



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Case 1329 of 2005**

**DANIEL MAKAU NYINGI.....1<sup>ST</sup> PLAINTIFF**

**JOSEPH MWANGI KIMANI .....2<sup>ND</sup> PLAINTIFF**

**ISSAC THUO NGUMI.....3<sup>RD</sup> PLAINTIFF**

**JOEL WAITITU MAUCHI.....4<sup>TH</sup> PLAINTIFF**

**VERSUS**

**CITY COUNCIL OF NAIROBI .....DEFENDANT**

**RULING OF THE COURT**

1. I have before me an application dated 29/11/2007 brought by way of Notice of Motion under Order 16 Rule 5 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act on behalf of the Defendant seeking **ORDERS:-**

(1) *that this suit be dismissed for want of prosecution.*

(2) *that the costs be to the Defendant*

The application is premised on 5 (five) grounds on the face thereof ?

(a) *This suit was filed on 3<sup>rd</sup> November 2005*

(b) *The suit was last in court on 3<sup>rd</sup> November 2006 when the Defendant's application to amend the defence was allowed.*

(c) *It is well over three (3) months, since the matter was last in court and the plaintiffs have not taken any step to prosecute the same.*

(d) *It is apparent that the plaintiffs have no interest whatsoever in prosecuting this suit.*

(e) *That it is a cardinal principal (sic) in law that in one way or litigation must come to an end (sic).*

2. The application is supported by the sworn affidavit of Joseph Gikandi dated 29/11/2007. The affidavit reiterates the grounds on the face of the application, only highlighting that it was well over a year since the case was last in court and that it was apparent that the plaintiffs have lost interest in the case.

3. The application was opposed. The Replying Affidavit dated 22/04/2008 was sworn by **Daniel K. Nyingi** the 1<sup>st</sup> plaintiff herein. He says that he has the authority to swear the Affidavit on behalf of the other plaintiffs. From the record however, the court has not seen the authority given to the deponent in compliance with Order 1 Rule 12(2) of the

Civil Procedure Rules which provides:-

*“12. (2) The authority shall be in writing signed by the party giving it and shall be filed in the case.”*

4. The deponent explains that they have not been able to take any action in this matter because they were not able to locate the 3<sup>rd</sup> plaintiff whose whereabouts they were able to ascertain only in mid year 2007. He also goes on to say that the 3<sup>rd</sup> plaintiff could not avail himself because he was the chief campaigner for one of the political aspirants in Kahuro during the General Elections of 2007. He says that the delay in proceeding with the suit was therefore not intentional on their part.

5. At the hearing of the application, Miss Gichuki of the firm of Rumba Kinuthia & Company Advocates appeared for the respondents while Mr. Kithii of the firm of Madzayo Mrima & Company Advocates appeared for the applicant. In his submissions Mr. Kithii contended that the respondents, in their Replying Affidavit had not given any answers for the delay in having their suit prosecuted. He also said that the reason advanced by the plaintiffs, that the 3<sup>rd</sup> plaintiff was engaged in political campaigns is not a good excuse for the plaintiffs' failure to prosecute their case against the defendant. Mr. Kithii also said that paragraph 5 of the Replying Affidavit exposes the plaintiffs even more because even after they were summoned by their advocate to attend the said advocates, vide a letter dated 15/01/2007, the plaintiffs failed to do so, and that this goes a long way in demonstrating that the plaintiff have indeed lost interest in the case.

6. Miss Gichuki for the plaintiffs urged the court to find that this application is premature for the following reasons:-

- i. *that the application does not meet the requirements of Order 16 Rule 5 of the Civil Procedure Rules.*
- ii. *that pre-trial proceedings namely discovery and inspection of documents has not been completed, nor have the issues been agreed and/or filed as provided for under Orders 10 and 14 of the Civil Procedure Rules.*
- iii. *that the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs were not available to give counsel full instructions.*
- iv. *that since 2007 was an election, it took away the 3<sup>rd</sup> plaintiff who acted as chief campaigner for one of the political aspirants in the 3<sup>rd</sup> plaintiff's home area.*

7. Miss Gichuki urged the court to find that the above reasons adequately explain the delay. She said that the plaintiffs still have an interest in proceeding with their case against the defendants and that the case is a strong one with a probability of success.

8. In reply, Mr. Kithii stated that the essence of Order 16 Rule 5 is to compel parties to fix matters for hearing without undue delay, and that if they fail to do so in accordance with the rules, the court has power even on its own motion to dismiss a suit for want of prosecution. He also contended that the three year lapse between filing of the suit and the filing of the instant application have not been explained. Mr. Kithii also contended that it did not matter where the plaintiffs lived; they were under a duty to proceed with their case. He also said that lack of interrogatories, discovery or agreed issues does not change the position. In my own view, fixing a case for hearing is not conditional upon completion of pre-trial proceedings being undertaken and therefore, Orders 10 and 14 of the Civil Procedure Rules are not a bar to this application.

9. There are only two issues that arose for determination:- (a) whether the Replying Affidavit is competently before this court and (b) whether the plaintiffs have given sufficient explanation for the delay in having their suit prosecuted. As far as the first issue is concerned, I am persuaded that Daniel Kamau Nyingi did not have the authority of the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs to swear the affidavit since he has not filed in this case such authority as is provided for under Order 1 Rule 12(2) of the Civil Procedure Rules. In the circumstances, I find and hold that the affidavit as sworn by Daniel Kamau Nyingi is incompetent and is accordingly struck out. In this regard, the applicant's application remains unconstested.

10. I now move on to the second issue and that is whether if the application had been contested, the plaintiffs have given sufficient case. Order 16 Rule 5 of the Civil Procedure Rules provides for dismissal of suit for want of prosecution in the following terms:-

*“5. If, within three months after –*

- (a) *the close of pleadings; or*
- (b) *Deleted by L.N. 36/00)*
- (c) *The removal of the suit from the hearing list; or*

*(d) The adjournment of the suit generally, the plaintiff, or the court on 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”.*

11. In the instant suit, I think that it is Rule 5(a) which is applicable. With the filing of the amended defence on 10/11/2005, the pleadings closed. Since that date up to the filing of the instant application, the plaintiffs took no single step with a view to setting down the suit for hearing. The defendant could have set down the suit for hearing, but it was the primary responsibility of the plaintiffs to set down the suit for hearing. They did not do so and have not given any reasonable explanation for failing to do so.

12. In the result, I have no option but to dismiss the plaintiff’s suit for want of prosecution. Costs of this application and of the suit shall be paid to the defendant.

Orders accordingly.

Dated and delivered at Nairobi this 19<sup>th</sup> day of September, 2008

**R.N. SITATI**

**JUDGE**

**Delivered in the presence of:-**

..... Plaintiffs/Applicants

.....Defendants/Responde