



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 432 of 2002**

JOHN NGARI MACHARIA (suing as the father and Personal

Representative of the estate of

FRANCIS MUHORO NGARI (DECEASED).....PLAINTIFF

VERSUS

BERNARD HOTHATU KAMAU.....1ST DEFENDANT

FRANCIS KIARIE MBUGUA.....2ND DEFENDANT

AND

JASPAL SINGH.....1ST THIRD PARTY

**PELICAN HAULAGE CONTRACTORS LIMITED.....2ND THIRD
PARTY**

R U L I N G

1. The application before me is the Notice of Motion dated 18/10/2007 which is brought under Order 50 Rule 1, Order 16 Rule 5 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and all other enabling provisions of the law. The Applicants who are the Defendants herein are seeking an order dismissing the Plaintiff's suit for want of prosecution. The Applicants are also praying for costs of both the application and the suit.

2. The application is premised on the grounds:?

1. *THAT this suit was filed on 25th July 2002.*

2. *THAT this suit had been dismissed under Order IXB Rule 4 on 6th August 2004 for non attendance of the plaintiff and/or his Advocate and was reinstated at the behest of the Plaintiff on 13th July 2006 and has then never been listed for hearing.*

3. *THAT the Defendant's Advocate received an invitation to fix a hearing date from Plaintiff's Advocate on 27th March 2007 however no hearing date has been scheduled to date despite the court orders of 13th June 2006.*

4. *THAT the Plaintiff has not made any efforts to prosecute this matter since its institution and the law should assist the indolent and the vigilant.(sic)*

5. *THAT in view of the extended delay in setting down this matter for hearing, and the Plaintiff's laxity in prosecuting this claim it is clear that the Plaintiff has lost interest in this suit and the same should therefore be dismissed for want of prosecution.*

3. The application is also supported by the sworn affidavit of CHRISTINE ADHIAMBO ORARO dated 18/10/2007. The deponent reiterates the grounds on the face of the application and says that pleadings herein closed with the filing of the Statement of Defence on 12/09/2002. She also says that despite the reinstatement of the suit on 13/07/2006, the Plaintiff has taken no steps towards setting down the suit for hearing. In the deponent's view, the Plaintiff has been indolent and should not be assisted by the court. She also depones that the delay in setting down the suit for hearing is an indication that the Plaintiff has lost interest in the case.

4. The application is opposed. The Plaintiff filed a Replying Affidavit on 6/03/2008. He says that he is aged about 78 years and suffers from hypertension and diabetes; that it is his previous advocate who caused the delay in having this suit prosecuted and that it was only on 28/02/2008 that he learnt of the instant application from his former advocate when he (Plaintiff) visited the said advocates' offices. The Plaintiff says that he has now instructed another advocate to pursue this claim on his behalf.

5. During the hearing hereof, counsel for the Plaintiff argued that it is not correct that the Plaintiff has been asleep all the while. He pointed out that in March 2007, he invited the Defendant's counsel for fixing of the case for hearing although the case is yet to be heard. In reply, counsel for the Defendants contended that the Plaintiff has not produced any evidence of illness on his part and further that since March 2007, no other action has been taken by the Plaintiff to set down the suit for hearing.

6. The orders sought by the Applicant herein are governed by Order 16 Rule 5 of the Civil Procedure Rules which gives a Plaintiff only three months from close of pleadings or removal of the suit from the hearing list or adjournment of the suit generally to set down the suit for hearing. In default of such action the court on its own motion or the Defendant with notice to the parties, may set down the suit for hearing or the Defendant may apply for dismissal of the suit. The Defendants have chosen to apply to have the suit dismissed for want of prosecution. This suit had earlier been dismissed for non-attendance of both the Plaintiff and his counsel when the same came up for hearing 6/08/2004. The case was however reinstated on 13/06/2006. By a letter dated 16/08/2006 counsel for the Plaintiff's invited Defendant's counsel for fixing of a hearing date but the record does not indicate what may have transpired on 1/09/2006 when the parties were supposed to take hearing dates. Thereafter the Defendants filed the instant application.

7. I have carefully considered the application together with all the affidavits for and against the application. I have also carefully considered the submissions made by both parties. Ordinarily I would straight away allow the Applicant's application for reasons that the Respondent has not demonstrated by way of documentary evidence that he is hypertensive and diabetic; nor has he produced evidence to confirm that indeed he is aged 78 years. I am however persuaded that in the circumstances of this case, and in order to do justice between the parties, for that is the primary duty of the court, I shall give the Respondent a last chance to prosecute his case.

8. In the result, I dismiss the Applicant's application but award them costs. I order that the Plaintiff do set down his suit for hearing within the next ninety (90) days from today, failing which the suit shall stand dismissed for want of prosecution with costs to the 1st and 2nd Defendants.

It is so ordered.

Dated and delivered at Nairobi this 17th day of November, 2008.

R.N. SITATI

JUDGE

Delivered in the presence of:

No appearance For the Plaintiff/Respondent

Miss Karumba holding brief For the Defendants/Respondents