



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

**AT NAIROBI**

**CIVIL SUIT 978 OF 2004**

**GIBSON KAMAU KURIA.....PLAINTIFF**

**VERSUS**

**THE STANDARD LIMITED.....1<sup>ST</sup> DEFENDANT**

**MURIITHI MUTIGA.....2<sup>ND</sup> DEFENDANT**

**JAMES ANYANZWA.....3<sup>RD</sup> DEFENDANT**

**R U L I N G**

Before the court is a Notice of Motion dated 3<sup>rd</sup> March 2008 by the defendants. The motion is brought under Order XVI rule 5(a) Order L rule of the Civil Procedure Rules and Section 3A of the Civil Procedure Rules. The same is supported by the affidavit of Nelly Matheka an Assistant Director Legal with the 1<sup>st</sup> defendant a local daily and Rubeena Dar an advocate.

The application is seeking for orders:-

- 1. That the suit against the defendant/applicants herein be dismissed for want of prosecution.**
- 2. That costs of the suit and the application be borne by the plaintiff/respondent.**

The application is based on the grounds that at the time of filing the application more than 1 year 5 months had lapsed since the pleadings were closed. The delay was prejudicial to the defendants/applicants and was an abuse of court process.

The plaintiff/respondent opposed the application by filing 2 affidavits. One by the plaintiff/respondent dated 1<sup>st</sup> July 2008 and by his clerk.

The plaintiff's defence is that although there is delay it is not inordinate. That the plaintiff was not aware that a defence had been filed until when his current lawyers perused the court file that they noticed a defence. That there was an inadvertence on the part of a clerk in the plaintiff's office.

I have considered the affidavits filed, submissions by counsels and case law cited.

It is important for the court to consider the principles to be applied in deciding whether a suit should be dismissed for want of prosecution. I will be guided by the following authorities:-

1. **ALLEN vs SIR ALFRED MCIPHONE & SONS** (1968) AII E.R. in the said case the following principles were established. It must be shown that

- (a) the delay is inordinate
- (b) the inordinate delay is inexcusable
- (c) the defendant is likely to be prejudiced

2. In *Concorde Container Services Ltd. versus Joseph Muthika Kago & Another* CA No. 737 of 2002 Alnashir Visram J had this to say

**“Delay is a matter of fact to be decided on the circumstances of each case. Where a reason for delay is offered, the court should be lenient and allow the plaintiff to have his case determined on merit. Finally the court must consider whether the defendant has been prejudiced by the delay. To achieve justice the court must consider the possible loss likely to be sustained by the plaintiff if his case is terminated summarily for a procedural default. Where a plaintiff would result in great hardship to a plaintiff who has reasonable excuse for his delay.”**

The plaintiff has admitted the delay he has given credible excuse in my view. It is now for this court to consider whether there will prejudice is suffered by either of the parties. In her submission counsel for the defendants contend that for as long as the case remains in court this fact by itself and the costs of retaining a lawyer is prejudicial to her client agree with her sentiments and have to consider that prejudice against the possible loss likely to be suffered by the plaintiff were the court to take the drastic measure of dismissing the suit. In making the balance I wish to be guided by Chesoni J (as he then was). In *IVUTI vs KYUMBU* (1984) KLR 441 as quoted in the *Concorde Container Services Ltd. supra*.

**“So the vest 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 the defendants so both parties to the suit must be considered and the position of the judge too ...”**

In my view in considering whether to dismiss a suit for want of prosecution Order XVI rule 5 court be read in isolation a suit can only be set down for hearing after certain steps have been taken Order X rule IIA regards every party to a suit to make discovery by filing and serving the opposite party a list of documents. In this instance no such step had been taken by either of the parties.

Having found that there was delay which has been reasonably explained I now turn to consider with the prejudice suffered by the defendants is such that it will deny them justice. I am of the view that the prejudice suffer at this stage be compensated for by way of costs.

I decline to grant the order 1 as prayed in the application and direct as follows:

- 1. That the parties herein do comply with order X rule IIA within the next 30 days of the date hereof.**
- 2. That the parties frame and exchange issues and/or file agreed or separate issues within the next 24 days of the date hereof.**
- 3. That the plaintiff do fix the case for hearing within the next 6 months of the date hereof failure of which the suit stands dismissed.**
- 4. The plaintiff do pay the defendants costs of this application.**

Dated and delivered this 16<sup>th</sup> June, 2009.

**ALI- ARONI**

**JUDGE**