



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO. 562 OF 2007

1. FAITH IN ACTION
2. DEREK HAMMOND
3. BRETT ZUICH
4. PHILIP MUUA
5. FAITH IN ACTION INTERNATIONAL.....PLAINTIFFS

VERSUS

1. DENNIS MAKAU
2. AMAR AMOUN.....DEFENDANTS

RULING

1. The Plaintiffs filed this suit on 31st July 2007. Together with the plaint they filed chambers summons dated 31st July 2007 seeking, *inter alia*, temporary injunction pending disposal of the suit. That application was dismissed on 4th October 2007 for non-attendance of the Plaintiffs or their advocate at the hearing.
2. The Plaintiffs then applied by chamber summons dated 30th April 2008 for an order to set aside the said order of dismissal and reinstatement of the application. In dismissing the application by ruling dated 5th and delivered on 6th November 2009, the court directed the Plaintiffs to concentrate on the hearing of the main suit.
3. The Defendants have now applied by **notice of motion dated 26th September 2011** for dismissal of the Plaintiffs' suit for want of prosecution. That application is the subject of this ruling.
4. The application is made under **Order 17, rule 2** of the **Civil Procedure Rules** (the **Rules**) which provides:

“(2) (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.

(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.

(4) The court may dismiss the suit for non-compliance with any direction given under this Order.”

5. The application is supported by the affidavit of the Defendant’s learned counsel.

6. The main thrust of the application is that since the directions given in the ruling delivered on 6th November 2009, a period of nearly two years, the Plaintiffs have not taken any steps towards setting the suit down for hearing.

7. The Plaintiffs did not file any replying affidavit and therefore the delay complained of by the Defendants has not been denied or explained. A delay of nearly two years after the court directed the Plaintiffs to concentrate their efforts towards hearing of the case is certainly inordinate.

8. All that the Plaintiffs filed were grounds of opposition dated 3rd November 2011. Those grounds are that the application is misconceived, bad in law, frivolous, incompetent and an abuse of the process of the court; that the Plaintiff will suffer irreparable loss if the application is allowed; that the 5th Plaintiff has an arguable case against the Defendants; and that it is in the wider interests of justice for the application not to be allowed. As can be readily seen, two of the four grounds of opposition are not germane to the application.

9. The application was canvassed by way of written submissions. I have considered them.

10. The submissions filed on behalf of the Plaintiffs do not even attempt to demonstrate how the Defendants’ application might be misconceived, bad in law, frivolous, incompetent or an abuse of the process of the court. What those submissions seek to do is to explain from the bar the delay in prosecuting the suit. That should have been done by way of replying affidavit.

11. It is clear to me that the Plaintiffs’, if they have not lost interest in the suit, certainly have no intention of prosecuting the same. There is no reason at all why the suit should be permitted to continue hanging over the Defendants’ heads. With the passage of time it will be difficult to have a fair trial as witnesses may no longer be available, and if they are, their memories may fade. Documents to be tendered in evidence might also be lost and be no longer available.

12. I am also satisfied that non prosecution of this suit without explanation is causing grave prejudice to the Defendants.

13. In the circumstances, I will allow the application. The Plaintiffs’ suit is dismissed for want of prosecution with costs to the Defendants. It is so ordered.

DATED AT NAIROBI THIS 22ND DAY OF MARCH 2012

H.P.G. WAWERU
JUDGE

DELIVERED AT NAIROBI THIS 23RD DAY OF MARCH 2012