



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Suit 767 of 2003**

**DR. JAPHETH MUNYITHIA MWATHI.....PLAINTIFF/RESPONDENT**

**VERSUS**

**HOWARD CARLSON.....DEFENDANT/APPLICANT**

**RULING**

The plaintiff filed this suit against the defendant on 24<sup>th</sup> July 2003. The defendant upon being served with summons entered appearance on 5<sup>th</sup> September 2003 and the defence was filed on 29<sup>th</sup> September 2003. Since the close of the pleadings the plaintiff has not taken any steps to fix down the suit for hearing.

By way of Notice of Motion dated 22<sup>nd</sup> August, 2005 and expressed to be brought under Order L Rule 1 and Order XVI Rule 5 of the Civil procedure Rules and Section 3A of the Civil Procedure Act the defendant seeks orders that the plaintiff's suit be struck out for want of prosecution.

The application is based on the ground that since the pleadings were closed the plaintiff has not taken any steps to set down the suit for hearing. The application is also supported by sworn affidavit of the defendant in which he avers that the plaintiff has lost interest in the suit.

The application is opposed on the ground that immediately this suit was filed another one was filed at Kitui Childrens Court by 3<sup>rd</sup> Parties against the plaintiff whose maternal facts were similar to the facts of the instant suit. Counsel for the plaintiff was busy with that other suit and hence the delay.

A suit can be dismissed for want of prosecution if the plaintiff has been guilty of prolonged and inexcusable delay which has seriously prejudiced the defendant. Counsel for the plaintiff submits that sooner after the suit was filed another one was filed in the Childrens Court whose outcome would affect this one as the same concerned the fatherhood of the child from which this defamation suit emanates. The delay is explained and is excusable and no prejudice shown on the part of the defendant.

The application to dismiss the suit for lack of prosecution is therefore dismissed. But the plaintiff will have to bear the costs of this application. It is so ordered.

DATED and delivered at Nairobi this 5<sup>th</sup> day of April 2006.

**J.L.A. OSIEMO**

**JUDGE**