

REPUBLIC OF KENYA

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

Civil Suit 1034 of 2004

BRAEBEURN LIMITED PLAINTIFF/RESPONDENT

Versus

NAIROBI CITY COUNCIL 1ST DEFENDANT

NATION MEDIA GROUP LIMITED 2ND DEFENDANT/APPLICANT

RULING

In the Notice of Motion dated 9.5.2005 the Applicant who is the Second Defendant in the suit has applied for orders that the Plaintiff's suit herein be dismissed for want of prosecution. This is because after the filing of pleadings closed and following the withdrawal of the Second Defendant's application dated 1st March, 2005 on 1st December 2005, to-date the Plaintiff has taken no step to have the suit set down for hearing and have therefore left the burden of this litigation hanging over the head of the Applicant for an unnecessarily long time.

The Application is opposed by the Plaintiff who in its Replying Affidavit dated 20th September, 2007, claims that the delay was caused by three reasons. Firstly, was the pending of the Second Defendant's aforementioned application dated 1st March, 2005 seeking to strike out the plaint. Secondly, the Court case file went missing after the application dated 1st March, 2005 was withdrawn and that situation persisted until sometime in February, 2007. From March, 2007 the Plaintiff's Advocates misinterpreted a notice given by the Chief Magistrate's Court Miliman to the effect that the Court diary for the year 2007 was full to mean that it applied to High Court cases.

Thereafter when the Plaintiff's counsel now went to fix a hearing date, he could not be given one because of the pending of the present application. In the circumstances the Respondent prays that this application be dismissed.

The Respondent cited the case of Sagoo -vs- Bhariji (1990) KLR, 459 and the case of Ivita -vs- Kyumbu (1984) KLR, 441. There has to be intentional, inordinate or inexcusable delay on the part of the Plaintiff and there has to be risk that the delay would inhibit a fair trial or that it would cause prejudice to the defendants. Otherwise the court should not exercise the drastic power of dismissing a suit. 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 should not be dismissed. In the case of Invita, the court says that when the case is not dismissed, the court should order that the case be fixed for hearing at the earliest available time. It is a matter in the discretion of the Court.

On the basis of those case authorities I am persuaded the Plaintiff in this case has given a satisfactory explanation of the delay and justice can still be done to the parties if the case is left to go to hearing provided there is no further delay. I will therefore allow the Plaintiff further opportunity to prosecute this suit.

Accordingly the second Defendant's Notice of Motion dated 9.5.2005 is hereby dismissed with the costs to be in the cause.

Dated and delivered at Nairobi this 21st day of February, 2008

J.M. KHAMONI

JUDGE