REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL SUIT 87 OF 2002

MARGARET MWONTUNE MUTURI.....….PLAINTIFF/RESPONDENT

VERSUS

CONSOLATA HOSPITAL NKUBU.....…1ST DEFENDANT/APPLICANT

NATIONAL HOSPITAL INSURANCE FUND…..……2ND DEFENDANT

R U L I N G

1. The Application dated 14.3.2007 is premised on Order XVI Rule 5(a) of the Civil Procedure Rules and seeks the order that the suit as against the 2nd Plaintiff be dismissed for want of prosecution. The main reason given is that pleadings in the suit closed on 8.8.2002 and yet the plaintiff has taken no steps to have the suit listed for hearing as is expected. That the 2nd Defendant is thereby prejudiced and oppressed by the suit. This is further explained at paragraph 8 of the supporting Affidavit of T.J. Kajwang Esq, Advocate where he depones as follows:-

"**The 2nd Defendant is apprehensive that the longer this matter drags in Court without being heard, there is a real likelihood that its potential witnesses and exhibits may not be available when necessary**."

2. In a brief replying Affidavit sworn on 31.5.2007, Duncan Gichunge Muthuri Esq, Advocate depones that the Plaintiff has not lost interest in the suit and had fixed it for mention on 25.1.2007 and had in any event written to the 2nd Defendant's advocates on 5.9.2006 seeking an amicable conclusion to the suit.
3. Both Mr. Kajwang and Mr.Gichunge reiterated the above matters in submissions and I see no need to reproduce their otherwise concise arguments. On my part however, the record in this matter speaks for itself and I note that on 16.5.2002, 21.5.2002, 23.5.2002 and 29.5.2002 the Plaintiff was in court pursuing the hearing of her Application dated 16.5.2002 seeking the release of the body of the late Lawrence Mwangi Muturi for burial. On 29.5.2002 and the body having been released to her, she withdrew the application and no order as to costs was made. The Plaintiff thereafter did nothing until 8.1.2007 when her Advocates fixed the case for hearing on 20.6.2007 without notice to the Advocates for the 2nd Defendant on the hearing date although by letter dated 4.12.2006, the advocates for the 1st Defendant were invited to the Registry on 8.1.2007 to fix mutually agreeable dates.
4. Unaware that the matter had been fixed for hearing on 20.6.2007 and unaware of the monthly call-over slated for 18.5.2007 to confirm the matter for hearing, Advocates for the 2nd Defendant filed

the instant Application on 16.3.2007 and the same was fixed for hearing on 20.6.2007. They served the Advocates for the Plaintiff on 17.3.2007 but the Reply to the Application was filed on 11.6.2007. What do the Rules expect of this court in such circumstances?

Order XVI Rule 5(a) and (d) the Civil Procedure Rules Provides as follows:-

"**If, within three months after_**

(a) the close of pleadings; or

(b)…….

(c)……

(d) the adjournment of the suit generally, the plaintiff or the court of 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 didmissal"

5. It is not denied that pleadings closed on 18.8.2002 and as I have indicated above, the plaintiff did nothing as regards the suit form 29.5.2002 until 8.1.2007 a period of over 4 ½ years and it was expected that the 2nd Defendant would on its part either set the suit down for hearing or "**apply for its dismissal**". Although otherwise the 2nd Defendant was right in seeking dismissal of the case, I have just shown that in fact by the time the Application was filed, the suit had already been fixed for hearing, a matter quite lost on Mr. Gichunge, Advocate for the Plaintiff who was under some misapprehension that the suit was due for mention on 25.1.2007. To dismiss the suit with this background would be against the applicable rule as set out above, notwithstanding that there would otherwise have been a good reason to dismiss this old suit.
6. In a very lucid Ruling on the subject of dismissal of a suit for want of prosecution Chesoni J. (as he then) was held as follows in Ivita vs Kyumbu [1984] KLR 441;

"**The test to be applied by the courts in an application for dismissal for want of prosecution is whether the delay is prolonged and inexcusable, and it is, whether justice can be done despite the delay. Thus even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time. It is a matter in the discretion of the court."**

7. Adopting this approach and to fit it in the circumstances of this case, I will not dismiss the suit for reasons that at the time the 2nd Defendant moved the court and although there was clear delay on the part of the plaintiff, the suit had in fact been set down for hearing. Further the 2nd defendant having itself adopted the "**sleeping dog"** tactic and did nothing since 2002, cannot but be seen as having acquiesced in the delay and moved much later than the Plaintiff to have the suit dismissed for want of prosecution when in fact a hearing date had already been set .– see Fitzpatrick vs Batger & Co Ltd [1967] 2 All E.R. 657. The Plaintiff being equally to blame cannot derive any benefit from this finding by way of costs.
8. Accordingly, the Application dated 14.3.2007 is dismissed but with no order as to costs.
9. Let parties now take mutually agreeable dates to finalize this otherwise short matter.

Orders accordingly.

Dated, signed and delivered in open court at Meru this 26th Day of July 2007.

ISAAC LENAOLA

JUDGE

In the presence

N/A Advocate for the Plaintiff/Respondent

N/A Advocate for the Defendant/Applicant

ISAAC LENAOLA

JUDGE