**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL SUIT NO. 134 OF 2007**

**IN THE MATTER OF NYANDARUA PROGRESSIVE AGENCIES CO. LIMITED**

**IN THE MATTER OF THE COMPANIES ACT**

**AND**

**IN THE MATTER OF AN APPLICATION FOR APPOINTMENT OF INSPECTORS**

**BETWEEN**

**JOHN KANYORO & 60 OTHERS……………………..…………PLAINTIFF/APPLICANTS**

**VERSUS**

**PASTOR FRANCIS MUGO & OTHERS………………..DEFENDANTS/RESPONDENTS**

**RULING**

By an application dated and filed on 6th May 2009, the Defendants/Applicants applied for dismissal of the suit herein for want of prosecution. The Application was based upon the provisions of Order XVI, rule 5 of the Civil Procedure Rules *(now Order 17, rule 3 of the Civil Procedure Rules 2010)*. The said Order XVI Rule 5 provided as follows -

***"5. If, within three months after -***

***(a) the close of pleadings; or***

***(b)       …***

***(c)        the removal of the suit from the hearing list, or***

***(d)       the adjournment of the case generally the plaintiff, or the court of its own motion 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.***

The principles for dismissal of suit for want of prosecution have been set down in various case. In **<u>IVITA</u> VS. <u>KYUMBU</u> [1984] KLR 441**, the court said -

***"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 is inexcusable and if it is, whether justice can be done despite the delay."***

In the English case of **<u>FITZPATRICK</u> VS. <u>BATGER & CO. LTD</u> [1967]2 ALL ER 657 at 658,** Lord Denning MR (citing his decision in **<u>Reggentin</u> v <u>Beecholme Bakeries Ltd</u> [1967]111 Sol Jo 216; [1968]1 All ER 566)** said at p. 658 -

***"It is the duty of the Plaintiff\'s adviser to get on with the case.  Public policy demands that the business of the courts should be conducted with expedition."***

And again in **<u>PAXTON</u> VS. <u>ALLSOPP</u> [1971]3 ALL ER. 370**, Edmund Davies, LJ. said at p. 377 -

***"The tests applicable to the case are clear and for the most part it is conceded that they result in conclusions adverse to the plaintiff.  First, was there delay?    Clearly there was.  Secondly was there inordinate delay?  Most certainly, concedes counsel for the plaintiff.  Was it, in addition, inexcusable delay?  Counsel for the plaintiff concedes that also.  Would it cause prejudice to the Defendant if the action were allowed?"***

In answering these questions Edmund Davies L.J. continued at p. 378 -

***"… If I may be acquitted of immodesty by quoting some words of mine used in <u>Austine Securities Ltd</u> vs. <u>Northgate and English Stores Ltd</u> [1969]2 ALL E.R. 753 at 756 where having set out the familiar tests to be applied in such cases, I said: -***

***"But these questions are, as it were, posed en route to the final question which overrides everything else and was enunciated by Lord Denning M.R. in <u>Allen</u> vs. <u>Sir Alfred Mc Alpine & Sons Ltd</u> [1968]1 ALL E.R. 543 at 547, in these words; "the principle on which we go is clear; when the delay is prolonged and inexcusable, and is such as to do grave injustice to one side or the other, or to both, the court may in its discretion dismiss the action straightaway …"  So the overriding consideration always is whether or not justice can be done despite the delay.  Thus LORD DENNING M.R. referred later in his judgment in that case to "delay … so great as to amount to denial of justice."***

Applying these tests to this case, was there delay, was the delay inordinate? Was the delay inexcusable?

The suit herein was filed on 14th June 2004, and following filing of the suit, the plaintiffs also filed an application for interim orders to which the Defendants/Applicants took out a Preliminary Objection both of which were canvassed and determined in the Plaintiffs\'/Respondents favour.

According to the record, on 8th April 2008, the court ordered parties to file skeletal arguments, but the plaintiffs failed to file any such arguments, and also neglected to set down the suit for hearing, which is now over two years since the orders of court were made.

The Plaintiffs/Respondents appeared to have lost interest in their case. They stopped communicating with their Advocates as evidenced by Chamber Summons dated 17th February 2010 filed by Ochieng Gai & Co. Advocates to be allowed to withdraw and cease acting for the Plaintiffs/Respondents.

Although the said Advocates later in a Replying Affidavit dated 28th May 2010 stated that the post election violence (PEV) had caused delay on the part of their clients *(the Plaintiffs/Respondents)* from giving their instructions, rather than loss of interest, the Plaintiffs/Respondents have failed to take any steps to set down the suit for hearing, and the last record of any steps taken in this suit is 28th May 2010, that is over a year ago.

The current application, the subject of this Ruling was brought by the Defendants/Applicants on 17th February 2010 seeking dismissal of the suit for want of prosecution. However when the Plaintiffs/Respondents showed renewed interest in arguing/prosecuting their case the Applicants/Defendants let their application (for dismissal of suit) rest. However the plaintiffs have not taken any steps to set down their suit for hearing for over one year now hence the Defendants/Applicants set down their application *(for dismissal of suit)* for hearing on 16th February, 2011 and served a hearing notice on the Plaintiffs/Respondents\' Advocates but even with the Hearing Notice, the Plaintiffs\' Advocates failed to make an appearance in court on that date.

As already stated, Order XVI rule 5 allows the Defendant in a suit to apply for its dismissal for want of prosecution if the plaintiff does not set down a hearing date for the suit within 3 months of either the closure of pleadings or as in this case, the adjournment of the case generally. The last date when the plaintiffs took any action in this matter is 28th May 2010, that is well over 14 months ago. So far as even the Newspapers go, PEV effectively ended in February/March 2008 following the formation of the Coalition Government. There has been relative peace even in Bonde la Ufa *(Rift Valley)* since then, and PEV cannot be blamed for inordinate and inexcusable delay in this matter.

For those reasons, I find and hold that the Defendants have established the tests for dismissal of a suit for want of prosecution, prolonged and inexcusable delay. The only question is whether justice can be done despite the delay.

Justice is a two way street. The suit herein was filed in the year 2007 *(14th June 2007)* that is slightly over four years ago. The Plaintiffs have taken no effective steps to prosecute it. Is it just for the plaintiffs to keep the suit hanging over the heads of the Defendants like the sword of Damocles for ever? It is in the public interest that litigation must come to an end. Justice would be better served if the suit is dismissed so that the Defendant is freed from worry of the pending suit, and can go about managing the affairs of the company as required by law.

In the premises therefore the Defendants\' application dated and filed on 17th February 2010 is allowed and the plaintiffs\' suit filed on 14th June 2007 is hereby dismissed with costs to the Defendants.

There shall be orders accordingly.

**Dated, delivered and signed at Nakuru this 12th day of October 2011**

**M. J. ANYARA EMUKULE**
**JUDGE**