



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL SUIT NO.297 OF 2004**

**ALICE WAIRIMU MWANGI.....PLAINTIFF/  
APPLICANT**

**VERSUS**

**P. WAIGWA NGUNJIRI T/A WAIGWA NGUNJIRI & CO. ADV.....1<sup>ST</sup>  
RESPONDENT**

**HENDRICUS ANTHONIUS FLATON.....2<sup>ND</sup>  
RESPONDENT**

**RULING**

This is an application brought under **order 16 rules 5 and 6** of the **Civil Procedure Rules** for the dismissal of this suit for want of prosecution. The court's inherent jurisdiction to dismiss a suit for want of prosecution under former provision is exercised where:

**i) within three months after the close of pleadings, or after the removal of the suit from the hearing list or after the adjournment of the suit generally, 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.**

Under the latter provision

**2. in any case not otherwise provided for in which no application is made or step taken for a period of three years by either party with a view to proceeding with the suit, the court may order the suit to be dismissed, and in such case the plaintiff may, subject to the law of limitation, bring a fresh suit.**

The suit was instituted on 1<sup>st</sup> November, 2004. It was last in court on 28<sup>th</sup> June, 2007 when the respondent was granted leave to file a supplementary affidavit within 90 days from the date of that leave. This application was brought on 24<sup>th</sup> February, 2010, over two years since the last time the plaintiff took action in the matter.

The applicants have averred that the respondent has lost interest in the matter and that they would be prejudiced as there cannot be a fair trial in view of the delay.

In reply to these averments the respondent's counsel has deposed that the respondent and the 2<sup>nd</sup> applicant have been having extensive on-and-off negotiations aimed at settling the dispute out of court. That this matter is related to **Nbi. HCCC No.399 of 2004** in which the 2<sup>nd</sup> applicant is represented by the firm of Hamilton Harrison and Mathews Advocates. The negotiations involve both this suit and **Nbi. HCCC No.399 of 2004**. Counsel has further stated that throughout the aforesaid negotiations, the

2<sup>nd</sup> applicant has always made the respondent to believe that their advocates in this matter was aware of the negotiations. It is also stated that the negotiations collapsed towards the end of 2009 and the Nairobi suit was set down for hearing while this suit could not be set down for hearing due to lack of dates in the registry for this year.

I have considered these arguments together with the authorities cited by counsel for the applicants – i.e., **Agip (K) Ltd. V Highlands Tyres Ltd.** (2001) KLR 630 and **Mobile Kitale Service Station v Mobil Oil (K) Ltd. & Another** (2004) 1 KLR 1.

These and other authorities cited in them give the guidelines for consideration of applications of this nature. These principles are to the effect that:

i) the jurisdiction to dismiss a case for want of prosecution must be resorted to in exceptional cases, is permissive and not compulsory,

ii) the suit will only be dismissed if the court is satisfied that the delay is inordinate,

iii) the suit will also be dismissed if the inordinate delay is inexcusable,

iv) there will be an order of dismissal if the defendant is likely to be prejudiced as a result of the delay,

v) the suit will be dismissed if the court is satisfied justice cannot be done due to the inordinate delay.

See **Allen v Sir Alfred Mc Alpine & Sons** (1968) ALL ER.

The respondent has explained that since this matter came up in court on 28<sup>th</sup> June, 2007 she has not been sleeping. That she has been engaged in negotiations aimed at compromising this suit and **Nbi HCCC No.399 of 2004**. These averments have not been challenged.

I have looked at the annexures to the replying affidavit and I am persuaded that indeed the respondent has not lost interest in the matter. Her advocate has been exchanging letters and holding meetings with the advocates of the 2<sup>nd</sup> applicant between July, 2005 all through to July, 2009. The efforts by the respondent to list this matter for hearing after the negotiations collapsed have similarly not been controverted.

For these reasons I come to the conclusion that the apparent delay has adequately been explained and this application fails. It is dismissed. I make no orders as to costs.

**Dated, Signed and Delivered at Nakuru this 23<sup>rd</sup> day of July, 2010.**

**W. OUKO**

**JUDGE**