

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS Civil Case 37 of 2003

JUSTUS MUSYIMI MBILAPLAINTIFF/RESPONDENT

VERSUS

NATIONAL MUSEUMS BOARD OF GOVERNORS.....DEFENDANT/ APPLICANT

RULING

1. The Application dated 20/6/2005 seeks orders that the suit herein be dismissed for want of prosecution under Order XVI Rule 5 (a) of the Civil Procedure Rules. It is the Defendant's case that pleadings closed on 27/8/2003 and since then the Plaintiff has taken no action to have the suit heard and determined.
2. The Plaintiff's simple response as contained in his Replying Affidavit sworn on 12/9/2008 is that indeed he took no action since the pleadings closed because one Mr Njogu, an employee of the Defendant entity, had insisted that he should withdraw the suit and pursue settlement of the dispute outside court. That he indeed wrote to his advocates, M/s Lucy Njiru & Co. Advocates on 3/6/2004 and instructed them to withdraw the suit but that was not done and that he had suffered a lot as a result of the injuries sustained and which necessitated the suit.
3. For my part, the matter portends no difficulty at all. In Ivita vs Kyumbu (1984) KLR 441, Chesoni J (as he then was), stated at page 449 para. 15 – 37 as follows in restating the law on this subject;

“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. He must show that justice will not be done in the case due to 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. Thus, even if delay is prolonged if the court is satisfied with plaintiff's excuse for the delay and that justice can still be done to the parties notwithstanding the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time. Where the defendant satisfied the court that there has been prolonged delay and the plaintiff does not give sufficient reason for the delay the court will presume that the delay is not only prolonged but it is also inexcusable and in such case the suit may be dismissed. To put it in the words of Salmon LJ in *Allen v McAlpine*, at p 561, as a rule, when inordinate delay is established until a credible excuse is made out, the natural inference would be that it is inexcusable. It is an all time saying, which will never wear out however often said that, justice delayed is justice denied.” (*emphasis added*)
4. I wholly agree with the learned judge and in the instant case, the explanation given is that the Plaintiff gave instructions for the suit to be withdrawn and indeed exhibit “JMM1” is a letter to that effect. Had the suit been withdrawn as expressly instructed by the Plaintiff, the present application would not have been necessary. The effect would have been that there would be no suit to dismiss but since nothing has been done since the pleadings closed and it is now 6 years since the suit was filed, there is no reasonable explanation given why this suit should be in this court's docket for one day longer.
5. The Application is merited and the suit is dismissed with costs to the Defendant.

6. Orders accordingly.

Dated and delivered at Machakos this 29th day of October 2009.

ISAAC LENAOLA

JUDGE

In presence of: Mrs Mutua for Applicant

ISAAC LENAOLA

JUDGE