



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 1115 OF 2003**

**1. PATRICK ATENYA ASITIBA**

**2. PHANICE ONDECHE ASITIBA.....PLAINTIFF**

**VERSUS**

**CITY COUNCIL OF NAIROBI.....DEFENDANT**

**RULING**

1. Before me is the Defendant’s Notice of Motion dated 24<sup>th</sup> August, 2011 seeking to dismiss this suit for want of prosecution. The application is expressed to be brought under Order 54 Rule 2, Order 51 Rule 1, 2, and 4, Order 17 Rule 2(3) of the Civil Procedure Rules, 2010 and Section 3 of the Civil Procedure Act.
2. The motion is based on the grounds stated on the body of the application and the supporting affidavit of A.J. Owuor sworn on 24<sup>th</sup> August, 2011. He averred that neither the Plaintiffs nor their advocates on record has made any effort to set down the main suit for hearing for more than two (2) years with the matter being last in court on 21<sup>st</sup> February, 2007 and it is apparent that the Plaintiffs are not keen on prosecuting their claim. He averred that the Defendant is incurring unnecessary costs in keeping vigil over the matter.
3. The application is not opposed. The application was canvassed by oral submissions of the Defendant’s Counsel Mr. Opondi who reiterated the depositions in the supporting affidavit. I have considered the said submissions and the law on dismissal of a suit for want of prosecution.
4. Order 17 Rule 2(3) of the Civil Procedure Rules allows either party to apply for dismissal of a suit for want of prosecution where no steps to prosecute have been taken for one (1) year. The test applied by courts in an application for dismissal of a suit for want of prosecution is whether or not the delay in setting down the suit for hearing is inordinate and inexcusable. (See: *Ivita v. Kyumbu [1984] KLR 441*).
5. I have read the court record. On 30<sup>th</sup> May, 2007, a hearing date was taken by consent for 7<sup>th</sup> and 8<sup>th</sup> November, 2007; on 14<sup>th</sup> November, 2007, a hearing date for 7<sup>th</sup> and 8<sup>th</sup> May, 2008 was taken ex parte; on 18<sup>th</sup> June, 2008 the Plaintiff filed a notice of change of advocates; on 29<sup>th</sup> July, 2008, 29<sup>th</sup> July, 2008, 3<sup>rd</sup> May, 2010 and 25<sup>th</sup> March, 2011, the Defendant filed notices of change of advocates. While I appreciate that the Plaintiff has failed to offer a reason for the delay in prosecuting this matter, it is worth noting that whenever a party changes an advocate, it takes a bit of time for that advocate to obtain a file from the preceding advocate. The change of advocates by both the parties in my view contributed to the delay in prosecuting this matter and I therefore so find and hold.
6. I in the circumstances order that this suit be set down for hearing within the next sixty (60) days failure to which the suit stands dismissed.

**Dated, Signed and Delivered in open court this 6<sup>th</sup> day of February, 2015.**

**J. K. SERGON**

**JUDGE**

**In the presence of:**

**N/A for the Plaintiffs**

**Odhiambo holding brief Opondi for the Defendant**