



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Case 1823 of 1997**

**RAMADHAN KINYUDI.....**  
**.....PLAINTIFF**

**VERSUS**

**C.F.C. BANK LTD.....DEFENDANT**

**RULING**

This application by the defendant under Order XVI Rules 5 of the Civil Procedure Rules seeks orders that this suit be dismissed for want of prosecution.

The application is based on the grounds that the plaintiff has neglected, failed or ignored to take any measures to prosecute this matter.

This application is opposed by the plaintiff Order XVI Rule 5 provides as follows:

If within three months after (a) the close of pleadings ..... or (b).....(c) the removal of the suit from the hearing list or (d) the adjournment of the suit generally, the plaintiff does not set down the suit for hearing, the defendant may either set down the suit for hearing or apply for its dismissal.

Miss Makokha for the defendant submits that this is a proper suit to be dismissed under Rule 5. The suit was filed on or about 23<sup>rd</sup> July 1997. The defence was filed on 12<sup>th</sup> March 1998. The firm of Gikandi & Company Advocates filed a notice dated 17<sup>th</sup> April 2001 to come on record. On 4<sup>th</sup> February 2002 the firm of Gikandi & Company Advocates filed an application seeking to amend the plaint which application was fixed for hearing on 18<sup>th</sup> March 2002. But when the application came up for hearing on 18<sup>th</sup> March 2002 the plaintiff's counsel failed to attend and the same was adjourned generally.

Counsel for the defendant submitted that to date the said application is yet to be heard and the plaintiff has not moved the court. That since the plaintiff has not moved the court to fix the same for hearing for a period of 3 years there is good reason to believe that he has lost interest in pursuing this matter.

Mr. Kisaka for the plaintiff in opposition to the application, relied on the replying affidavit sworn on 17<sup>th</sup> October 2005 in which they have deponed that the suit was filed on behalf of the plaintiff by Arimi Kimathi & Co. Advocates. They took over on 19<sup>th</sup> April 2001. At the time they took the matter, there was the issue of the settlement of the costs between the plaintiff and the previous advocates. When finally they obtained copies of the proceedings and perused the pleadings, they were of the considered opinion that there was need to file an amended plaint.

They filed an application to amend the plaint on 4<sup>th</sup> February 2002. The said application was set down for hearing on 18<sup>th</sup> March 2002. On 15<sup>th</sup> March 2002 they instructed M/S F.W. Njoroge & Co. Advocates to prosecute their application on their behalf. But unfortunately the said firm of advocates never informed them of what happened. Copies of the correspondences annexed herein.

The question of delay in bringing civil actions to speedy conclusion was exhaustively considered by the Court of Appeal in England in **ALLEN VS. ALFRED MC ALPINE & SONS LTD [1968] 1 ALL ER 543** where it was held that when delay is prolonged and inexcusable and is such as to do grave injustice to the one side, or the other or to both, the court may in its discretion dismiss the action straightaway. On

the other hand this power should not be exercised unless the court is satisfied: (1) that the default has been intentional and contumelious e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers and (b) 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 such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party. This case was quoted with approval in the case of ***NJUKI GACHIGU VS. GITHI [1977] KLR 108.***

In the present suit the plaintiff instructed the firm of ARIMI KIMATHI & CO ADVOCATES to file the case on his behalf. When they delayed the hearing, he abandoned them and instructed the firm of GIKANDI & CO. ADVOCATES to act on his behalf. In this circumstances it cannot be said that the delay was intentional and contumelious nor can it be said that the delay is inordinate and inexcusable. Further the plaintiff is willing to pay costs to the defendant.

In my opinion the circumstances in this case do not justify an order of dismissal. However it is ordered that the parties take steps within the next 7 days from the date of this ruling to set down the application dated 18<sup>th</sup> December 2001 for hearing.

The plaintiff to pay costs of this application to the defendant.

Dated and delivered at Nairobi this 12<sup>th</sup> day of September 2006.

**J.L.A. OSIEMO**

**JUDGE**