



REPUBLIC OF KENYA

High Court at Nakuru

Civil Case 165 of 2010

COUNTY COUNCIL OF OLKEJUADO.....PLAINTIFF/RESPONDENT

VERSUS

TOURISM PROMOTION SERVICES (KENYA) LTD.....DEFENDANT/APPLICANT

RULING

The instant application brought pursuant to **Order 17 rule 2(3)** and **Order 51 rule 1** of the **Civil Procedure Rules** asking the court to dismiss this suit for want of prosecution as the plaintiff has failed to take any steps to set it down since pleadings closed on 18th September, 2010.

In reply, the plaintiff through its clerk, has deposed that the plaintiff has not lost interest in the matter and has indeed been pursuing an out of court settlement with defendant; that the defendant has not suffered any prejudice by the delay and that it is the plaintiff who stood to lose colossal sums of money if the suit was dismissed.

Under **Order 17 rule 2(3)**, a suit may be dismissed if no application has been made or step taken by either party for one year. Further such a suit will only be dismissed if the plaintiff fails to show cause why it should not be dismissed.

Under that rule, it is the duty of both the plaintiff and the defendant to strive to sustain the suit by ensuring that steps are taken towards its prosecution. Dismissal of a suit on the ground that it has not been prosecuted for one year must be resorted to as a last option, hence the use of the word “*may*” in the rule.

This suit was instituted on 14th July, 2010, defence filed on 26th August, 2010 and thereafter a reply to defence brought on 15th September, 2010. The defendant has deposed that pleadings having closed on 18th September, 2010 and the plaintiff having failed to take any steps to prosecute the suit, it ought to be dismissed.

Although the defendants have cited **Order 17 rule 2(3)** aforesaid, they have failed to notice that unlike the repealed Civil Procedure Rules, the 2010 Rules do not make reference to close of pleadings but instead only lays down the time-lines for the prosecution of suits.

Indeed the court in considering an application under **rule 2(3)** of **Order 17** is concerned with the questions:

- i) whether for one year, no matter the stage, no application has been made or step taken to prosecute the suit;

- ii) whether the court has notified the plaintiff of impending application for dismissal;
- iii) whether or not the plaintiff has satisfied the court that there was justification in the delay.

From the annexures to the plaintiff's replying affidavit, it is clear that an out-of-court settlement was mooted and pursued between 16th November, 2010 to 19th January, 2012, evidenced by the exchange of correspondence. The plaintiff was not expected to prosecute the suit while at the same time pursuing a settlement.

In the result, I am persuaded that the plaintiff had reasonable cause to hold in abeyance the prosecution of this action.

This application fails and is dismissed with costs.

Dated and Signed at Nakuru this 17th day of January, 2013

**W. OUKO
JUDGE**

Dated, Signed and Delivered at Nakuru this 31st day of January, 2013 by Hon. Justice M. J. Anyara Emukule,

JUDGE