



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Case 4241 of 1992**

**PROF. JOHN MARANGU.....PLAINTIFF/RESPONDENT**

**VERSUS**

**KENYATTA UNIVERSITY.....DEFENDANT/APPLICANT**

**R U L I N G**

The defendant applies under Order XVI Rule 5 to have the plaintiff's suit dismissed for want of prosecution as well as the costs of this application. The application is based on the ground that there has been inordinate delay. In support of the application Prof. Mohamed Rajab Deputy vice Chancellor of the defendant has sworn an affidavit giving grounds for the application.

Rules 5 of Order XVI provides as follows:

**“If within 3 months after (a) the close of pleadings; or (b) ..... (c the removal of the suit from the hearing list; or (d) the adjournment of the suit generally, the plaintiff does not set down the suit for hearing, the Defendant may either set down the suit for hearing or apply for its dismissal.**

Mr. Njuguna for the Defendant submits that it is a proper case which the court should dismiss under Rule 5. The suit against the defendant was instituted by the plaintiff on 6.8.92 seeking an order that the defendant do furnish the plaintiff with three return air tickets from Nairobi to the United States of America and an injunction to restrain the defendant from refusing and/or neglecting to furnish the plaintiff with three return air tickets. The Defendant upon being served with summons entered appearance and filed a defence on 5th October 1993.

The plaintiff took no steps to set the suit down for hearing until 11<sup>th</sup> July 1997 when Counsel for defendant filed an application dated 9<sup>th</sup> July 1997 seeking to dismiss the suit for want of prosecution.

The said application came up for hearing before Ole Keiwua J. when the application was stood over generally and the court ordered the parties to make discovery in accordance with Order X of the Civil Procedure Rules within 60 days. The defendant re-listed the application dated 9<sup>th</sup> July 1997 for dismissal of the suit for want of prosecution for hearing. The application came up for hearing before Hayanga J on 21<sup>st</sup> July 2003 when it was stood over generally following the plaintiff's Advocate's application for adjournment so as to enable him to formerly apply for leave to cease acting for the plaintiff. The court when granting the application for adjournment made an order that the said application be filed within 7 days of the said date. Three and a half years along the line no such application has been filed nor has the plaintiff taken any steps to have the matter heard.

The application is opposed by the plaintiff who has filed a replying affidavit explaining the reason for the delay. The plaintiff states that he was away from the country where he worked and he blamed his former advocate on record for the failure to prosecute the suit. He has since replaced that advocate. The defendant alleges inordinate delay on the part of the plaintiff in bringing his suit to a speedy conclusion.

It is the duty of a plaintiff to bring his suit to early trial. But the act to dismiss a suit for want of prosecution is draconian and should only be resorted to in undeserving case only.

As was stated in Halsbury's Laws of England 4<sup>th</sup> Ed. Vol. 37 par 448

**“The power to dismiss an action for want of prosecution without giving the plaintiff the opportunity to remedy his fault will not be exercised unless the court is satisfied that the default has been intentional and contumelious or that there has been prolonged or inordinate delay on the part of the plaintiff or his lawyer and such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendant either as between themselves and the plaintiff or between each other or between them and third parties.”**

This case has been in court for the last 15 years and it is apparent from what I have stated that the plaintiff has not shown sufficient excuse for the alleged delay. I am satisfied that the defendant has established that there was delay in prosecuting this suit, and in the circumstances of this case and in the absence of any credible excuse made by the plaintiff I have not the slightest hesitation in finding that the delay in this case was inordinate and inexcusable and that for the reasons I have given, the defendant will be prejudiced if the suit is allowed to continue and justice cannot be done now.

Accordingly in exercise of my discretion I allow the application and dismiss the suit for want of prosecution. I award the defendant the costs of the suit and of this application.

Dated and delivered at Nairobi this 14<sup>th</sup> day of February 2008.

**J. L. A. OSIEMO**

**JUDGE**