



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 774 of 2000**

**THEODORE OTIENO KAMBOGO ..... PLAINTIFF**

**VERSUS**

**NORWEGIAN PEOPLES AID ..... DEFENDANT**

**RULING**

In this application by notice of motion dated 27<sup>th</sup> September 2006, the Defendant seeks an order under Order 16 rule 5 (d) of the Civil Procedure 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 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. The Defendant has elected the latter option, as it was its right to do. There is a supporting affidavit sworn by one LARN GILL who describes himself as the Resident Representative of the Defendant.

It is the Defendant's case that the suit was adjourned generally at the request of the Plaintiff on 8<sup>th</sup> November 2004 when it came up for hearing, and that since that time the Plaintiff has not set it down for hearing. The present application was filed on 6<sup>th</sup> October 2006, that is, nearly two years after the suit was adjourned generally. It is therefore submitted for the Defendant that the Plaintiff is guilty of inordinate and inexcusable delay. It is further submitted that this delay has prejudiced the Defendant in that it will no longer be possible for it to trace its witnesses.

The Plaintiff has opposed the application as set out in his replying affidavit filed on 25<sup>th</sup> January 2007. He concedes that there has been delay, but he lays it entirely on the head of his former advocates. He has annexed to the replying affidavit various correspondences between him and his said advocates, and also between him and the Advocates Complaints Commission, to whom he had complained about his former advocates' conduct of the matter on his behalf. Part of his complaint was that the advocates were not fully briefing him, were not preparing him properly for hearing of the case and that that they were colluding with the Defendant to delay trial of the case. The Plaintiff ultimately instructed another counsel. Unfortunately the new counsel declined to take up the brief. The Plaintiff then opted to act in person. He states that he has always been keen to prosecute the case and pleads to be accorded the chance to do so.

I have carefully and anxiously considered the submissions of the learned counsel for the Defendant and those of the Plaintiff. I have also read the cases cited. It cannot be gainsaid that there has been inordinate delay on the part of the Plaintiff to set down his case for hearing since it was generally adjourned on 8<sup>th</sup> November 2004. I must thus decide if this inordinate delay has been satisfactorily explained and excusable. The Plaintiff obviously was not happy with the way his former advocates were conducting the matter. He addressed to them many letters complaining of not being properly briefed or prepared for trial. He also complained of collusion between them and the Defendant to delay hearing of the case. He felt strongly enough in these matters to formally complain to the Advocates Complaints Commission. The Commission eventually advised him to instruct another counsel. This he did; unfortunately the new counsel declined to take the brief. He then opted to act in person. In the meantime days passed into many months.

I am not here concerned with the merit of the Plaintiff's complaints against his former advocates. These complaints were raised long before the present application was filed. It cannot therefore be said that the complaints were raised to try and explain the delay. I detect in the complaints a genuine desire on the part of the Plaintiff to prosecute his case as expeditiously as possible. That desire is still apparent in his replying affidavit and in his address to court during hearing of this application. I am therefore satisfied that the Plaintiff has satisfactorily explained the delay. The delay, it is clear, was occasioned while the Plaintiff tried to solve his problems with his former advocates. The delay is therefore excusable.

But I must also decide if the delay has prejudiced the Defendant as pleaded. I have perused the court record herein. I note that the Defendant applied by chamber summons dated 27<sup>th</sup> May 2003 for an order that the evidence of one HELGE ROHN be taken by way of affidavit. This Helge Rohn is stated in the affidavit sworn in support of the present application to have been the Defendant's Resident Representative in Kenya between March 1992 and May 1996. The application was heard *inter partes* and by a ruling dated and delivered on 4<sup>th</sup> November 2003 the court (Njagi, J.) the court allowed it having been satisfied under the proviso to section 35 (1) of the Evidence Act, Cap. 80 that bringing the witness from Norway would involve delay and expense that were unreasonable in the circumstances of the case. I note that the other potential witnesses for the Defendant in this matter, as mentioned in the affidavit sworn in support of the present application, being Messrs. HANS HAVIK, LARS JOHAN JOHNSON and STEL RINO BONSAKSEN appear also to be from Norway. It should be possible to make a similar application in regard to them for their evidence to be taken in affidavit form. I therefore do not find that the delay in setting down this suit for hearing has caused the Defendant such prejudice as cannot be compensated by an appropriate award of costs.

Dismissing a litigant's suit without a hearing on merits is a very drastic action to take. No court will lightly take that step. Where justice will be done by allowing the case to be fixed for hearing, the court ought to refuse an application to dismiss the suit for want of prosecution. In the instant case, I am satisfied that the justice of the matter dictates that the Plaintiff be accorded one more opportunity to set down his case for hearing.

In the circumstances, therefore, I must refuse the application. It is hereby dismissed, but not without conditions. These conditions are:

1. The Plaintiff shall pay to the Defendant the costs of this application hereby assessed at KShs. 15,000/00 within 30 days of delivery of this ruling. In default the Defendant may execute for the same.
2. The Plaintiff shall within 15 days of the opening of the court diary for the year 2008 (as I understand the diary for this year is full and has been closed) set down the suit for hearing at the earliest mutually convenient date.

Those shall be the orders of the court.

**DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF FEBRUARY 2007.**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED THIS 2<sup>ND</sup> DAY OF MARCH, 2007**