



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 502 OF 2004

JERRY MAGUTU t/a SED-ARCH (K) LTD..... PLAINTIFF

VERSUS

FRANCIS MUDANYA AYOMO.....DEFENDANT

RULING

The Notice of Motion herein, dated 6/9/06, and filed on 8/9/06 seeks dismissal of the suit for want of prosecution for over 1 year. Supported by the affidavit of P. Muga, the application is on the grounds, **inter alia**, that: the suit was last in court on 8/9/05 when it was not listed and the Plaintiff has taken no steps since then to fix the suit for hearing.

In opposition, the Respondent's Counsel, who was in conduct of the suit then, averred, **inter alia**, that he was out of the country between July 2005 and May 2006 when he returned from South Africa where he had gone for further studies; and that the delay in prosecuting the suit was not intentional and such conduct, on his part, should not be visited against the Respondent.

Having perused the pleadings herein, it is trite to observe that delay is a factual matter and the facts and circumstances of each case must be taken into account.

In the application before me, the suit was filed in court on 17/5/04, and was last in court on 8/9/05, but it was not listed on that day, and hence could not be heard.

The current application for dismissal of the suit for want of prosecution was filed just a year after the matter was last in court.

Whereas Order 16 rule 5 talks of three months, there is no magic about the three months. It is not the

longevity **per se** that counts towards grant of an order of dismissal of a suit. The existence or otherwise of explanation for the delay is more important than the period since the matter was last in court, provided that that explanation is credible and excusable.

As was held in SAGOO V. BHARIJ HCCC NO. 657 OF 1989 [1990] KLR 459, **“It is not the practice of the courts to exercise the drastic power of dismissing a suit unless satisfied that there has been intentional inordinate or inexcusable delay on the part of the Plaintiff and that there is a risk that the delay would inhibit a fair trial or that would cause prejudice to the Defendants.”**

In the case before me, there is evidence that Plaintiff’s counsel was out of the country during the period claimed to have constituted the delay. The reason for that absence from the country, is, in my humble view, a noble one (for further studies) and that the counsel forgot to hand over the file to any other counsel in the firm, who could have handled the matter.

Accordingly, not only do I find the explanation credible and satisfactory, but also clearly feel that to dismiss the suit herein would be to victimize the Plaintiff for the mistakes/omissions of his counsel. That would not be a proper exercise of this court’s discretion, given the consequences of dismissing a suit.

Accordingly, I dismiss the application for dismissal, but order that the Plaintiff/Respondent moves with speed to fix a hearing date for the suit within the next 21 days from today, failing which the suit to stand dismissed for want of prosecution.

Under the above circumstances, I make no order as to costs.

DATED and delivered in Nairobi this 21st Day of February, 2007.

O.K. MUTUNGI

JUDGE