REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CIVIL SUIT NO.38 OF 2005

RICHARD KIPSANG KOECH……PLAINTIFF

VERSUS

PROF. J.O. NYABUNDI ……..1ST DEFENDANT

WILSON JOSEPH WANDEI……2ND DEFENDANT

CHEMELIL SUGAR CO.LTD……..3RD DEFENDANT

RULING

The Defendants seek in their application dated 26/4/2011 dismissal of this suit for want of prosecution. I need to know the history of this litigation. The record shows that the suit herein was commenced by Plaint on 22nd March 2005 by **Richard Kipsang Koech**, the Plaintiff, against **Prof J.O. Nyabundi**, **Willis Joseph Wandei**, and **Chemelil Sugar Co. Ltd**, the Defendants Nos. 1, 2, and 3 respectively. It is a libel action.

The Defendants have entered appearance and filed a joint defence. Lists of documents have been filed.

The suit came up for hearing on 26/1/2006. Adjournment was sought by the Defendant's Counsel on the ground that the defendants had filed an application seeking to strike out the plaint which they desired be heard first. The Court noted that there was no merit in the application for adjournment but for reasons not discernible from the record, the case did not proceed to hearing. The following day (on 17/2/2006), the Plaintiff fixed the suit for hearing on 25/7/2006 but it did not proceed to hearing then.

On 13/6/2006, the Defendants' application to strike out the Plaint was heard. The Defendants' application was dismissed on 19/10/2006. The court held the view that the Plaintiff's suit ought to be allowed to proceed to hearing.

Then came the hearing of the Plaintiff's application on 17/5/2007 seeking to amend the Plaint. Court dismissed it on 3/10/2007.

The suit was then fixed for hearing, on 5/7/2010. The call over was on 14/6/2010. Neither the parties nor their counsel on record attended the call over and as a result the hearing was taken out.

On 5/7/2010, the application dated 26/4/2010 seeking dismissal of the suit for want of prosecution was fixed for hearing on 14/10/2010. It is not clear from the record what happened on 14/10/2010 but on 29/7/2010, the Defendant's Counsel was in Court to take a date for the hearing of the Defendant's application seeking dismissal of the suit. The Defendants and their Counsel were absent. The Court fixed the hearing of the said application on 27/1/2010. On that day, Counsel attended Court. Advocate

Motanya's application for adjournment was disallowed and the Defendants' said application proceeded to hearing.

The application for the dismissal was not opposed because neither grounds of opposition nor a replying affidavit had been filed. Mr. Motanya had in his unsuccessful application for adjournment of the hearing of the application submitted that his client had been out of the Country, hence the Plaintiff's inability to file a replying affidavit. He had also indicated that his client had returned into the Country on 22/1/20110 and he needed a little time to liaise with him. He did not, however, indicate why he did not file grounds of opposition which did not need to be on oath or to have the Plaintiff's signature. At any rate, he had not indicated when his client had left Kenya and whether it was before or after filing of the application. He did, however, respond to the application on points of law. In his submission, he contended that dismissal would be premature as there has not been a pretrial. He thought the dismissal would be too draconian.

The application **(dated 26/4/2010)** was filed pursuant to the revoked **Civil Procedure Rules**. The transitional provisions in the new **Civil Procedure Rules 2010** contained in **Order 54** state in **Rule 2** thereof that the provisions of the new 2010 Rules shall apply but without prejudice to the validity of anything previously done. The proviso thereto is not relevant.

Rule 2 (1) of Order 17 provides that where 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 shown to its satisfaction, the Court may dismiss the suit. A party may also under **Rule 2 (3)** of that Order apply for dismissal of the suit.

There is no hard and fast rule that the Court must dismiss a suit where no application has been made or step taken for one year. The dismissal depends on the discretion of the Court which is exercised on the basis of what is in the best interest of justice regard being had as to whether the Court is satisfied that the party instituting the suit has lost interest in it, or whether the delay in prosecuting it has been inordinately long or unreasonable, or whether the circumstances attendant to the delay show that the delay is scandalous or inexcusable or that serious prejudice will be suffered by the Defendant on account of the delay. The attention of the Court was drawn to the case of **Inter V. Kyumba (1984) KCR 441** in which it was held in holding 3 that ***"the test applied by the courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a mater in the discretion of the court."***

The history of the litigation in this case does not show that the delay has been caused by the Plaintiff alone, nor that the delay is inordinate or inexcusable so as to cause prejudice to the Defendant. I hold the view that justice can still be done inspite of the delay complained of by the Defendants who must also take part of the blame for the delay as a good measure of the reasons that have militated against expeditious hearing of the suit is attributable to them. Justice can still be done and I think the plea by counsel for the Plaintiff to be given one more chance cannot be disregarded.

It is my finding that the delay in this case is not inordinate or inexcusable and in my discretion I therefore decline to dismiss the suit for want of prosecution. I exercise my discretion in favour of allowing the suit to go to full hearing and to be determined on merit. The Plaintiff shall however be condemned to pay costs of the application in any event. In the result, the Notice of Motion dated 26/4/2010 fails and is dismissed with costs to the Plaintiff.

DATED at **KERICHO** this 7th day of March, 2011

G B M KARIUKI, SC
RESIDENT JUDGE

COUNSEL APPEARING;
Mr. Motanya, Advocate, for the Plaintiff

Mr. Olel Onyango, Advocate, for the Defendants
Mr. Koech, Court clerk