



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**Civil Suit 1053 of 2002**

**JAMES K. HORERIA t/a HORERIA & COMPANY... PLAINTIFF**

**VERSUS**

**CORPORATE INSURANCE CO. LTD.....**

**DEFENDANT**

**RULING**

Before me is an application by the defendant made under the provisions of **Order XVI Rule 5(d)** of the **Civil Procedure Rules** seeking the dismissal of the plaintiff's suit for want of prosecution. The defendant states that the plaintiff had failed to take appropriate steps to prosecute the suit since the case was last before the court on 27<sup>th</sup> September 2006. The defendant was of the view that the suit should in the circumstances be dismissed since the plaintiff appeared no longer interested in prosecuting the same. The application is supported by the annexed affidavit of Nancy Shikuku, the chief legal officer of the defendant. The application is opposed. The plaintiff filed a replying affidavit in opposition to the application. He states that it was not his intention that the suit had not been fixed for hearing. He explains that the delay in fixing the case for hearing was occasioned by a breakdown in communication between himself and his advocate on account of his indisposition and being away from his office for long periods of time. He deponed that he had always diligently pursued the prosecution of the case. He urged the court to give him a chance so that he may fix the case for hearing to enable the same to be heard and disposed off on its merit.

At the hearing of the application, I heard the rival submissions made by Mr. Munene for the defendant and by Mr. Munyororo for the plaintiff. I have carefully considered the said arguments made. Under **Order XVI Rule 5(d)** of the **Civil Procedure Rules**, this court has discretion to dismiss a suit that has not been set down for hearing three months after the same was adjourned generally. The principles to be considered in determining whether or not to dismiss a suit for want of prosecution were set out by Chesoni J (*as he was then*) in **Ivita vs. Kyumbu [1984] KLR 441** at page 449 where he held that:

*“So the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution.”*

In the present application, it is evident that the plaintiff made several attempts to fix this suit for hearing but for one reason or the other, including on several occasions the fact that there were no sufficient judges in the station to hear his case, the hearing of the case was frustrated. Discovery has been concluded. The plaintiff has filed his list of documents. It is the view of this court that the plaintiff has always been ready to prosecute his case but for the fact that he has been frustrated by events beyond his control. The plaintiff cannot be at fault when his case was not heard during the date scheduled for the hearing when there was no judge to hear the case. It was conceded that from 13<sup>th</sup> February 2007, the plaintiff made no

effort to fix this case for hearing. The plaintiff has explained this inaction by giving a reason, which in my view is excusable in the circumstances. He states that he has been indisposed and has not therefore been in a position to effectively communicate with his advocate. I think the plaintiff is now on notice that should he fail to take appropriate action and fix his case for hearing, then he will have no one to blame if the suit herein is dismissed at a later date for want of prosecution.

I will, in the circumstances, decline to dismiss the plaintiff's suit for want of prosecution. The defendant application dated 11<sup>th</sup> February 2009 is hereby dismissed. The plaintiff shall however pay the defendant's costs of the application. The plaintiff is advised to transfer this suit to the subordinate court for hearing and determination since his claim falls within the pecuniary jurisdiction of the subordinate court.

**DATED at NAIROBI this 22<sup>nd</sup> day of APRIL, 2009.**

**L. KIMARU**

**JUDGE**