



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

**Civil Case 680 of 2004**

**DANIEL GATHAIYA NJAGI**

**KEVIN O'BYRNE BOTH t/a GATHATIYA NJAGI & PARTNERS.....  
.....PLAINTIFFS**

**VERSUS**

**THE BOARD OF TRUSTEES OF THE NATIONAL SOCIAL SECURITY  
FUND.....RESPONDENT**

**R U L I N G**

This is an application (by notice of motion dated 13<sup>th</sup> January, 2006) by the Defendant for an order to dismiss the Plaintiffs' suit for want of prosecution. It is brought under Order 16, rule 5 (a) of the Civil Procedure Rules. The grounds set out on the face of the application are:-

- (a) that it is now more than eleven (11) months since the close of pleadings and the Plaintiffs have not taken any steps to prosecute their suit;
- (b) that the suit has taken unduly long to conclude and the delay is occasioning prejudice to the Defendant; and
- (c) that it is in the interests of justice and equity that this litigation do come to an end.

There is a supporting affidavit sworn by one SAID CHITEMBWE, the corporation secretary of the Defendant.

The Plaintiffs have opposed the application upon the grounds set out in the replying affidavit sworn by their counsel, DONALD O. OWANG'. Those grounds amount in essence to the plea that the Plaintiffs have not been indolent and have in fact been preparing the suit for hearing, and further that the application by the Defendant is unduly haste and premature.

I have read the supporting and opposing affidavits. I have also given due consideration to the submissions of the learned counsels appearing, including the case cited. As held by the Court of Appeal in the case of **BHANDARI CONSTRUCTION COMPANY vs STANDARD JOINERY & BUILDING COMPANY** [1983] KLR 111,

***“the dismissal of an action at an interlocutory stage is a very serious matter and may well work serious injustice unless carefully exercised”.***

In the instant case, it is common ground that pleadings closed on or about 24<sup>th</sup> February, 2005. Under paragraph (a) of rule 5 aforesaid, 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. The Defendant has elected the latter option, as it was undoubtedly entitled to do.

The material placed before the court discloses that as late as 16<sup>th</sup> January, 2006 the parties were exchanging correspondence with regard to statement of agreed issues and lists of documents. Indeed, prior to that date there was extended exchange of correspondence which led ultimately to the filing of a statement of agreed issues duly signed by both advocates on 19<sup>th</sup> December, 2005. It is apparent that the Plaintiffs' advocates were the movers in these correspondences. The present application was filed on 18<sup>th</sup> January, 2006, that is about a month after the statement of agreed issues was filed.

It appears to me that the Plaintiffs have not been indolent at all. Prior to the present application being filed they were active in preparing the suit for trial. The Defendant has been rather haste in bringing the application, but I hasten to add that under the relevant rule it was entitled to bring the application. The Plaintiffs have properly offered to pay the Defendant's costs of the application. I hold that it would occasion serious injustice to the Plaintiffs in the circumstances of this case should their suit be dismissed at this stage. An award of costs would be a sufficient recompense for the Defendant. I must therefore refuse the application. It is hereby dismissed. I will award costs of the application, hereby assessed at KShs.15,000/00, to the Defendant. These costs must be paid within fourteen (14) days from the date of delivery of this ruling. In default the Defendant may execute for the same forthwith. I also order that the Plaintiffs must within thirty (30) days from the date of delivery of this ruling take demonstrable steps towards prosecution of the suit. In default the court may be moved to review the order of dismissal of the application herein. Those shall be the orders of the court.

**DATED AND SIGNED AT NAIROBI THIS 5<sup>TH</sup> DAY OF JUNE, 2006.**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED THIS 9<sup>TH</sup> DAY OF JUNE, 2006.**