



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC. CASE NO. 634 OF 2012**

**MACHO AGENCIES LIMITED.....PLAINTIFF/RESPONDENT**

**VERSUS**

**BENJAMIN MULI MWAU.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**ESTHER WANGUI MUTURI.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**ABRAHAM MWANGI MUTURI.....3<sup>RD</sup> DEFENDANT/APPLICANT**

**JOSEPH KAGO NGUGI.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

The 3<sup>rd</sup> Defendant filed the Notice of Motion dated 12<sup>th</sup> March 2014 under **Order 17 Rule 2(1) and (3) of the Civil Procedure Rules** seeking to have the Plaintiff's suit dismissed for want of prosecution.

The Application is premised on the ground appearing on the face of it together with the Supporting Affidavit of the 3<sup>rd</sup> Defendant, Abraham Mwangi Muturi, sworn on 12<sup>th</sup> March 2014 in which he averred that the Plaintiff had not taken any steps to prosecute this matter for more than one year therefore the court should dismiss this suit with costs.

This Application is contested. The Plaintiff through its Managing Director, Gregory Kimani Thuita , filed his Replying Affidavit sworn on 12<sup>th</sup> June 2014 in which he averred that this suit was still in progress in the year 2013 according to the request for judgment dated 15<sup>th</sup> February 2013 that was filed in court on 26<sup>th</sup> July 2013. He prayed that the Application be dismissed with costs.

The two parties filed their written submissions. The 3<sup>rd</sup> Defendant submitted that the Plaintiff had not attached copies of the request for judgment and the affidavit of service and insisted that the Plaintiff had not made any steps to prosecute this matter in a period of one year.

In response thereto, the Plaintiff submitted that the Application was premature as the time frame of one year had not lapsed since the last activity on the file. It relied on the case of **Communications Courier & Another –vs- Telkom (K) Limited [1999] eKLR**.

This court has carefully considered the Application, the affidavits together with the submissions made by the Plaintiff and the 3<sup>rd</sup> Defendant and the issue for this court's consideration is whether or not to dismiss this suit for want of prosecution.

The applicable law is **Order 17 Rule 2(1)** which provides as follows:

***“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, may dismiss the suit.”***

**Order 17 Rule 2(3)** provides as follows:

***“Any party to the suit may apply for its dismissal as provided in sub-rule 1”***

The dismissal of a suit for want of prosecution is meant to prevent an abuse of the court process. The test in an application for dismissal of suit for want of prosecution was laid out in the case of **Ivita vs. Kyumbu [1984] KLR 441**, where Chesoni, J. (as he then was) held that,

***“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 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 however 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 before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”***

Further in **E. T. Monks and Co Ltd v Evans (1985) KL R 584** the court stated as follows,

***“The court when pondering over an application to dismiss a suit for want of prosecution should among other things ask whether the delay was lengthy, has it made a fair trial impossible and was it inexcusable. Whether or not the application should be allowed is a matter for the discretion of the judge who must exercise it, of course, judicially. Each turns on its own facts and circumstances..... If the plaintiff has caused or consented to the delay which led to its suit being dismissed for want of prosecution then it must blame itself.... It is the duty of the plaintiff to bring his suit to early trial, and he cannot absolve himself of this duty by saying that the defendant consented to the position.”***

I have perused the court record and find that indeed the last action in this suit is the Plaintiff's request for judgment against the 2<sup>nd</sup> and 4<sup>th</sup> Defendants filed in court on 26<sup>th</sup> July 2013. This Application was filed on 12<sup>th</sup> March 2014, a period of 7 months and 14 days since the last action on this file. In the first place, the 7 month of inaction in this matter does not meet the one year requirement set out in **Order 17 rule 2(1) of the Civil Procedure Rules, 2010** cited above. Further, the 7 months delay is excusable and the 3<sup>rd</sup> Defendant has not shown what prejudice it has suffered in the 7 months delay. I also note that not all the parties in this suit have not completed filing their pleadings therefore this suit is not ready for full hearing. It is my finding that the 3<sup>rd</sup> Defendant's Application is premature and is hereby dismissed with costs.

**DELIVERED AND SIGNED IN NAIROBI THIS 10<sup>TH</sup>**

**DAY OF JULY 2015.**

**MARY M. GITUMBI**

**JUDGE**