

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

Civil Suit 324 of 2002

REMIGIUS OGADO OGANAPLAINTIFF

V E R S U S

HOUSING FINANCE COMPANY OF KENYA.....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 (by an undated notice of motion filed on 28th January, 2005) seeking the main order that the Plaintiff's suit be dismissed for want of prosecution. It is brought under Order 16, rule 5 (d) of the Civil Procedure Rules (the Rules). Under that paragraph, if within three (3) months after the adjournment of the suit generally, the plaintiff or the court on 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. The application is supported by the affidavit of one ICHAU MUTAHI, the Defendant's learned counsel.

The Plaintiff has opposed the application as set out in the replying affidavit filed on 6th September, 2005. It is sworn by him. I have read the same together with the various documents annexed thereto.

I have considered the submissions of the learned counsels appearing. It is apparent from the materials placed before the court that when the present application was filed on 28th January, 2005 there were negotiations going on between the parties towards an out-of-court settlement of the suit. Those negotiations had been initiated by the Defendant. The negotiations collapsed in March, 2005, about two months after the present application was filed. There is thus some justification in the Plaintiff's complaint that the application was not brought in good faith.

The general test to be applied in applications for dismissal of suit for want of prosecution is whether the delay 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 allow an application to 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 suit unheard.

I am not satisfied that in this case there has been any prolonged and inexcusable delay on the part of the Plaintiff to prosecute the case; even if there had been such delay, I am satisfied that justice could still be done by permitting the action to proceed to hearing. There would thus be no prejudice to the Defendant.

In the event I will refuse the application. It is hereby dismissed. In the circumstances of this case the just order regarding costs will be that each party bears its own costs of the application. There will be orders accordingly.

DATED AT NAIROBI THIS 28TH DAY OF AUGUST, 2007

H. P. G. WAWERU

JUDGE

DELIVERED THIS 31st DAY OF AUGUST, 2007