



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 53 of 2005

FRANCIS GITHINJI KAROBIA.....  
.....PLAINTIFF

VERSUS

STEPHEN KAGENI GITAU.....DEFENDANT

R U L I N G

The Defendant herein seeks by notice of motion dated 14<sup>th</sup> October, 2005 an order to dismiss the Plaintiff's suit for want of prosecution under Order XVI, rule 5 (a) of the Civil Procedure Rules. Under that rule, if within three (3) months after the close of pleadings the plaintiff, or the court of 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.

It is common ground that pleadings herein closed on or about 26<sup>th</sup> May, 2005, that was fourteen (14) days after the date of service of the reply to defence upon the Defendant on 13<sup>th</sup> May, 2005. Three (3) months after close of pleadings thus lapsed on or about 25<sup>th</sup> August, 2005. As the present application was filed on 14<sup>th</sup> October, 2005, there has been delay of about one month and three weeks on the part of the Plaintiff in setting down the suit for hearing.

I have considered the submissions of the learned counsels appearing and the many authorities cited. The following principles emerge in considering applications of this nature:-

1. ***The court should always be slow to dismiss a suit for want of prosecution where it is satisfied that the suit can be heard and justice done to the parties without further undue delay.***
2. ***Unless the delay is prolonged, flagrant and inexcusable and is such as to do great injustice to the defendant, or indeed to both the plaintiff and the defendant, the court will not dismiss the suit. Put another way, the court will not dismiss a case for want of prosecution unless it is satisfied that the default has been intentional and contumelious or that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers and that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in action or is such as is likely to cause or have caused serious prejudice to the defendant.***
3. ***The court's duty is to decide the fundamental issues in dispute between the parties without undue regard to technicalities.***
4. ***Each case will depend on its own peculiar facts and circumstances.***

For all these principles, see for instance the following cases:-

- (i) ***Allen v Sir Alfred McAlpine & Sons Ltd [1968] 1 All ER 543.***
- (ii) ***Sheikh v Gupta and Others [1969] E.A. 140.***

- (iii) *Abdul and Another v Home & Overseas Insce. Co. Ltd. [1971] E.A. 564.*
- (iv) *Njuki Gachugu v Githi [1977] KLR 108.*
- (v) *Ivita v Kyumbu [1984] KLR 441.*
- (vi) *Kenya Commercial Bank Limited v Jidraph Ngethe Thairo, Nairobi HCCC No. 3134 of 1987 (unreported).*

Having considered the present application in light of the above principles, I do not find that there has been any prolonged, flagrant or inexcusable delay on the part of the Plaintiff. This is not a suitable case for dismissal for want of prosecution. Such dismissal would in fact occasion grave injustice to the Plaintiff. The cause of justice will have been better served by having the suit disposed off on merit. I will in the event refuse the application. It is hereby dismissed. The Defendant was certainly entitled to bring the application, and I will award the costs thereof to him. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 15<sup>TH</sup> DAY OF JUNE, 2006.**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED THIS 16<sup>TH</sup> DAY OF JUNE, 2006.**