REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU Civil Suit 247 "A" of 2004

MOSES P.N. NJOROGE

JIM WAMBWILE

DANIEL HINGA MUIRURI (The Registered Trustees,

New Testament Church of God.....PLAINTIFF

-VERSUS-

REV. MUSA NJUGUNA t/a CHARISMA

RIVAL NETWORK (The Registered Trustee)...1ST DEFENDANT

MUSA NJUGUNA MINISTRIES.....2ND DEFENDANT

ISAAC NDUNGU KINYANJUI.....3RD DEFENDANT

RULING

A suit will be dismissed for want of prosecution under **Order 16 rule 5(a)** of the **Civil Procedure Rules** if, within three months after-

> **"(a) the close of pleadings……., The plaintiff or the court of 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."**

No duty is imposed on the court to mechanically dismiss for want of prosecution any suit which has not been set down for hearing within three months of the close of pleadings, hence the use of the word *"may"*. The court therefore, exercises discretion in deciding whether or not to dismiss a suit for want of prosecution under the provision cited herein.

In this regard it is now settled that the test applied in an application for dismissal for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite such delay? Thus, even if delay is prolonged, if the court is satisfied with the plaintiff's explanation for the delay, the court is likely to look at the plaintiff with sympathy and order the suit to be set down for hearing without further delay.

See **Ivita** Vs. **Kyumba** (1984) KLR 441

See also **Allen** Vs. **Sir Alfred McAlpine & Sons Ltd.** (1968) All ER 543. That is the law. What are the facts?

This suit was filed in 2004. There has been enough applications. I have counted not less than ten (10) applications. The instant application dated 15th October, 2009 seeks the dismissal of the suit for want of prosecution under **Order 16 rule 5(a)** of the **Civil Procedure Rules**, reproduced earlier in this ruling. The application is premised on the grounds that the respondent having obtained interlocutory injunction went into deep slumber; that for the last five (5) years, the respondent has not made any effort to list the case for

hearing; that the applicants have been taking hearing dates even though they have no counter-claim in the suit; that pleadings were closed on 28th September, 2004.In reply to these averments the respondent has deposed that since there is an application seeking to commit the applicants for contempt of court, they have no right of audience. It is further submitted that unlike the applicants, the respondent have filed issues and a list of documents; that there is an application for amendment pending hearing; that the applicant has been mischievous in fixing the suit for hearing; that there have been numerous applications in the matter.

Pleadings are closed, by dint of **Order 6 rule 11** of the **Civil Procedure Rules** fourteen (14) days after service of the reply or defence to counterclaim, or, if neither is served, fourteen (14) days after service of the defence.

Even though pleadings may have closed on 28th September, 2004, this file has not been dormant. There have been enough applications as I have observed. As a general practice a suit cannot be set down for hearing when there is a pending application. A perusal of the file would reveal that nearly every month, since 2004, there has been some form of proceedings recorded in the file.

That is not the kind of mischief **Order 16** was intended for. As was stated in **Victory Construction** Vs. **Duggal** (1962) EA 697 the purpose of **Order 16** is to provide the court with administrative machinery to disencumber itself of case records in which the partie appear to have lost interest. It targets the indolent and not the vigilant.

The respondent is not depicted, by the activities on record as a disinterested party. By all standards, the delay, in the circumstances explained cannot be described as inordinate or prolonged. Despite the brief delay occasioned by applications with far reaching effects, such as contempt of court and amendment of the plaint, justice can still be done and there is no discernible prejudice to the applicants. I find no merit in this application which has also only contributed to the delay in hearing earlier applications.

To avoid further delay in the matter and considering its emotive nature it is now ordered that within fourteen days of the delivery of this ruling the plaintiff and/or the defendants must indicate how many applications are pending and which ones they intend to pursue. Thereafter there will be further directions. Mention on 4th March, 2010. Otherwise this application is dismissed with costs.

Dated, signed and Delivered at Nakuru this 19th day of February, 2010.

W. OUKO
JUDGE