



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

**Civil Case 1209 of 2000**

**(FORMERLY CENTRAL REGISTRY HCCC NO. 142 OF 2000)**

**JAMES NDERITU GACGAGUA (T/a JAGAR CONSULTANTS) .....**  
**.....PLAINTIFF**

**V E R S U S**

**THE BOARD OF TRUSTEES OF NATIONAL SOCIAL SECURITY  
FUND.....DEFENDANT**

**R U L I N G**

There has been considerable delay in the preparation and delivery of this ruling. The same was occasioned by my serious illness in 2006 and the long attendant recuperation. The delay is regretted.

This is an application by the Defendant under Order 16, rule 5(d) of the Civil Procedure Rules (the Rules) for dismissal of the Plaintiff's suit for want of prosecution. It is by notice of motion dated 22<sup>nd</sup> June, 2004, and is supported by the annexed affidavit of one SAID CHITEMBWE, the Defendant's corporation secretary. I have read the affidavit. It alleges that the Plaintiff has not taken any steps to prosecute the suit since it was taken out of the hearing list on 7<sup>th</sup> May, 2003.

The application is opposed by the Plaintiff upon the grounds set out in the notice and grounds of opposition dated 1<sup>st</sup> September, 2004. Those grounds are:-

(a) That the suit was taken out of the hearing list of 8<sup>th</sup> May, 2003 by consent of the parties due to circumstances beyond the control of either party, and those circumstances have not changed. It is unreasonable for the Defendant to seek to take advantage of the same.

(b) The claim is substantial, and it would be in the interests of justice that the suit be allowed to proceed to hearing.

There is no replying affidavit filed.

I have considered the submissions of the learned counsels appearing. No authorities were cited. I have also perused the court record. The suit was taken out of the hearing list of 8<sup>th</sup> May, 2003 by consent letter dated 5<sup>th</sup> May, 2003. No reasons were given in the letter for taking it out. The present application was subsequently filed on 22<sup>nd</sup> June, 2004. The application came up for hearing on 7<sup>th</sup> July, 20<sup>th</sup> September, and 19<sup>th</sup> October 2004 and again on 5<sup>th</sup> April, 2006. It was not heard on all those occasions for the various reasons recorded.

Again it came up for hearing on 6<sup>th</sup> June, 2006; the court was informed that the parties were negotiating, and the application was stood over generally. Eventually the application was heard on 26<sup>th</sup> July, 2006, apparently after the negotiations fell through. In the meantime the Plaintiff had on 12<sup>th</sup> June, 2006 set down the suit for hearing on 11<sup>th</sup> December, 2006.

The test to be applied in applications of this nature is whether the delay complained of is prolonged and

inexcusable, and if it is, whether justice can be done despite the delay. If the court is satisfied that justice can still be done to the parties the action will be permitted to proceed to hearing. See the case of **IVITA – vs- KYUMBU, [1984] KLR 441**. Unless the delay has occasioned, or will occasion, prejudice to the defendant the court will not dismiss the suit for want of prosecution. The court will always endeavour to sustain an action rather than dismiss it because of the drastic nature of an order of dismissal of a suit unheard.

In the present suit, the parties themselves know why they removed the suit from the hearing list of 8<sup>th</sup> May, 2003; neither of them has cared to inform the court why this was done. But there is no explanation why the Plaintiff did not set the suit down for hearing between 8<sup>th</sup> May, 2003 and 22<sup>nd</sup> June, 2004 when the present application was filed, a period of over one year. The Defendant's own conduct thereafter was itself not very encouraging; it contributed to delay in hearing of the application. Besides, it entered into negotiations with the Plaintiff towards an out-of-court settlement while the application was subsisting. One may argue that it thereby abandoned the application. The Plaintiff fixed the suit for hearing, albeit after the application for dismissal of the suit was filed and served; nonetheless it is an indication of his desire to prosecute the suit.

I hold that the justice of this matter demands that the suit be permitted to proceed to hearing. I will therefore refuse the application; it is hereby dismissed. But the Plaintiff will have to pay the Defendant's costs of the application, hereby assessed at KShs. 10,000/00. The same must be paid within twenty-one (21) days of delivery of this ruling. In default the Defendant may execute for the same. Those shall be the orders of the court.

**DATED THIS 29<sup>TH</sup> DAY OF AUGUST, 2007.**

**H. P. G. WAWERU**

**J U D G E**

**DELIVERED THIS 31<sup>ST</sup> DAY OF AUGUST, 2007**