

REPUBLIC OF KENYA.
IN THE HIGH COURT OF KENYA AT KITALE.
CIVIL SUIT 88 OF 2004

COUNTY COUNCIL OF POKOT PLAINTIFF

VERSUS

KERIO VALLEY DEVELOPMENT AUTHORITY DEFENDANT

R U L I N G.

This application is brought under OXVI Rule 5 (a) and (d) of the Civil Procedure Rules. The applicant is asking the court to be pleased to dismiss the suit herein for want of prosecution. There are 3 grounds set out on the face of the application. The same is also supported by the affidavit of one David Rioba Omboto whose contents are self explanatory. I have considered these grounds along with both affidavits for and against the application. The suit herein was filed in court on 3/9/2004. The defence was filed on 7/10/2004. There was no reply to defence filed and so the pleadings are deemed to have closed 14 days after service of the defence on the plaintiff. On 25/10/2004, the defendants filed a notice to produce under OX r. 15 and served counsel for the plaintiff with the same. There has been no response to that notice to date. The plaintiff did not take any other steps to set the matter in motion. The defendants therefore filed the application for dismissal approximately 7 months after the service of the defence on the plaintiff.

Counsel for the plaintiff filed the replying affidavit to that application today. He deponed that the plaintiff is very keen to prosecute the matter and the same should therefore be heard and determined by the court. He stated that he called for the documents needed for discovery and which had also been requested for by the defendant. He says that the same are quite bulky and it therefore took them time to compile them. He said that the same are now ready and they are ready to proceed with the hearing. He also contends that counsel for the defendant did not take any steps either to have the matter set in motion. He urged the court not to dismiss the case.

It goes without saying that in civil proceedings, it is the duty of the plaintiff to pursue his matter in court once he files it. Public policy also demands that business of the courts be conducted with expedition. It was the duty of the plaintiff herein therefore to ensure that the case was fixed for hearing. It is true that under OXVI r. 5 the defendant can also set the suit down for hearing. This does not however absolve the plaintiff of his duty to move his matter. In deciding whether or not to dismiss a matter for want of prosecution, the court should consider the following issues – among others

- (i) Was the delay prolonged, inordinate or inexcusable?
- (ii) Is the said delay so great as to amount to denial of justice?
- (iii) Will the Defendant be prejudiced by the said delay and will the delay compromise a fair and just hearing and disposal of the suit?
- (iv) Has the plaintiff given sufficient reasons for the delay?

These issues are nonetheless not exhaustive and each case must be treated on its own peculiar facts or circumstances

. In this case, there is a delay of approximately 8 months. Mr. Kiarie has explained this delay saying that they were compiling the documents needed for discovery. The same documents are the ones the defendants had notified them to produce. The explanation is that they are quite bulky and it took time for them to do so. They are ready now and are geared to proceed without any further unnecessary delay.

As stated by Mr. Kiarie and as is clear from the pleadings herein, the claim involved is in respect of a colossal amount of money. Dismissing this suit at this stage will in my considered view not be in the interests of justice.

I also note that the defendant has failed to satisfy the court that indeed he will suffer any prejudice on account of the delay. On the contrary, if the delay has resulted in the compilation of the documents needed for discovery purposes, the better because this will enable the court to consider these exhibits and arrive at a fair decision. Justice in this case demands that the plaintiff be given a chance to proceed with its case. This time however, they must ensure that there is no laxity or indolence on their part. For these reasons, I dismiss the application for dismissal with costs in the cause. The plaintiff is nonetheless ordered to respond to the notice to produce dated 25/10/2004 within 15 days of the delivery of this ruling. They should comply with the other preliminaries as to discovery and have the matter fixed for hearing without further delay. If a similar application is filed, I will not hesitate to dismiss this case for want of prosecution. Orders accordingly.

WANJIRU KARANJA.

JUDGE.

Delivered, dated and signed at Kitale this 4th day of October, 2005 in the presence of:-