

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 767 OF 2003

DR JAPHETH MUNYITHIA MWANTHI..... PLAINTIFF

VERSUS

HOWARD CARLSON..... DEFENDANT

R U L I N G

1. The Defendant has applied by **notice of motion dated 26th March 2008** for dismissal of the Plaintiff's case for want of prosecution. The application was brought under **Order XVI, rule 5(C)** of the then **Civil Procedure Rules** (the **Rules**). Under that provision, if, within three months after the removal of the suit from the hearing list, the plaintiff, or the court on its own motion on notice to the parties, does not set down the suit for hearing, the defendant may either set the suit down for hearing or apply for its dismissal.
2. I have read the supporting affidavit and grounds of opposition (no replying affidavit was filed). I have also perused the court record. Finally, I have given due consideration to the submissions of the learned counsels appearing.
3. A previous application to dismiss the Plaintiff's suit (notice of motion dated 22nd August 2005) was refused in a considered ruling dated and delivered on 5th April 2006 (Osiero, J) after the court found that the Plaintiff had explained the delay (which it found excusable) in prosecuting the suit since close of pleadings, and also that no prejudice was demonstrated by the Defendant. The Plaintiff was however condemned to pay costs of the application.
4. The Plaintiff has raised this refusal of the previous application for dismissal for want of prosecution as a defence (of *res judicata*) to the present application. But it is apparent that the present application has been brought under different circumstances. Whereas the previous application was brought upon the ground that the suit had not been prosecuted since close of pleadings, the present application has been brought upon the ground that the suit has not been prosecuted since removal of the same from the hearing list. The principle of *res judicata* thus cannot apply.
5. The record of the court shows that on 8th December 2006 the suit was fixed for hearing for 7th and 8th March 2007. As it happened, the suit was not listed on any of those two days, most likely because it was not confirmed for hearing at the monthly call-over. This must mean that it was removed from the hearing lists of both 7th and 8th March 2007.
6. The present application was filed on 7th April 2008. There was thus delay of over one year. In the circumstances of this case, that delay was inordinate. The Plaintiff has not bothered to explain the delay. I am satisfied that it will no longer be possible to have a fair trial of the action on account of the delay, and the Defendant will thereby be prejudiced.
7. In any event, it does appear that the Plaintiff has lost interest in the suit. His learned counsel informed the court at the hearing of the application that it was lack of his client's instructions that had led to delay in prosecuting the suit.
8. In the circumstances, I will allow the notice of motion dated 26th March 2008. The Plaintiff's suit is

hereby dismissed for want of prosecution. The Defendant shall have costs of the suit (including costs of this application). It is so ordered.

9. The delay in preparation of this ruling is deeply regretted. It was caused by my poor state of health the last few years. But thank God I have now regained my full health.

DATED AT NAIROBI THIS 10TH DAY OF SEPTEMBER 2012

H. P. G. WAWERU
JUDGE

DELIVERED AT NAIROBI THIS 14TH DAY OF SEPTEMBER 2012