

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

Civil Case 1062 of 2004

MEGAWATT DISTRIBUTORS CO. LTD.....PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI.....DEFENDANT

R U L I N G

This is an application by the defendant under Order XVI Rule 5 of the Civil Procedure Rules for an order that the Plaintiff's suit be dismissed for want of prosecution. The application is based on the ground that the Plaintiff has not taken any step to fix the suit down for hearing. The application is also supported by an affidavit sworn by Mary N. Ngethe the Director of Legal Affairs of the Defendant in which she avers that the suit was filed on 8th October 2004; that pleadings were closed on 2nd December 2004; that the Plaintiffs filed the list of documents on 31st May 2005 and that no step has ever been taken to set the suit down for hearing.

The Plaintiff was served with this application but he never filed any papers in opposition.

Mr. Kariuki counsel for the defendant submitted that this is a fit case for dismissal for want of prosecution. He relied upon the case of **Naftali Opondo Onyango v. National Bank of Kenya HCC No. 1550 of 2001** (unreported) in which Ringera J (as he then was) quoting from the case of El Monks & Co. Ltd v. Evans [1985] All ELR 581, for the proposition that public policy demands that the business of the courts should be conducted with expedition. The test to be applied in an application for dismissal of a suit for want of prosecution was stated in the case of **Ivita v Kyumbu [1984] KLR 441** (unreported) thus:

“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 explanation 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”

In the instant suit the delay is about 3 years but the Plaintiff did not file any papers in opposition to this application when he was served to explain the delay which is inordinate. There being no opposition the defendant's application is allowed in terms of prayers 1 and 2 of the Chamber Summons dated 3rd August 2007. The defendant is also awarded the costs of the suit.

Dated at Nairobi this 28th day of February 2008.

J. L. A. OSIEMO

JUDGE

