



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KISII**

**Civil Case 118 of 2003**

**JAMES GISEMBA ..... PLAINTIFF**

**VERSUS**

**THE CLERK KISII MUNICIPAL COUNCIL )**

**KISII MUNICIPAL COUNCIL ) ..... DEFENDANTS**

**RULING**

The defendants filed an application by way of notice of motion seeking dismissal of the plaintiff's suit for want of prosecution. They stated that the suit was filed on 4<sup>th</sup> August 2003. The suit was last fixed for hearing on 26<sup>th</sup> February 2004. Since then the plaintiff had not taken any step towards hearing and disposal of the suit.

The plaintiff filed grounds of opposition and stated that the defendants had not filed their pleadings in answer to the amended plaint. As a result, the status quo that obtained on 14<sup>th</sup> October 2003 had been maintained. Since the plaintiff's amended plaint remains unchallenged, there was nothing to fix for hearing, the plaintiff stated. He added that the defendants had not made any attempt on their part to have the suit heard.

Mr. Bosire for the defendants and Mr. G. J. M. Masese for the plaintiff made brief submissions in support of their respective clients' arguments as stated hereinabove. It is not in dispute that the plaintiff has not taken any step towards disposal of this matter since 15<sup>th</sup> October 2003 when it was last in court. An amended plaint was filed on 29<sup>th</sup> September 2003. A statement of defence had been filed on 25<sup>th</sup> September 2003. Mr. G. J. M. Masese was not right in his submission that since the defendants had not filed any defence to the amended plaint, the plaintiff's suit was unopposed and that there was nothing to fix for hearing. **Order VIA rule 1(6)** provides as hereunder:

***“where a party has pleaded to a pleading which is***

***subsequently amended and served on him under***

*subrule (1), then, if that party does not amend his pleading under the foregoing provisions of this rule, he shall be taken to the rely on it in answer to the amended pleading, and Order VI, rule 10(2) shall have effect at the expiry of the period within which the pleading could have been amended.”*

This in effect means that the defendants chose to rely on their defence and did not deem it appropriate to amend the same even after they were served with the amended pleadings. The plaintiff has not advanced any good reason as to why he has not prosecuted his suit for nearly five years. While the law enables a defendant to fix a hearing date for a suit, it also enables him to apply for dismissal of a suit for want of prosecution. The defendants herein chose the latter option.

I am satisfied that the plaintiff's suit is for dismissal and I hereby dismiss the same for want of prosecution.

The plaintiff shall bear the costs of the suit including the costs of this application.

DATED, SIGNED and DELIVERED at KISII this 25<sup>th</sup> day of June, 2008.

**D. MUSINGA**

**JUDGE**

Delivered in open court in the presence of:

N/A for the plaintiff

Mr. Nyakundi for the defendant.

**D. MUSINGA**

**JUDGE**