

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Suit 440 of 2004

ALFAYAZ SUNDERJI PLAINTIFF

VERSUS

RAHIM VIRANI DEFENDANT

RULING

This is an application for dismissal of the suit for want of prosecution under O.16 R.5 of the Civil Procedure Rules. The Applicant says that the Plaintiff has taken no steps to prosecute this suit since its filing on 30th April, 2004.

In her submissions before this Court, Ms. Migiro, Counsel for the Defendant, argued that the delay in prosecuting this case was inordinate, and prejudicial to the Defendant. She submitted that this being a defamation case, there is a likelihood that there will be “loss of evidence” with delays taking place. She has relied on this Courts decision in the case of *Agip (Kenya) Ltd. v. Highland Tyres* (2001) KLR 630 which laid down the test to be applied in applications for dismissal for want of prosecution.

Although the Plaintiff was not represented at the hearing of this application, his Counsel, Mr. Majanja, filed a Replying affidavit explaining that he was in South Africa from 16th July, 2005 to 30th May, 2006 pursuing further studies, and that he had inadvertently omitted to hand over this file to another advocate in the firm.

Although Mr. Majanja has been tardy in prosecuting this case efficiently, I do not propose to penalize his client for his mistake. The mistake is excusable, but I will Order that he take steps to set this case down for hearing within the next fifteen days, failing which this suit shall remain dismissed, with costs to the Defendant.

This application is disallowed. Costs in cause.

Dated and delivered at Nairobi this 20th day of June, 2007

ALNASHIR VISRAM

JUDGE