



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CIVIL SUIT NO.83 OF 2003**

**NATIONAL UNION OF TEACHERS (NAKURU BRANCH).....PLAINTIFF**

**VERSUS**

**JOHN MARIGA KIHICO.....1ST DEFENDANT**

**DAVID KIMANI KAMAU.....2ND DEFENDANT**

**FREDRICK MWANIKI TUGUIYI.....3RD DEFENDANT**

**RULING**

1. The Applicants filed the Notice of Motion dated 20/05/2014 seeking to dismiss the suit for want of prosecution. They also sought the costs of the suit and the application.
2. The application is supported by the Affidavit of the 3rd Applicant and his further affidavit headed “*replying affidavit*” sworn on 4th October, 2014. It is premised on the grounds that this suit has not been prosecuted since it was filed in the year 2003. The Plaintiff has only fixed the suit for hearing once since it was filed, on 20/9/2007 but it was dismissed for non-attendance. It was later reinstated on 20/12/2007 at the instance of the Plaintiff who then went to slumber and did not take steps to prosecute the suit up to this time.
3. The Defendants' allege that the Plaintiff clearly has no interest in this matter and in the circumstances, the interest of Justice will be best served if the matter is dismissed for want of prosecution.
4. The application was opposed by the Plaintiff who filed an affidavit sworn by its executive secretary on 25th August, 2014. The Plaintiff blamed the defendants for the delay as they filed an application praying that the suit be dismissed for being *res judicate*. As a result the defendant was unable to fix the matter for hearing.
5. The Plaintiff also averred that the delay was occasioned by the dissolution of the firm acting for the Plaintiff at the time, M/s. Kiplenge & Ogola Advocates. Nonetheless the Plaintiff alleged that it was interested in pursuing the claim wherein it seeks to recover Kshs.11,000,000/= owed by the Defendants. It averred that it had complied with the provisions of **Order 11** of the **Civil Procedure Rules** and is ready to prosecute the matter.
6. The application was argued in court on 27th October, 2014. The Defendants' Counsel's submission was simply that the delay of seven years in prosecuting the suit is inordinate and has caused the Defendants great prejudice as they have had a suit worth 11 million hanging and pending against them.

Counsel regarded the reason that the delay was caused by the dissolution of the firm to be trivial as one of the partners was left with the file and continued practicing. In addition, this reason was speculative, ambiguous and argumentative because there was no evidence submitted and no time lines given.

7. The Plaintiff's Counsel relied primarily on the submissions filed on 27/10/2014. His argument was that the Plaintiff has a right to fair hearing under **Article 50** of the **Constitution**. Therefore the Plaintiff must be given an opportunity to ventilate its issues in a full trial. He further submitted that the Plaintiff is interested in its case. The delay which was inordinate was caused when the Plaintiff's file was misplaced during the dissolution of the firm of advocates. He accused the Defendants of coming to court with unclean hands for they are seeking to dismiss a suit which is not ready for hearing as they have not complied with the provisions of **Order 11** of the **Civil Procedure Rules**.

8. He urged the court to dismiss the application and order that the suit be set down for hearing.

### **ISSUES FOR DETERMINATION**

9. Whether to dismiss the suit for want of prosecution.

10. The application is brought under the provisions of **Order 17 Rules 2(1)** and **(3)** of the **Civil Procedure Rules** which provide:

**“2(1) In any suit in which no application has been made or step taken by either party for one year; the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction.**

**(3) any party to a suit may apply for its dismissal as provided in sub-rule (1).”**

11. It is accepted that the court should exercise its power to dismiss a suit for want of prosecution only in sparingly as ultimately its main concern is to serve substantive justice. The test then as laid out in **Agip Kenya Limited V. Highlands Tyres Limited** [2001] KLR and **Utalii Transport Company Limited & 3 others V. NIC Bank Limited & Another** [2014] eKLR is whether there has been inordinate delay in prosecuting the matter, whether the delay has been intentional and unjustified and therefore inexcusable, whether it is possible to conduct a fair trial despite the delay and the court will look at any prejudice that is likely to be suffered by the Defendant *vis a vis* the Plaintiff.

12. The court records shows that this suit was filed on 3rd June, 2003. The suit was only set down for hearing once, on 20th December, 2007 when it was dismissed on the court's motion for want of prosecution because neither the plaintiff nor the Defendant was in court. The suit was subsequently reinstated on 20th December, 2007 for in the court's opinion the suit involved a substantial sum and and it was only fair that the suit is heard and determined in its merits.

13. No further step was taken in the matter by either party until the present application was filed by the Defendant. A period of seven years constitutes inordinate delay. The Plaintiff's explanations for the delay are not persuasive. Firstly the Defendants' application to dismiss the suit for being *res judicata* was disallowed in the year 2004.

14. Secondly the averment that the delay was occasioned by the dissolution of the firm of advocates representing it appears to be an afterthought. In the Replying Affidavit it is alleged that the confusion that resulted was to blame while in the submissions Counsel alleged that the file went missing for an indeterminate period of time.

15. Nonetheless even if the court was to believe this explanation, the Plaintiff has the burden to pursue the expeditious determination of its case. Therefore, it was the Plaintiff's obligation to ensure that its Counsel acts with haste. A period of seven years of inaction and in the absence of evidence of any steps taken

during that time to reconstruct the file is inexcusable.

**DETERMINATION:**

16. The Plaintiff is found to be indolent and is undeserving of the discretion of this court. Its attempt to demonstrate its willingness to conduct the matter by complying with the pre-trial procedures under **Order 11** of the **Civil Procedure Rules** is defeated by its past conduct which shows disinterest in the conclusion of the matter.

17. I find that the delay in prosecuting this suit is inexcusable.

18. For the above reasons, the Plaintiff's suit is dismissed. The defendants shall have the costs.

Orders accordingly.

**Dated, Signed and Delivered at Nakuru this 11th day of February, 2015.**

**A. MSHILA**

**JUDGE**