



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

Civil Case 1057 of 1999

§ Section 3A & Order 16 rule 5 Civil Procedure Rules

§ Dismissal of suit for want of prosecution

§ Principles applicable

ERASTUS ADERO GOGO..... PLAINTIFF

VERSUS

NICODEMUS WAITE MURAGURI.....1ST DEFENDANT

EVA WAMUYU MURAGURI.....2ND DEFENDANT

CONSOLIDATED SALES & SERVICES

(TECH) LIMITED.....3RD DEFENDANT

R U L I N G

The Notice of motion application is dated 26th May 2008 and is expressed to be brought under Section 3A & Order 16 rule 5 Civil Procedure Rules. It seeks the following orders:

1. That the Plaintiff's suit against the 2nd Defendant herein be dismissed with costs for want of prosecution.
2. That in any event the costs hereof be awarded to the 2nd Defendant/Applicant.

The application is based on the following grounds.

- a) More than one (1) year has lapsed without the plaintiff setting the suit down for hearing.
- b) The Plaintiff has depicted by its indolence, a lack of willingness to prosecute the suit herein.
- c) Public policy demands that litigation must come to an end.
- d) No prejudice whatsoever or at all shall be occasioned to the Plaintiff/Respondent by the dismissal of a suit he does not intend to prosecute.

The suit was filed initially against N. Waite Muraguri the 1st Defendant in the suit on 10th August 1999. The plaint was subsequently amended on application by the Plaintiff on 16th November 2000 and the 2nd and 3rd Defendants enjoined to the suit. There was ex parte judgment entered in default of appearance entered against the 2nd and 3rd Defendants on 18th May, 2001. That judgment was subsequently set aside by Ochieng, J. on 10th October 2006. After the judgment was set aside the suit was set down for hearing on 8th May 2007. It was however adjourned at the Plaintiff's instance for reason discovery was incomplete. One year later on 29th May 2008, the 2nd Defendant filed a Notice of Motion application. It is this application which is under consideration.

The application is opposed through a replying affidavit filed on 28th November 2008, sworn by the Plaintiff's Advocates before the firm ceased acting for the plaintiff. I have considered the application and the affidavits sworn by both parties.

IVITA v KYUMBU [1984] KLR 441 sets out the principles that should guide a court while considering an application of this nature. These are:

“3. The test applied by the Courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the Court is satisfied with the Plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter in the discretion of the court.”

A brief summary of this case is set out in this ruling. Considering these facts, I am of the view that there has not been inordinate and unexplained delay in this matter. The record of the proceedings is very clear that the Plaintiff has been diligent in pursuing this case and at one point had obtained judgment against the Applicant herein and the 3rd Defendant in default of defence. In addition the Plaintiff did set the suit down for hearing once in May 2007. The Plaintiff's Advocate has also deponed, which averment was not controverted, that attempt was made to have the case set down for hearing a year later, i.e. in 2008, but was unsuccessful as the diary had been closed for the year.

Knowing the tradition of this court, once the diary is closed, parties have to wait until the following year for it to be reopened in order to take a date. The record herein shows that the Applicant filed the instant application within the period the diary was closed (2008) and in the circumstances the Plaintiff had no further chance to set the suit down for hearing.

The court has to consider the interests of both parties. The Defendant did not show what prejudice she stands to suffer if the application was not granted. Neither was it shown that justice cannot be served despite delay. I am satisfied that the Applicant stands to suffer no prejudice if the application is not granted.

In conclusion, I find no merit in this application and dismiss it with costs in the cause.

Dated at Nairobi this 3rd day of July, 2009.

LESIIT, J.

JUDGE

Read, delivered and signed in the presence of:

Ms. Kamende for the Applicant/2nd Defendant

Dated at this 17th day of July, 2009.

LESIT, J.

JUDGE