



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

**Civil Case 485 of 2004**

**JOSEPH GATHIRWA .....PLAINTIFF**

**VERSUS**

**EAST AFRICAN PORTLAND CEMENT CO. LTD.....DEFENDANT**

**RULING**

This is an application by the Plaintiff under Order XVI Rule 5 of the Civil procedure Rules for an order that the Defendant's application against him dated 19<sup>th</sup> September 2005 be dismissed for want of prosecution. The Plaintiff says there has been inordinate delay in prosecuting the application. In support of the application Albert S. Kuloba Advocate for the Plaintiff has sworn an affidavit giving grounds for the application. The application was filed on 19<sup>th</sup> September 2005 seeking orders that the Plaintiff's suit be struck out with costs.

The defendant in opposing the application filed Grounds of Opposition on 11<sup>th</sup> June 2007 in which he states that the Defendant's application the subject of this Notice of Motion was last in court on 24<sup>th</sup> July 2006 when both parties agreed by consent that the matter be taken out. This is a 2004 suit and was last in court barely 6 months prior to the filing of this application. A matter can only be dismissed if there has been inordinate and inexcusable delay which will give rise to a substantial risk that it is not possible to have a fair trial of the issues in action or is likely to cause prejudice to the other party. The Applicant has not established that there has been inordinate and inexcusable delay on the part of the Respondent in prosecuting the application dated 19<sup>th</sup> September 2005. And in fact the record will bear me out that the suit has not been dormant. I am not persuaded to exercise my discretion in favour of the Applicant.

Accordingly the Applicant Notice of Motion dated 31<sup>st</sup> January 2007 is dismissed with costs.

Dated and delivered at Nairobi this 25<sup>th</sup> day of July 2007.

**J.L.A. OSIEMO**

**JUDGE**