



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL CASE NUMBER 42 OF 2011**

**MURI MWANIKI & WAMITI ADVOCATES .....1<sup>ST</sup>  
PLAINTIFF**

**JAMES NJUGUNA MURI.....2<sup>ND</sup>  
PLAINTIFF**

**VERSUS**

**KENYA TEA DEVELOPMENT AGENCY LTD..... 1<sup>ST</sup>  
DEFENDANT**

**CHRISTOPHER M'MAITSI .....2<sup>ND</sup>  
DEFENDANT**

**RULING**

The defendants/applicants have moved this Honourable court by way of a Notice of Motion dated 22<sup>nd</sup> February 2016 seeking for the dismissal of the suit herein, for want of prosecution.

The application is premised on the grounds set out on the body of the application and it is supported by the annexed affidavit sworn by **NJUGUNA PAUL CHUCHU** on the 22<sup>nd</sup> February 2016.

The facts in support of the application are that, the Plaintiffs have not taken any steps to prosecute the suit or set it down for hearing since the 10<sup>th</sup> October 2012 when it was scheduled to come up for hearing.

That it is now over 38 months since the suit was last in court and the Plaintiffs have not bothered to set it down for hearing or take any steps towards its prosecution. That the Plaintiff's failure to set down the matter for hearing has prejudiced the defendants in that the suit continues to remain pending in the defendant's books and records without prospects of a hearing date. It is apparent that the Plaintiffs have lost interest and are no longer interested in pursuing the case.

The Plaintiffs have opposed the application vide a replying affidavit sworn by **JAMES NJUGUNA MURI** on the 25<sup>th</sup> April 2016. The summary of the facts as captured herein are that the Plaintiffs fixed the matter for hearing on the 10<sup>th</sup> October 2012 and by no fault of their own, the matter did not proceed on the said date.

That subsequently, the Plaintiffs' advocates made various attempts to fix the matter for hearing to no

avail as the court file could not be traced, which culminated to the Plaintiffs' advocates letter dated 13<sup>th</sup> June 2013 to the Deputy Registrar requesting for assistance in tracing the court file to enable them fix the matter for hearing. That the Plaintiffs did not, and have not received a response to that letter and subsequent attempts to trace the file were also not fruitful.

That the allegations therefore that the Plaintiffs have not taken any effort to prosecute the matter or set it down for hearing since 10<sup>th</sup> October 2012 are untrue and intended to mislead the court. It is further averred that from the pleadings filed herein, it is evident that there are triable issues which ought to be determined on merits.

That the Plaintiffs are ready to prosecute the matter and that the defendants will not suffer any prejudice if the matter proceeds to full hearing. Indeed, they are yet to comply with the pretrial requirements.

Both parties filed their submissions which I have duly considered.

In order for the application herein to succeed, the defendants must show;

(i) That there has been inordinate delay. It would be highly undesirable and indeed impossible to lay down a tariff so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case but it should not be difficult to recognize inordinate delay when it occurs.

(ii) That the inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural interference would be that it is inexcusable.

(iii) That the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff or between each other, or between themselves and the third parties. In addition to any interference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial. (see the case of Allen Vs. Sir Alfred Mc Arlpine & Sons Ltd. (1968) 1 All ER 543.)

The above principles have been followed in Kenya, consistently, in the case of Inter Vs Kyumba (1984) ICLR 441 where it was held inter alia that ;

***“the fact applied by the courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter in the discretion of the court”.***

In the matter before me, the Plaintiffs states that they made several attempts to fix the matter for hearing but they were not successful as the court file was missing. They have annexed copies of letters which had been served upon the Defendants advocates and stamped with the Registry stamp.

Annexed to the affidavit is also a copy of a letter dated 13<sup>th</sup> June 2013, to the Deputy Registrar seeking assistance in tracing the file. It is, however, noted that the letter was not stamped at the registry but this court shall give the Plaintiffs the benefit of doubt.

The applicants have not alluded to any serious prejudice that they will suffer, if the application is not granted. The only prejudice that they have stated is that the suit continues to remain pending in their books and records and in my view this is not a serious prejudice.

The court finds that the delay though inordinate, is excusable, as the same has been explained even

though the Plaintiffs did not tell the court when exactly, the court file was traced.

In the upshot, the application dated 22<sup>nd</sup> February 2016 is hereby dismissed but with no orders as to costs.

This being an old matter the court further orders that it be prosecuted within the next 120 days from the date of this ruling, failing which it shall stand dismissed.

Dated and delivered at Nairobi this 19<sup>th</sup> Day of January, 2017.

.....

**LUCY NJUGUNA**

**JUDGE**

**In the Presence of**

..... for the Appellant

.....for the Respondent