



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)**

**Civil Suit 1216 of 2001**

**JOEL MUISYO NZIOKA.....PLAINTIFF**

**VERSUS**

**DEVELOPMENT BANK (K) LIMITED.....1<sup>ST</sup> DEFENDANT**

**GRAHAM JAMES GREER SILCOCK.....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

The application is dated 24<sup>th</sup> August, 2006 but filed in court on 29<sup>th</sup> May, 2007. It is expressed to be brought under Order XVI rule 5(d) and Order L rule 1 of Civil Procedure Rules. It seeks to have the Plaintiff's suit dismissed for want of prosecution. Only one ground is cited on the face of the application as the basis for the application which is, that since 27<sup>th</sup> November, 2003 when the suit was stood over generally, no action had been taken to set the suit down for hearing.

The application is supported by an affidavit sworn by Peter Mwaniki Kiura dated 28<sup>th</sup> August, 2006 and filed in court on 28<sup>th</sup> May, 2007. The affidavit merely states that since 27<sup>th</sup> November, 2003 when the suit was stood over generally, no further action has been taken.

**IVITA –v- KYUMBU 1984** KLR 441 sets out the principles that should be applied in determining whether an application to dismiss the suit should be allowed. In the case, Chesoni, J. as he then was held:

***“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”***

I have looked at the record of the proceedings. Since 27<sup>th</sup> November, 2003 there has been a lot of activity

in the case. On 24<sup>th</sup> December, 2003 the court certified the Plaintiff's application dated 24<sup>th</sup> December, 2003 urgent and set it down for hearing on 2<sup>nd</sup> January, 2004. The application sought to join two other parties to the suit as the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. On the resumed hearing set for 2<sup>nd</sup> January, 2004, none of the parties came for hearing and the case was marked stood over generally.

Subsequently on 9<sup>th</sup> January, 2004, the Plaintiff applied to withdraw the application dated 24<sup>th</sup> December, 2003 which the court allowed. Thereafter the Defendant filed the current application. The application was removed from the hearing list by the consent of the parties. In the meantime the Plaintiff's Advocate filed an application to cease acting for the Plaintiff. The application was adjourned four times on the instance of the Plaintiff's Advocate. It was never prosecuted. The Defendant's Advocate finally set down the current application for hearing on 19<sup>th</sup> November, 2008 and prosecuted it. Despite service of the hearing notice on the Plaintiff's advocate, he did not appear for the hearing of the application.

I have also read the record and noted remarks by the K'owade Advocate for the Plaintiff. On 24<sup>th</sup> December, 2003 as he argued a certificate of urgency for the application dated 24<sup>th</sup> December, 2003 before Njagi, J., Mr. K'owade stated that the Plaintiff wished to join the purchaser of the suit property to the suit as he was in the process of selling it off to third parties. The application was indeed certified urgent on that ground. It was subsequently withdrawn.

The substantive prayer sought in the plaint was a permanent injunction against the (1<sup>st</sup>) Defendant from selling or alienating the suit property. That prayer has certainly been over taken by events as the suit property, as indicated herein above, was sold off to third parties before any injunction was served on the Defendant. The substratum of the suit has effectively been determined and all that awaited determination was the issue of costs.

I find for reasons given above, that the Plaintiff has lost interest in the suit. I find that keeping the suit pending does not serve the interest of justice. The application is accordingly allowed.

**The Plaintiff's suit is dismissed with costs to the Defendant/Applicant for lack of prosecution under Order XVI rule 5 of Civil Procedure Rules.**

**Dated at Nairobi this 5<sup>th</sup> day of December, 2008.**

**LESIT, J.**

**JUDGE**

**Read, signed and delivered in presence of:-**

Mr. Kiura for the Applicant

Thangei for the Respondent

**LESIT, J.**

**JUDGE**