



**JOHN HARUN MWAU.....PLAINTIFF**

**VERSUS**

**THE STANDARD LIMITED.....1<sup>ST</sup> DEFENDANT**

**TOM MSHINDI.....2<sup>ND</sup> DEFENDANT**

**MUTUMA MATHIU.....3<sup>RD</sup> DEFENDANT**

**RULING**

This is a Notice of Motion brought by the Defendant and expressed to be brought under Order XVI Rule 5 of the Civil Procedure Rules for orders that the Plaintiff's suit be dismissed for want of prosecution. It also seeks costs of this application as well as the entire suit.

The application is based on the grounds that it has been more than 3 months since the close of the pleadings and no further step has been made; and that the Plaintiff has since 22<sup>nd</sup> March 2005 taken no step to set the matter down for hearing.

The application is also supported by an affidavit sworn by Lois Gakumo in which she avers that it is evident that since the Reply to Defence was filed on or about the 22<sup>nd</sup> March 2005 the Plaintiff has not attempted to avail or set down the suit for hearing.

The application is opposed by the Plaintiff who has filed a replying affidavit sworn on 16<sup>th</sup> November 2005 in which he avers that the reason for the delay, if any, in prosecuting this suit against the Defendants is assignable to the relatively clogged Civil Division of the High Court diary; that he verily believes that the delay if any, in prosecuting the action against the Defendants is not inordinate and is excusable in the totality of the circumstances; that he is anxious and willing to proceed with the suit against the Defendants and moreover he has filed an application to strike out the Defendants defence; that it is in the interest of justice that this Honourable Court permits him to proceed with the action against the Defendants to its logical conclusion as a suit in law for trial on merits; and that this suit is a 2005 suit and by any stretch of imagination cannot be an old matter whose disposal has been inordinately delayed.

Mr. Gitonga, counsel for the Defendants submitted that this is a fit case to be dismissed under Order XVI Rule 5 of the Civil procedure Rules for want of prosecution. The suit is for damages for defamation and the nature of the defamatory remarks is begged on time and the issues that affect the society at that time and failure by the Plaintiff to pursue his claim within a reasonable time would be prejudicial to the Defendants. There would be loss of witness or loss of source of information which will lead to inability to defend the suit effectively.

Miss Migiro, counsel for the Plaintiff in opposition to the application relied on the replying affidavit sworn by John Harun Mwau on 16<sup>th</sup> November 2005. She submitted that the principles governing dismissal of suits for want of prosecution are threefold. First, the delay must be inordinate. The suit was filed on 3<sup>rd</sup> February 2005. This being a 2005 matter cannot be said to be an old matter whose disposal

has been inordinately delayed.

Secondly the reason for delay if any is excusable. The reason for the Plaintiff not to prosecute his suit is attributed to the relatively clogged High Court diary of the Civil Division. She also asked the court to take judicial notice that 90% of the cases that have been filed are not fixed for hearing within 90 days because of the backload of the cases. Counsel further submitted that the Plaintiff has not been indolent and has been vigilant in pursuing his claim against the Defendants. In that regard the Plaintiff has filed two Chamber Summons applications dated 28<sup>th</sup> February 2006 and 5<sup>th</sup> June 2006 respectively which are awaiting to be heard.

Thirdly the Defendants have failed to demonstrate before this court the prejudice occasioned to them, if any.

Order XVI Rule 5 (d) applies to a situation where the suit has been set down for hearing and the same has been adjourned generally. A consideration of the principles to be applied in deciding whether or not a suit ought to be dismissed for want of prosecution shows that an application by a Defendant under Order XVI Rule 5 of the Rules is not automatic. What are those principles?

The Court of Appeal in England in **ALLEN V. SIR ALFRED MC. ALPINE & SONS 1968 ALL ER** established as the principles governing applications for dismissal for want of prosecution. It must be shown that:

- (a) the delay is inordinate
- (b) the inordinate delay is inexcusable or
- (c) the Defendant is likely to be prejudiced.

Delay is a matter of fact to be decided on the circumstances of each case. Where a reason for delay is offered, the court should be lenient and allow the Plaintiff an opportunity to have his case determined on merit. Finally the court must consider whether the Defendant has been prejudiced by the delay. To achieve justice the court must also consider the possible loss likely to be sustained by the Plaintiff if his case is terminated summarily for a procedural default. Where a Plaintiff has a prima facie case, to determine his rights by the summary procedure under Order XVI Rule 5 would result in great hardship to the Plaintiff who has a reasonable excuse for the delay. In **NGWAMBU IVIJA VS. AKTON MUTUA KYUMBU HCCC 340 OF 1991** (unreported) it was said:-

**“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 the Defendant; so both parties to the suit must be considered.**

**The Defendant must however satisfy the court that he will be prejudiced by the delay. He must show that justice will not be done in the case due to 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 delay and that justice can still be done to the parties notwithstanding 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. Where the Defendant satisfies the court that there has been prolonged delay and the Plaintiff does not give sufficient reason for the delay, the court will presume the delay is not only prolonged but it is also inexcusable and in such a case the suit may be dismissed.”**

The act to dismiss a suit for want of prosecution is draconian and should only be resorted to in undeserving cases only. As was stated in Halsburys Laws of England 4<sup>th</sup> Ed. Vol. 37 para.448:

**“The power to dismiss an action for want of prosecution without giving the Plaintiff the opportunity to remedy his fault will not be exercised unless the court is satisfied that the default has**

**been intentional and contumelious or that there has been prolonged and inordinate delay on the part of the Plaintiff or his lawyer and that such delay will give rise to substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the Defendant either as between themselves and the Plaintiff or between each other or between them and the third parties.”**

In the instant suit the Defendants have not shown that there was inordinate delay on the part of the Plaintiff in prosecuting this suit. As submitted by Miss Migiro, the court has also taken judicial notice that cases filed one or two years ago are not fixed for hearing within 90 days because of the backload in the Civil Division of the High Court. I have in the recent past declined to dismiss suit for want of prosecution on similar grounds. In most cases they are unlikely to be confirmed during the call over.

In the result the Defendants Notice of Motion dated 14<sup>th</sup> February 2006 is dismissed with costs to the Plaintiff.

Dated and delivered at Nairobi this 23<sup>rd</sup> day of May 2007.

**J.L.A. OSIEMO**

**JUDGE**