

REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 1073 of 2003**

GIDRAF KINYANJUI KAMAUPLAINTIFF

V E R S U S

PAYLESS CAR HIRE & TOURS.....1ST DEFENDANT

ANDEREW MUIHIUHIA MAHUGU2ND DEFENDANT

R U L I N G

This is an application by the Defendants (by notice of motion dated 8th October, 2007) under Order 16, rule 5(d) of the Civil Procedure Rules (the Rules) for dismissal of the Plaintiff's suit for want of prosecution. Under that rule, if within three months after the adjournment of the suit generally the plaintiff, or the court of its own motion on notice to the parties, does not set down the suit for hearing, the defendant may either set the suit down for hearing or apply for its dismissal. The application has been opposed by the Plaintiff.

I have read the supporting affidavit sworn by the Defendants' learned advocate and also the grounds of opposition filed for the Plaintiff. I have also given due consideration to the submissions of the learned counsels appearing. No cases were cited. Finally, I have perused the court record.

I am satisfied that when the case was "taken out" at the "call-over" of 25th October, 2005 before Ang'awa, J the case was adjourned generally, though it was not so stated expressly. Since that time the Plaintiff has not set down the suit for hearing, a period of over two and-a-half years at the time the present application was filed. The Plaintiff did not file any replying affidavit, even after being extended indulgence in order to do so. There is thus no explanation for the inordinate delay.

Having said that, I note that there is no averment in the supporting affidavit (which is sworn by an advocate and not by a party) that the delay in prosecuting the suit has occasioned, or will occasion, the Defendants such prejudice as cannot be assuaged by an award of costs. There is no averment for instance, that it will no longer be possible to have a fair trial of the action on account of the long delay.

Dismissal of a suit unheard is a drastic power that ought to be exercised with restraint. The court's inclination should be to preserve the suit rather than to dismiss it unheard. I will therefore give the Plaintiff one more chance to prosecute his suit.

For the above reason this application is hereby refused. It is dismissed. But I will award costs therefore, hereby assessed at KShs. 15,000/00, to the Defendant. These costs must be paid within 30 days of delivery of this ruling. In default the Defendant may execute for the same.

I further direct that the Plaintiff must, within 30 days of delivery of the ruling, take demonstrable steps towards setting down the suit for hearing. In default the suit shall stand dismissed upon application to that effect by the Defendant. Those shall be the orders of the court.

DATED AND SIGNED AT NAIROBI THIS 20TH DAY OF JUNE 2008.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 20TH DAY OF JUNE 2008