



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**CIVIL CASE 423 OF 2004**

**JOHN KARUKU KAHUNO.....PLAINTIFF**

**VERSUS**

**EQUITY BUILDING SOCIETY:.....DEFENDANT**

**RULING**

The plaint in this matter was filed on the 27<sup>th</sup> July 2004 and on the 30<sup>th</sup> August, 2004 the Defendant filed its statement of Defence. On the 31<sup>st</sup> day of December 2005 the Plaintiff filed his list of documents under order 10 Rule 11A of the Civil Procedure Rules. Earlier on the 17<sup>th</sup> November 2005 the Plaintiff's Advocates had invited the Defendant's Advocate to take a hearing date for the suit to be heard. Advocates for the Defendant did not attend the court Registry for the purpose of taking a date but the Advocates for the Plaintiff took an ex parte hearing date. The case was taken out of the hearing list for the 1<sup>th</sup> May 2006 at the court's instance. Both parties appear to have gone to sleep thereafter until the 28<sup>th</sup> March 2008 when the Defendant took out a Notice of Motion under Order XVI Rule 5, Order L Rule 1 and 2 of the Civil Procedure Rules, section 3A of the Civil Procedure Act and all enabling provisions of Law to have the suit dismissed for want of prosecution. In the supporting Affidavit the deponent described to be the Legal Officer of the Defendant herein swears that the case was last fixed to be heard on 16<sup>th</sup> May 2006 but was taken out of the hearing list and since that time the Plaintiff has not set it down for hearing. He describes such delay as inordinate and such delay has prejudiced the Defendant's case and hence he prays for the suit to be dismissed.

The Plaintiff's counsel on record swore an Affidavit in opposition to the Application and stated that his firm has attempted to take a hearing date on two occasions but that the court diary for the relevant periods was already closed. On 16<sup>th</sup> May 2006 when the case was taken out, he states that the diary for year 2006 was already closed. He then invited the Defendant's Advocate to take a hearing date on 23<sup>rd</sup> March 2007 and even on that date the court diary for 2007 had already been closed. He submitted that these were not actions of a Plaintiff who was not interested in prosecuting his case. It is further deponed in the said Affidavit that issues have yet to be agreed and the Application was not brought in good faith as it was open to the Defendant to set down the suit for hearing if not so wished.

On the court file is a Chamber Summons under Order VI A Rule 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act cap 21 of the Laws of Kenya which was filed in court on 17<sup>th</sup> April, 2008. It seeks to amend the plaint.

There has been delay of about seventeen months as at the time of filing the Application for

dismissal. The Plaintiff has explained the cause of such delay. The law on this subject matter is well settled and I take the liberty to paraphrase thus:-

That if the delay is prolonged and inexcusable and justice can nevertheless be done, then the courts should be very slow in dismissing the suit. Even where the delay is prolonged and the court is satisfied with the Plaintiff's excuse for the delay and justice can still be done to the parties the delay notwithstanding, the suit will not be dismissed but rather it will be ordered set down for hearing without any further delay. The court's duty is to decide the issues in dispute between the parties without undue regard to technicalities.

It is my considered view that the delay herein is not such that a fair trial of the issues in dispute is impossible. The delay is unlikely to have caused prejudice to the parties herein in particular the Defendant. I am satisfied with the Plaintiff's explanation for the delay and hereby do exercise my discretion in favour of the Plaintiff and refuse to dismiss the suit. However this suit must now be progressed without further delay. I order that the Plaintiff do set the suit down for hearing and the court registry do give a date on a priority basis. The Application to amend the plaint must not be allowed to hinder an early disposal of this suit which is about 15 years in the courts causing backlog. If the Plaintiff does not take action to inch this suit towards hearing in the next three months the Defendant will be at liberty after such time to move the court for dismissal of the suit.

The upshot is that the Application under consideration is dismissed and the costs thereof will abide the outcome of the main suit.

Orders accordingly.

**DATED AT ELDORET THIS 27<sup>TH</sup> DAY OF JANUARY, 2009.**

**P.M.MWILU**

**JUDGE**

**DELIVERED IN OPEN COURT AT NAIROBI THIS 13<sup>TH</sup> DAY OF FEBRUARY, 2009.**

**J.KHAMINWA**

**JUDGE**

**DELIVERED IN THE PRESENCE OF:-**

.....Advocate for the Plaintiff

.....Advocate for the Defenda