



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Suit 356 of 2008

DAVID NJOGU GACHANJA.....PLAINTIFF/RESPONDENT

Versus

JUDY THONGORI.....DEFENDANT/APPLICANT

RULING

This Notice of Motion dated 13th November 2009 was brought by the Defendant/Applicant under Order XVI Rule 5 of the Civil Procedure Rules and Section 3 A of the Civil Procedure Act for orders seeking to have the suit herein by the Plaintiff against the Defendant to be dismissed for want of prosecution. The Defendant also asks the court to give such further or other orders as the court may deem fit and just to grant.

The Notice of Motion, based on grounds seen on its face, is supported by the affidavit deposed by Stephen Muhia on 13th November 2009.

The Plaintiff filed no replying affidavit but filed grounds of opposition dated 8th February 2010. It means the factual basis of this matter is uncontested, that the Plaintiff/Respondent filed this suit on 4th August 2008; that the relevant defence was filed on 12th September 2008; that from that date of filing defence up to now the Plaintiff has not taken any steps to set down this suit for hearing being a period of 1½ years which the Applicant describes as inordinate delay. The Applicant was represented by Mr. Ongoya.

Mr. F.M. Mulwa who represented the Respondent relied on the grounds of opposition emphasizing that this Notice of Motion was brought prematurely before discovery was done in terms of Order 4 rules 11 and 11A of the civil Procedure rules. He said the case is not ready for hearing and the Plaintiff/Respondent can in no way be faulted for failing to fix a date for hearing of the suit. Otherwise, he added, the Applicant ought to have exercised the option of fixing the case for hearing instead of filing this Notice of Motion. He relied on a decision of the Court of Appeal in Civil Appeal No. 270 of 1999 **JOHN NJIRU MUYA VS NGUU MUYA & DANIEL MUKUNYA** and urged this court to dismiss the Notice of Motion.

From my careful consideration of all that was brought before me, Order XVI Rule 5(a) of the Civil Procedure Rules has remained unaltered stating that

5. 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.”

That rule says nothing about “discovery” which is found in Order X Rules 11 and 11 A of the Civil Procedure Rules.

It be noted that Rule 11 does not specify the stage at which discovery may be made. The Rule also uses the word **may**. It means discovery under Rule 11 may be done at any stage from the time of filing suit up to and including the time pleadings are closed and that discovery is not mandatory as in a subordinate court, for example it may not be there all together.

It is in the High Court where discovery now under Rule 11 A becomes important so that

“..... Within one month after the pleadings are closed in a suit in the High Court every party shall make discovery by filing and serving on the opposite party a list of the documents relating to any matter in question in the suit which are or have been in his possession or power.”

That is clearly made mandatory to be done within one month after the pleadings are closed. But the rule does not interfere with the operation of Order XVI Rule 5 (a) as all to that effect is quiet; That remains so even if verification has to be there under Order X Rule 11 A (2) and (3).

In my view, what it means is that a party who goes to sleep after pleadings are closed thereby neither prosecuting the suit nor doing discoveries should not think he will not be faulted simply because Order X rules 11 and 11 A do exist in the Civil Procedure rules and clearly therefore the Plaintiff has no defence before me in this matter on those lines. He went soundly sleeping for 1½ years.

As concerns the option under Order XVI Rule 5 (a) as read with Rule 5 (d) it is the Defendant's right; either to set the suit down for hearing or to apply for dismissal of the suit. That is the Defendant's right and once he has exercised that right and decided to do one of the two, he should not, in normal circumstances, be faulted for his choice. In this application before me, I find no reason why the Applicant should be faulted on that issue. The Applicant has correctly exercised her right under the law.

To conclude therefore, this notice of motion is hereby granted and I do dismiss the Plaintiff's suit herein for want of prosecution.

The Plaintiff to pay costs of the suit and costs of this Notice of Motion to the Defendant.

Dated this 19th day of March 2010.

J.M. KHAMONI

JUDGE