



**REPUBLIC OF KENYA**  
**IN THE HIGHCOURT OF KENYA AT MERU**  
**CIVIL CASE NO. 31 OF 2006**

**SISO TUTA MWAMBIA ..... PLAINTIFF**

**-VERSUS-**

**KABANSORA COMPANY LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**RICHARD CHEBCHOK ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

The Defendants by Notice of Motion brought under Order 17 Rule 2(3), Order 51 Rule 1, 3 and 4 of the Civil Procedure Rules and Section 3 and 3A of Civil Procedure Act seek that the plaintiff's suit be dismissed for want of prosecution with costs. The application is based on the grounds on the face of the application and supported by affidavit of REGINA N. KITHEKA a Legal Manager with the Defendant's insurance company M/S Kenindia Assurance Company Limited.

The plaintiff filed a replying affidavit in opposition to the applicant's application. The applicant's main grounds for seeking dismissal of the suit are that the plaintiff has failed to set suit down for hearing since the amendment of the plaint filed on 22<sup>nd</sup> March, 2010. The applicants further state that the plaintiff has no interest in the suit and the pendency of the suit is prejudicial the defendants and that the delay in fixing suit for hearing is both inordinate and inexcusable. The plaintiff on his part has averred that he is interested in prosecuting the suit and listed several dates when the matter came up for hearing on which occasions the applicants occasioned the delay. That this matter has been previously set down for hearing on seven (7) times, the first one being on 8<sup>th</sup> March, 2010 and on all the seven (7) times the defendants did not attend hearing of the suit. That the defence even caused further delay by changing Advocates. The plaintiff averred that the defendants have not filed all necessary documents before seeking dismissal of the suit. The plaintiff relied further on Article 10(2)(b) and Article 159(2)(d) of the constitution in opposing the application.

The advocates agreed to have the application determined by way of written submissions. The defendants filed their submissions dated 20<sup>th</sup> November, 2013 whereas the plaintiff filed theirs on 28<sup>th</sup> November 2013. I have considered the submissions, the authorities relied upon by the parties in support of their opposing position.

The issue for consideration in this application is whether the suit is ripe for dismissal for want of prosecution. Whether there was a delay? Is it anordinate and inexcusable delay and are the defendants likely to be prejudiced by the delay?

The suit before me is a claim for general damages and mesne profit at a rate of Kshs.27,000/- per month from March, 2013 to date of judgment. The claim is governed by the provisions of Civil Procedure Rules

2010. Order 3 Rule 2 (a), (b), (c) and (d) of Civil Procedure Rules provides:-

**“2. All suits filed under Rule 1(1) including suits against the government except small claims, shall be accompanied by –**

- (a) The affidavit referred to under Order 4 rule 1(2)**
- (b) A list of witnesses to be called at the trial**
- (c) Written statements signed by the witnesses excluding expert witnesses and;**
- (d) Copies of documents to be relied on at the trial including a demand letter before action”.**

The parties herein have not given list of witnesses nor have they filed written statements signed by their witnesses and copies of document to be relied upon. Further the parties are yet to comply with Order 11(1) and 3 of Civil Procedure Rules which provides:-

Order 11(1) and (3)-

1. **“This Order shall apply to all suits except small claims or such other suits as the court may by order exempt from this requirement.**
2. ....
3. **(1) With a view to furthering expeditious disposal of cases and case management the court shall within thirty days after the close of pleadings convene a Case Conference in which it shall—**
  - (a) Consider compliance with Order 3 rule 2 and Order 7 rule 5;**
  - (b) Identify contested and uncontested issues;**
  - (c) Explore methods to resolve the contested issues;**
  - (d) With a view of furthering expeditious disposal of cases and case management the court shall within thirty days after the close of pleadings convene a case conference in which it shall:-**
  - (e) Narrow or resolve outstanding issues;**
  - (f) Create a timetable for the proceedings;**
  - (g) Change the track of a case;**
  - (h) Consider consolidation of suits;**
  - (i) Identify a test suit and order stay of other suits”.**

I note both the plaintiff and the defendants have not complied with the above mentioned provision of the Civil Procedure Rules before applying for dismissal of the suit. That both the plaintiff and the defendants are to blame for the delay in this matter as they have not on their part complied with Order 3

Rule 2 of the Civil Procedure Rules. I find that though there has been a failure to prepare record to enable hearing of the case leading to an inordinate delay both parties are to blame. The delay is not excusable on part of both parties but if the suit is not dismissed the applicants would not be prejudiced by the delay. I find that this suit is not even today ready for hearing and as such both parties are to blame for the delay.

**Under Order 17(2)(1), (2) and (3) of Civil Procedure Rules it is provided:-**

**“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, may dismiss the suit.**

**(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks to obtain expeditious hearing of the suit.**

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

In view of the foregoing I will dismiss the application dated 6<sup>th</sup> August, 2013. I order that the plaintiff do pay costs of the application to the defendants. The plaintiff is however given 30 days from the date of this ruling to comply with the provision of order 3 Rule 2 of civil Procedure Rules and prepare and serve all necessary documents to enable this old matter to be heard and determined. I further order in default of compliance and setting the suit down for hearing within the three (3) months of this ruling the suit shall stand dismissed for want of prosecution with costs to the defendants.

**DATED AT MERU THIS 6<sup>TH</sup> DAY OF FEBRUARY, 2014.**

**J. A. MAKAU**

**JUDGE**

Delivered in open court in presence of:-

Miss Kiome for the plaintiff

Mr. Muthomi for Defendants

**J. A. MAKAU**

**JUDGE**