

REPUBLIC OF KENYA

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

Civil Case 1465 of 2002

ALICE GITHAE (t/a ALICE NURSING HOME).....PLAINTIFF

V E R S U S

NATIONAL HOSPITAL INSURANCE FUND

(THRO' THE BOARD OF TRUSTEES)DEFENDANT

R U L I N G

This is an application (notice of motion dated 14th November, 2005) by the Defendant under Order 16, rule 5(a) of the Civil Procedure Rules (the Rules) for dismissal of the suit for want of prosecution. Under that rule, if, within three (3) months after the close of pleadings 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 dismissal. There is a supporting affidavit sworn by one M. A. HASSAN, the Defendant's Chief Executive Officer. It is the Defendant's case that the last pleading filed herein, being the amended defence, was served on 5th January, 2004. Under Order 6, rule 11 of the Rules, therefore, pleadings closed fourteen (14) days thereafter, that is, on or about 19th January, 2004. It is the Defendant's further case that since that date the Plaintiff has not set down her suit for hearing; the Plaintiff is therefore not interested in prosecuting this suit. The existence of the suit, further pleads the Defendant, is prejudicial to its interests, especially given the nature of the claim, which is for a substantial sum of money which, if awarded, is bound to attract interest.

The Plaintiff has opposed the application as set out in her replying affidavit filed on 2nd March, 2007. She depones that she is desirous of proceeding with the suit. She further depones that there has been some confusion as to who, between J. A. GUSERO & COMPANY, ADVOCATES and MZILANI MUTETI, ADVOCATE, is representing her in this suit.

I have read both the supporting and the replying affidavits. I have also given due consideration to the submissions of the learned counsels appearing. The record of the court shows that since the close of pleadings the suit has never been set down for hearing. There has been inordinate delay on the part of the Plaintiff that has not been satisfactorily explained. However, this delay has not been flagrant and culpable. I note that in the meantime there has been an application for amendment of the plaint which was duly prosecuted and allowed. I also note that on 3rd of May, 2007 the Plaintiff made discovery of documents under Order 10, rule 11A of the Rules. It does appear indeed that the Plaintiff is desirous in prosecuting the suit. On the other hand the Defendant has not made discovery. Discovery under the aforesaid rule is mandatory for both parties.

I am satisfied that once the Defendant makes discovery the suit can be heard without further delay. I am also satisfied that in these circumstances the Defendant will not suffer such hardship or prejudice as cannot be made good by an award of costs.

I will therefore refuse the application. It is hereby dismissed. But the Plaintiff shall pay to the Defendant its costs of the application, hereby assessed at KShs. 30,000/00, within fourteen (14) days of delivery of this ruling. In default the Defendant may execute for the same. Those shall be the orders of the court.

DATED AT NAIROBI THIS 17TH DAY OF 2007

H. P. G. WAWERU

JUDGE

DELIVERED THIS 20TH JULY DAY OF 2007