



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**CIVIL SUIT NO 205 OF 2003**

**1. HERBERT OCHOLLA OJWANG**  
**2. DENICE OTIENO OUNDA**  
**3. KOMOLA INVESTMENTS LTD .....PLAINTIFFS**

**VERSUS**

**1. CENTRAL BANK OF KENYA**  
**2. KENYA COMMERCIAL BANK LTD**  
**3. THE HONOURABLE ATTORNEY GENERAL .....DEFENDANTS**

**R U L I N G**

- 1.** The Plaintiffs' suit is for damages for malicious prosecution. The Defendants entered appearance and filed their defences. Amended pleadings were eventually filed, and pleadings closed about July 2008. An agreed statement of issues was filed on 27<sup>th</sup> November 2008.
- 2.** Then the 2<sup>nd</sup> Defendant filed a **notice of motion dated 19<sup>th</sup> July 2012** seeking an order for dismissal of the Plaintiff's suit for want of prosecution. The application, which is the subject of this ruling, is brought under **Order 17, Rule 2** of the **Civil Procedure Rules, 2010** (the **Rules**).
- 3.** The grounds for the application appearing on the face thereof are –
  - (i) That more than one year has lapsed without the Plaintiffs setting down the suit for hearing.
  - (ii) That the Plaintiffs have depicted a lack of willingness to prosecute the suit.
  - (iii) That litigation must come to an end.
  - (iv) That dismissal of the suit will not occasion prejudice to the Plaintiffs.

There is a supporting affidavit sworn by the 2<sup>nd</sup> Defendant's advocate, **Moibi Mose**. It gives a history of

the litigation.

4. The Plaintiffs' have opposed the application by **replying affidavit sworn by the 2<sup>nd</sup> Plaintiff and filed on 11<sup>th</sup> October 2012**. Grounds of opposition emerging therefrom include -

(i) That there was pending an application by the Plaintiffs' advocates by notice of motion dated 28<sup>th</sup> February 2012 which was subsequently withdrawn on 4<sup>th</sup> June 2012.

(ii) That after "mending relations" with their clients, the Plaintiffs' advocates embarked upon preparation of the suit for trial, culminating in the filing of witness statements a month later on 4<sup>th</sup> July 2012.

(iii) That the suit is now ready for hearing, and the same ought to be permitted to proceed to trial.

(iv) That should the case proceed to trial without further delay there will be no prejudice to the Defendants.

5. I have considered the submissions of the learned counsels appearing. No authorities were cited. But the law in applications for dismissal for want of prosecution is now well settled. The guiding principle is that even where there is inordinate delay without satisfactory explanation, unless the plaintiff has willfully disobeyed a court order made to propel the case towards trial, if the court is still satisfied that a trial of the action will still be possible without further delay, it will not dismiss the case.

6. In the present case I note that the suit was last fixed for hearing on 19<sup>th</sup> July 2011. The record does not show what transpired on that date; most likely the case was not listed. Then the application by the Plaintiffs' advocates to cease acting was filed. The present application for dismissal was filed on 2<sup>nd</sup> August 2012.

7. Thus the delay of about eleven (11) months in taking any action towards hearing of the suit is explained by the differences between the Plaintiffs and their advocates. As soon as their relationship was put back on course the advocates moved fast to file witness statements, and the suit is now undeniably ready for trial. There is no complaint in the supporting affidavit that a fair trial of the action will no longer be possible.

8. I am not persuaded in these circumstances that it will be just to dismiss this suit for want of prosecution. I will refuse the notice of motion dated 19<sup>th</sup> July 2012 and dismiss the same. But costs of the application, hereby assessed at KShs 10,000/00, are awarded to the 2<sup>nd</sup> Defendant. The same shall be paid within twenty-one (21) days of delivery of this ruling. In default the 2<sup>nd</sup> Defendant may execute for the same. Those will be the orders of the court.

**DATED AND SIGNED AT NAIROBI THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2013**

**H. P. G. WAWERU**

**JUDGE**

**DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2013**