



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL SUIT NO. 533 OF 2010**

**ISIAH BOSIRE MAGEMBE** suing in his capacity as the legal representative  
of the estate of the Late Burnett Tongi Magembe.....**PLAINTIFF**

**VERSUS**

**1. NICKSON ONDITI NYABWARI.....1<sup>ST</sup> DEFENDANT**

**2. MUIRURI DEDAN.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Defendants/Applicants have moved this court vide the Notice of Motion dated 12<sup>th</sup> May, 2014 brought under order 17 rule 2 (3) of the civil procedure rules seeking an order for dismissal of the plaintiff's suit for want of prosecution. The motion is supported by the affidavit of Kairu Timothy Waweru who is the advocate in conduct of this matter on behalf of the defendants. He contended that since the pleadings in this matter closed on 11<sup>th</sup> August, 2011, about three (3) years to the date of the motion, the plaintiff has never set down this suit for hearing. That it is apparent that the plaintiff has lost interest in this matter and it should therefore be dismissed for want of prosecution. He stated that the defendants are apprehensive that the continued delay is highly prejudicial to their case as they stand to lose their key witnesses and/or documents thereby denying them an opportunity to conduct a fair defence.

2. In response thereto, the plaintiff's counsel David Oyatta swore a replying affidavit on 25<sup>th</sup> November, 2014. He contended that the defendant is misleading this court. That contrary to the defendant's allegations, after filing the defence, the plaintiff on 19<sup>th</sup> July, 2012 filed a list of witnesses and documents in compliance with order 11 of the Civil Procedure Rules. That since the service of the same on the defendant's on 20<sup>th</sup> July, 2012, the defendant has not complied by filing their list of witnesses and documents to enable the plaintiff proceed with the matter to the next level. He contended that between February, 2013 and 12<sup>th</sup> November, 2014, the plaintiff invited the defendants' advocates' firm for fixing of a hearing date.

3. It was the plaintiff's submission that two factors are to be considered in determining an application for dismissal of a suit for want of prosecution, one is that it must be satisfied that no application has been made nor step taken by either party for not less than one year and that no cause is shown why the suit should not be dismissed. With regard to the first, the plaintiff submitted that the last step taken before the filing of this motion was the invitation for fixing of a hearing date on 28<sup>th</sup> May, 2013 with a view of fixing the matter for pre-trial conference on 31<sup>st</sup> May, 2013. That the suit was in a halt for exactly one year and not three as alleged. On the second aspect, the plaintiff cited the guiding principles for the exercise of court's discretion in determining such an application enunciated in **Utalii Transport**

**Company Limited & 3 others v. NIC Bank Limited & another [2014] eKLR** and submitted that he met the said requirements. The defendants on the other hand reiterated the averments in the affidavit.

4. The test for dismissal of a suit for want of prosecution is stated in the case of **Ivita v. Kyumbu (1984) KLR 441**). It was expressed as follows:

**“The test is whether the delay is prolonged and inexcusable and if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and the defendant so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents and or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time; the defendant must satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced; he must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff.”**

5. In the instant case, the question is whether the plaintiff has given a satisfactory explanation for the delay in prosecuting the suit and whether the delay was inordinate. The plaintiff in his explanation for the delay states that it is due to the defendant’s failure to comply with Order 11 of the Civil Procedure Rules. His advocates however sent invitation for fixing of a date between February, 2013 and 12<sup>th</sup> November, 2014. I have taken the liberty to peruse the file and it is revealed that before the filing of this motion, the plaintiff sent invitation for fixing of a hearing date by letters dated 28<sup>th</sup> May, 2013, 12<sup>th</sup> April, 2013, 26<sup>th</sup> March, 2013, 13<sup>th</sup> March, 2013 and 23<sup>rd</sup> February, 2013. In my view these were attempts made to have the matter set down for hearing. Further, it is worth noting that the steps taken (compliance with order 11) by the Plaintiff as the suitor were those that led to pre-trial conference being undertaken by the court after which the suit would be certified as ready for hearing. It is in fact the defendant who failed to comply. In my view therefore, the plaintiff gave sufficient reason for the delay which delay in my view was not inordinate.

6. In sum, I dismiss the application herein but I attach the following condition. That the plaintiff shall prosecute the suit within 120 days failing which it shall stand dismissed. It is so ordered.

Dated, signed and delivered at Nairobi this 16<sup>th</sup> day of March, 2017.

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**L NJUGUNA**

**JUDGE**

*In the presence*

..... *For the Plaintiff*

..... *For the 1<sup>st</sup> Defendant*

..... *For the 2<sup>nd</sup> Defendant*