



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**Civil Case 261 of 2002**

**JOHN M. MUSEMBI .....1<sup>ST</sup> PLAINTIFF**

**ZIPPORAH M. MUNYAO.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**ROSE M. MUEKE .....1<sup>ST</sup> DEFENDANT**

**PHILIP M. NZUKI .....2<sup>ND</sup> DEFENDANT**

**TONY MUEKE .....3<sup>RD</sup> DEFENDANT**

**NAIROBI CITY COUNCIL .....4<sup>TH</sup> DEFENDANT**

**RULING**

It is Notice of Motion dated 25<sup>th</sup> July, 2005 which this court has to determine and which seeks substantive order of dismissing the suit made on 12<sup>th</sup> April, 2005. Obviously it also seeks to set aside the ex-parte order allowing the application dated 13<sup>th</sup> January 2005.

The application is supported on the grounds set forth on the application and on the supporting affidavit of Mr. P.N. Kamau the Advocate of the Applicant.

The application dated 13<sup>th</sup> January 2005 was filed on behalf of 1<sup>st</sup> to 3<sup>rd</sup> Defendants to dismiss the suit for want of prosecution under order 16 Rule 5(d) of the Civil Procedure Rules.

The Plaintiffs filed the replying affidavit to the said application which was fixed for hearing on 12<sup>th</sup> April, 2005. The grounds amongst other raised in the replying affidavit was that issues to be agreed were sent in June, 2004 and the Defendants ignored to respond the same and also the reminders. In short, it was averred that the suit was not ready for trial in absence of the agreement on issues

The Plaintiffs' Advocate was present when the application was heard in the morning of 12<sup>th</sup> April 2005. I can take Judicial notice of the fact that normally the practice of the High Court at Law Courts (Central Registry) was to hear the applications in the afternoon. The Plaintiffs' Advocate has also during that period averred the same, and found himself in trouble when the application was heard in the morning

session. Considering the contents of the supporting affidavit I do agree and find that the absence of the Plaintiffs' Advocate during the hearing was not intentional. He could have been more vigilant than what he was on that day, but that factor, even if he was mistaken or has erred, cannot be visited on the litigant and in my belief, it is a trite law.

The application is opposed on the ground of insufficient cause shown for non-appearance and also on the fact that there is no suit in existence and thus this application cannot be heard as the court has power to dismiss suo moto the suit on ground of non-prosecution.

I do not think I can be trapped with this submission. The application is to set aside ex-parte order allowing the application which resulted in the dismissal of the suit. The court gave this order on the application presented before it and allowed it on the ground of non-prosecution. I do venture to decipher the order made which reads:

***“Respondent served and filed a Reply. Order as prayed in application of 13.1.2005. Costs of the suit to the Defendants.”***

I may also observe that there are four defendants in the suit and the application in question was filed only by 1<sup>st</sup> to 3<sup>rd</sup> Defendants.

No one can question when I say that the Applicant is seeking the discretion of the court which can be exercised judiciously looking at the interest of both the parties as well as prejudices, if any, to be suffered by any if the order is granted.

The Defendants have not shown any prejudice which they would suffer and looking at the pleadings the Plaintiffs shall definitely suffer grave prejudice, if the order is not granted.

The Defendants, in my view, can be comfortably compensated for their time and delay in hearing of the suit and also this application.

I shall, considering the substantial justice, allow the application and grant prayer numbers 1 and 2 thereof.

The Plaintiffs to pay the costs of this application and resultant costs of the orders which are set aside by this ruling to the 1<sup>st</sup> to 3<sup>rd</sup> Defendants, the 4<sup>th</sup> Defendant not having participated.

**Dated, Delivered and Signed at Nairobi this 5<sup>th</sup> day of October, 2007.**

**K.H. RAWAL**

**JUDGE**