



**REPUBLIC OF KENYA**

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

**Civil Case 549 of 1990**

**RUTH WAMBUI GICHURU.....PLAINTIFF**

**VERSUS**

**CROSSWAYS CAR HIRE TOURS & TRAVEL LTD**

**REBECCA LOUIS EFFITIZ GERALD.....DEFENDANTS**

**RULING**

By this Notice of Motion brought under Order XVI Rule 5 (a) (c) and (d) of the Civil Procedure Rules, the Defendant seeks orders that the Plaintiff's suit be dismissed for want of prosecution.

The Plaintiff also seeks costs of this application as well as the entire suit. The application is based on the ground that the cause of action arose on 10<sup>th</sup> March 1989 and this suit was filed on 12<sup>th</sup> February 1990 and the defence was filed on 17<sup>th</sup> April 1990. The Defendants were substituted and filed their defences on 17<sup>th</sup> September 1991 and 2<sup>nd</sup> October 1991 respectively.

The suit has been in court for the last 16 years and the Plaintiff has fixed the same for hearing on a few times only.

The Notice of Motion is opposed by the Plaintiff who has filed a replying affidavit sworn by K.N. Muigai in which he avers that the suit has been fixed for hearing on a number of occasions but could not proceed for no fault of the Plaintiff. At one time it was not confirmed at the call over, and at another time the suit was taken out of the hearing list at the request of the Defendant. At another time it was taken out by consent of both parties.

At some stage there were negotiations to settle the suit out of court and the file had gone missing from the registry at some time. This is conceded by the defendant in his grounds in support of the application in paragraphs (g) and (h).

From the court record it cannot be said that the suit was dormant. There was some activity though minimal. The act to dismiss a suit for want of prosecution is draconian and should only be resorted to in undeserving cases only.

The question of delays in bringing civil actions to speedy conclusion was exhaustively considered by the Court of appeal in England in ALLEN VS. SIR ALFRED MC ALPINE & SONS LTD 1968 1 ALL ER 543 where it was held that when the delay is prolonged and inexcusable and is such as to do grave injustice to the one side or the other or both, the court may in its discretion dismiss the action

straightaway.

On the other hand this power should not be exercised unless the court is satisfied:

1. that the default has been intentional and contumelious, e.g. disobedience to a peremptory of order of the court or conduct amounting to an abuse of the process of the court; or (a) that there has been inordinate and inexcusable delay on the part of the Plaintiff or his lawyer; and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in action or such as is likely to cause or to have caused serious prejudice to the Defendants either as between themselves and the Plaintiff or between each other or between them and a third party.

In the circumstances of this case, although there is obviously some delay on the part of the Plaintiff the record shows that the case has not been dormant. There were attempts at some stage to settle the suit out of court and at some time the suit was taken out at the instance of the Defendant and at times by consent of both parties.

All in all I have not been convinced by the Defendants that I should exercise my discretion in their favour. In the result the Defendants' Notice of Motion dated 11<sup>th</sup> July 2006 and filed on 8<sup>th</sup> July 2006 is dismissed. I order that costs of this application be costs in the suit. It is further ordered that a hearing date be taken in the registry on priority basis.

Dated and delivered at Nairobi this 18<sup>th</sup> day of July 2007.

**J.L.A. OSIEMO**

**JUDGE**