



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT BUNGOMA**

**Civil Suit 72 of 2003**

**FRANCISCA ADIKINYI  
BWIRE.....PLAINTIFF**

**VS**

**SAMWEL K.  
MUTWIRI.....DEFENDANT**

**RULING**

By an application dated 17<sup>th</sup> October 2005 by way of Notice of Motion, under Order XVI Rule 5 (a) of the Civil Procedure Act, the applicant seeks orders:

- (i) That the Plaintiff/Respondent suit be dismissed for want of prosecution.
- (ii) That the costs of the suit be borne by the plaintiff/respondent.

The application is based on the grounds:

- (a) That the plaintiff/respondent filed this suit against the defendant/applicant on 6.10.2003 and the defendant/applicant subsequently filed his defence on 7.4.2004 and served same on 13.4.2004.
- (b) That the plaintiff/respondent has shown no interest in prosecuting this matter as no action has been taken to list the suit down for hearing since the close of pleadings in April, 2004.

The application is predicated upon the annexed affidavit of one Isaac Simiyu Kuloba sworn on 17<sup>th</sup> October 2006.

The application was served on the firm of Manwari & Co. Advocates who filed a replying affidavit sworn on 20<sup>th</sup> February 2006 and filed in Court on 1<sup>st</sup> March 2006.

A hearing Notice dated 20<sup>th</sup> December 2005 was served upon Manwari & Co. Advocates on 11<sup>th</sup> January 2006 as per the affidavit of service of Isaac Simiyu Kuloba filed in Court on 6<sup>th</sup> March 2006.

At the hearing there was no representation from the firm of Manwari & Co. Advocates for the respondent. On application I granted the applicant leave to proceed ex-parte as enjoined by orders L Rule 16(1).

The applicant argued that the suit was filed on 6<sup>th</sup> October 2003. Defence was filed on 7<sup>th</sup> April 2004 and served on 13<sup>TH</sup> April 2004. The pleadings closed in April 2004 (see order VI Rule II). The applicant subsequently served the respondent with a Hearing Notice for 8<sup>th</sup> May 2005 but the case did not proceed. Since then the respondent went to sleep so to speak. On 11<sup>th</sup> May 2008, the applicant wrote a letter exhibited as “lsk” to the respondent pleading that the suit should be fixed for hearing, which letter drew a blank. That it is in the interest of justice that the suit be dismissed.

The respondent/plaintiff filed a replying affidavit in response to the applicant/defendants affidavit in support. The gravamen of the respondents case is that the suit was fixed for hearing on 8<sup>th</sup> May, 2005 which fell on a Sunday. That the delay in fixing the suit for hearing is not inordinate in any event.

I have carefully gone through the court record and what emerges clearly is that the suit was filed on 6<sup>th</sup> October 2003. Written statement of defence of the defendant filed on 7<sup>th</sup> April 2003. Reply to defence filed on 10<sup>th</sup> May 2004.

Hearing was fixed for 8<sup>th</sup> may 2005, subsequently, on 5<sup>th</sup> December 2005. Since then nothing has been done.

Order VI Rule II provides:

*“The pleadings in a suit shall be closed fourteen days after service of the reply or defence to counterclaim, or if neither is served, fourteen days after service of the defence, notwithstanding that any order or request for particulars has been made but not complied with.”*

The pleadings in this case closed 14 days after service of the reply or defence to the counter claim. The statement of defence was filed on 7<sup>th</sup> April 2003. the reply to defence was filed on 10<sup>th</sup> May 2004. There is no evidence when service of the reply or defence to counterclaim was effected. However from the time of filing defence, it is approximately 2 years and 11 months.

The plaintiff has not complied with the mandatory provisions of Order X Rule 11A of the Civil procedure rules which provides:

*“ (1) Notwithstanding anything contained in rule 11, within one month after the pleadings are closed in a suit in the High court, every party shall make discovery by filling and serving on the opposite party a list of the documents relating to any matter in question in the suit which are or have been in his possession of power.*

*(2) Any party on whom a list of documents is served under sub rule (1) may, give notice to the party making discovery requiring the verification on affidavit of the list of documents and the affidavit shall be filed and served within fourteen days of the request.*

*(3) On the default of a party to comply with sub rule (2), application may be made to the court for the fixing of a time limit within which the party must comply with sub rule (1).”*

Issues have not been framed. The applicant went to sleep so to speak. See FITZ PATRICK –VS- BATGER LTD (1967) 2 E.R. 657 at page 659.

On the premises, I find evidence of laxity on the part of the plaintiff which is unexplained or capable of plausible explanation on the evidence before me. There is no cogent reason shown to me why all the necessary steps to have the suit heard were not taken all this while. Laxity cannot be condoned by courts. It gives the court a bad name. In the words of LAW, Ag VP of the Court of Appeal in DEVSHI –VS- DIAMOND CONCRETE CO. (1974) E.R. page 493.

*“There is absolutely no reason hence shown to me why the appeal could not be lodged in time and I*

*would be failing in my duty if I were to give effect to the agreement between counsels. I have no doubt that this is an application which is devoid of merit and I cannot in conscience allow it. It is accordingly dismissed with costs to the respondent”.*

By parity of reasoning, no evidence has been shown to me why the suit has not been processed for hearing in 2 years and 11 months. On the evidence before me, I would be failing in my duty if I were to fail to dismiss this suit when the plaintiff has exhibited such prolonged and inexcusable delay. Accordingly the suit is dismissed in terms of prayer 1 and 2 of the application.

DATED and DELIVERED at Bungoma this 16<sup>th</sup> day of March 2006.

N.R.O. OMBIJA

JUDGE

N/A for plaintiff

Mr. Onchiri for defendant