



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 526 OF 2010**

**HARRY KABIRU GITUNDU T/A PREET STUDIO.....PLAINTIFF**

**VERSUS**

**VIKTAR MAINA NGUNJIRU.....DEFENDANT**

**RULING**

1. Before me is a Notice of Motion dated 31<sup>st</sup> January, 2013. It is expressed to be brought under Sections 1A and 1B of the Civil Procedure Act (the Act) and Orders 51 Rule 1, 17 Rule 2 and 11 of the Civil Procedure Rules, 2010. The Applicant seeks the dismissal of this suit for want of prosecution.
2. The application is premised on the grounds that the plaintiff has, since the filing of this suit on 4<sup>th</sup> November, 2010, taken no steps to prosecute it. The application is supported by the affidavit of Viktar Maina Ngunjiri sworn on 31<sup>st</sup> January, 2013. He stated that the suit was filed on 4<sup>th</sup> November, 2010, the defendant was served with summons to enter appearance on 8<sup>th</sup> November, 2010, a memorandum of appearance was filed on 22<sup>nd</sup> November, 2010, and served on the plaintiff on 1<sup>st</sup> December, 2010, a request for particulars was filed on 17<sup>th</sup> December, 2010 but has not been responded to by the plaintiff; a notice of discovery was served on the plaintiff on 20<sup>th</sup> January, 2011 and the said has not been responded to. He stated that Order 3 Rule 2 and Order 11 have not been complied with.
3. The application is opposed vide the replying affidavit of Harry Kabiru Gitundu sworn on 21<sup>st</sup> October, 2014. The respondent attributed the delay in prosecuting this suit to his former counsels Mr. Mutuli and Apopo's suspension by Law Society of Kenya from practice since the year 2013. He attempted to explain that the he subsequently appointed the firm of A.F. Gross and Company Advocates who have since been pursuing the file from Mr. Apopo. He contends that the Applicant has not demonstrated that he stands to suffer prejudice that cannot be compensated by costs by his delay in prosecuting this suit.
4. The parties herein reiterated the averments in their affidavits in their submissions.
5. I have considered the affidavits on record and the rival submissions. The issue falling for this court's determination is whether or not the delay in prosecuting this suit is inordinate and inexcusable and whether or not the Applicant is likely to be prejudiced by the delay.
6. There is obviously a delay in prosecuting this suit. The delay is said to have been occasioned by the suspension of his previous Advocates and his new advocates, A.F. Gross and Company

Advocates have been pursuing the file from Mr. Apopo. I have taken the liberty to read the record. My reading reveal that the firm of A.F. Gross came on record for the respondent on 14<sup>th</sup> May, 2014 vide their notice of change of advocates dated 8<sup>th</sup> May, 2014. Subsequently, Michuki and Michuki Associates came on record for the respondent on 9<sup>th</sup> October, 2014 vide their notice for change of advocates dated 6<sup>th</sup> October, 2014. The respondent has not disclosed when exactly he discovered Mr. Apopo and Mr. Mutuli's suspension. However, considering all the circumstances in this case, that the delay is between December, 2010 and December, 2012 since the present application was filed in January, 2013, there was delay which however has been explained. In the circumstances, I decline to grant the orders sought.

7. I accordingly dismiss the application and make orders as follows:

- a. **the respondent is given 30 days from the date of this ruling to undertake pretrials under Order 11 of the Civil Procedure Rules.**
- b. **this suit be set down for hearing within six (6) months of this ruling.**
- c. **In default the same shall stand dismissed.**

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**A. MABEYA**

**JUDGE**

Dated, Signed and Delivered at Nairobi this 26<sup>th</sup> day of November 2014

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**D A ONYANCHA**

**JUDGE**