



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

COMMERCIAL & TAX DIVISION, MILIMANI

CIVIL SUIT NO. 359 OF 2008

**CITY COUNCIL OF
NAIROBI.....PLAINTIFF**

VERSUS

**UNIVERSITY OF
NAIROBI.....DEFENDANT**

RULING

The Defendant/Applicant has moved the court under a Notice of Motion dated 9th February 2011, praying that the Plaintiff/Respondent's suit be dismissed for want of prosecution and that costs of both the suit and the application be awarded to it. The application, which is supported by an affidavit sworn by counsel for the Applicant, is premised on the grounds that the Respondent has not taken any steps to prosecute the suit, since the close of pleadings on or about 18th August 2008.

The application is opposed on the strength of the Replying Affidavit sworn by learned counsel for the Respondent on 28th February 2011, in which he deposes that the delay in setting down the matter down for hearing was caused by the Plaintiff/Respondent's changing of advocates thrice and the unavailability of the court file, which frustrated the Respondents' attempts to take hearing dated. That the file only surfaced on 1st February 2009. The Respondent also blames the Applicant's advocates for contributing to the delay by refusing to accept personal service of the invitations to take dates, necessitating service by registered post.

Written submissions were filed herein, with the Applicant submitting that the delay in taking action is not properly explained since the present counsel for the Respondent has been on record since 27th July 2009,

and that the non availability of the court file is not supported by evidence. Relying on the authority of **CENTURY OIL TRADING COMPANY LIMITED V GERALD MWANIKI MBOGO & ANOTHER H.C.C.C. No. 367**, (Unreported), which the Applicant says supports the application, counsel has asked the court to find that the delay herein is inordinate and dismiss the suit.

The Respondents have submitted that the act of inviting the Applicants to fix dates on three occasions is a clear demonstration that it has always been keen to set the matter down for hearing and that the same was hampered by the unavailability of the court file; particularly as will be seen from the invitation dated 7th February 2011, sent as recently as the 9th of February 2011, the same date the application for dismissal was filed. The authorities of **IVITA V KYUMBU [1984] KLR 441** and **SAGOO V BHARJI [1990] KLR**, have been cited in support of the Respondent's defence to the application.

Order 17 Rule 2 under which the application is brought provides as follows:-

"(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 party to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit. (underlining by court)

(2) If cause is shown to the satisfaction of the court it may make 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 under Rule 1."

I have noted that the Applicants contend that the Respondents have not taken "any or any material steps" to prosecute the suit, whereas the relevant rule talks of "any step." From the facts, it does appear that the Respondents did take some steps, albeit non effective ones, towards having the suit set down for hearing.

As is evident from the Affidavit of Service sworn on 15th February 2011, the present application was served upon the Respondents on 11th February 2011. I am therefore persuaded that the invitation dated 7th February 2011, filed on 10th February 2011, was not prompted by the present application. I consider this to be a material step, the consequence of which is that time, for the purposes of **Order 17 Rule 2**, began to run afresh on 10th February 2011. In the premises, I am of the view that the Respondent has shown good cause why the suit should not be dismissed for want of prosecution.

In view of the obvious delay of the trial, I order and direct that the Respondents do embark on pre-trial procedures in accordance with the **2010 Civil Procedure Rules** and to have the matter fixed for hearing within the next 45 days. Should they fail to comply then the suit will stand dismissed.

The costs of this application shall be in the cause in any event.

DELIVERED and SIGNED at NAIROBI this 12th day of SEPTEMBER, 2011

M. G. MUGO

JUDGE

In the presence of:

No Appearance For the Applicant

Mr. Wambugu holding brief for Mr. Kioko For the Respondent