup> October, 2011** when it was taken out.
- (ii) That the Plaintiff has breached the overriding objective of expeditious disposal of cases in civil litigation.
- (iii) That the Defendants continue to suffer prejudice as there is a real risk that evidence will be lost due to the passage of time.

There is a supporting affidavit sworn by the Defendants' advocate, **Gacheru Ng'ang'a**.

3. The Plaintiff has opposed the application by **replying affidavit filed on 10<sup>th</sup> June 2014** sworn by **Robert Havi**, his Counsel. He has explained the delay in prosecuting his case as follows –

- (i) That he has on several occasions fixed the matter for hearing although the court file has gone missing numerous times.
- (ii) That the **Civil Division** has been experiencing a shortage of judges, which cannot be blamed on him.
- (iii) That it is in the interests of justice that the suit be determined on its merits.

4. When the application came up for hearing on 11<sup>th</sup> June 2014, counsel for the Defendants orally applied for an order to expunge from the court record, the replying affidavit as it had been filed out of time. Counsel for the Plaintiff did not respond to this.

5. The said affidavit was most certainly filed out of time. Three clear days before the hearing were required to have been given upon the filing of the affidavit. However, disputes are best resolved on merit. Since the replying affidavit is now on record, notwithstanding that it was irregularly filed, I will consider it.

6. There is no satisfactory explanation for the inactivity of the Plaintiff from 27<sup>th</sup> October 2011 when the matter was taken out of the hearing list of the day to 20<sup>th</sup> January 2014 when the present application was filed. That is a delay of 2 years and three 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.

7. 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. The Defendants contend that a fair trial will no longer be possible as there is a risk that evidence will be prejudiced due to the age of the matter. The Plaintiff on his part has undertaken to comply with any conditions that the court might impose.

8. 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 will therefore refuse the application. But I will impose the following conditions –

(i) The Plaintiff must take demonstrable steps within thirty (30) days of delivery of this ruling towards prosecution of the suit.

(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 Defendants may execute for the same.

9. Those shall be the orders of the court.

**DATED AND SIGNED AT NAIROBI THIS 17<sup>TH</sup> DAY OF JULY 2014**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF JULY 2014**