



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**CIVIL CASE NO. 666 OF 2007**

**(APPLICATION FOR DISMISSAL FOR WANT OF PROSECUTION)**

**SPIN KNIT LIMITED.....PLAINTIFF**

**VERSUS**

**1. PERMANENT SECRETARY, MINISTRY OF HEALTH**

**2. THE KENYA MEDICAL SUPPLIES AGENCY**

**(KEMSA)**

**3. THE ATTORNEY GENERAL.....DEFENDANTS**

**R U L I N G**

1. The application by **notice of motion dated 2/4/2013** is brought under **Order 17, rule 2(1) and (3)** of the **Civil Procedure Rules, 2010** (the **Rules**) for dismissal of the Plaintiff's suit for want of prosecution. The main ground for the application appearing on the face thereof is that since the institution of the suit on 24th September 2007 the same has never been prosecuted and that therefore the Plaintiff is not interested in prosecuting the suit.

2. The application is supported by an affidavit sworn by 3<sup>rd</sup> Defendant's counsel. He depones, *inter alia* -

i. That following the close of pleadings in this suit the Plaintiff applied for the Defendants' defence to be struck out, and in a ruling delivered on 9th October 2009 the court (Khamoni, J) struck out the 1<sup>st</sup> and 3<sup>rd</sup> Defendants' statement of defence and ordered that the matter do proceed to formal proof.

ii. That 1 year and 4 months since the Plaintiff's last act of setting down the suit for formal proof the he has not taken any step towards preparing the suit for hearing.

iii. That the Plaintiff's inaction amounts to abuse of the due process of the law.

3. The Plaintiff has opposed the application by **replying affidavit filed on 6th September 2013** which is sworn by an advocate in the law firm representing the Plaintiff. The points of objection raised include

(i) That the delay in prosecuting the suit was caused by the fact that the Plaintiff and the advocates on record for the Defendants commenced negotiations with a view to settlement of the matter, which negotiations culminated in an out-of-court settlement with the 2nd Defendant.

(ii) That securing hearing dates in the year 2012 and 2013 was difficult due to the vetting of Judges and the election petitions.

(iii) That in the circumstances the Defendant's application should be refused.

4. I have considered the submissions of the learned counsels appearing. No authorities were cited.

5. Order 17, rule 2 (1) of the Rules provides as follows –

**“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.”**

6. As was stated by Lord Denning in *Regentine –vs- Beecholme Bakeries Ltd [1967] III Sol, Jo. 216*

**“It is the duty of the plaintiff's advisers to get on with the case. Public policy demands that the business of the courts should be conducted with expedition...”**

7. The test in applications for dismissal for want of prosecution was restated by Chesoni, J in *Ivita Vs Kyumbu [1984] KLR 441* 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 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.”***

8. In the case of *Victory Construction Co. –vs- A N Duggal [1962] EA 697* it was held, *inter alia*, that –

**“(i) ...**

**(ii) Where parties to an action are called upon to show cause why an action should not be dismissed for want of prosecution, the court should be slow to make an order if satisfied that the suit can be heard without further delay, that the defendant will suffer no hardship, and that there has been no flagrant and culpable inactivity on the part of the plaintiff.**

iii. ....”

**9.** In the present case the Plaintiff admits the delay complained of. It offers the explanation that it set down the suit for hearing twice but sought adjournment both times; that thereafter it embarked on trying to settle the matter out of court later it tried in vain to secure hearing dates; and that one of its directors died and the contact persons could thus not be reached. The Defendants have not disputed these facts.

**10.** There is no complaint by the Defendants that a fair trial of the action is no longer possible on account of the delay. Apart from the plea that the delay amounts to an abuse of the court process, there is in fact no plea of any particular prejudice that the Defendant may suffer.

**11.** A fair trial of the Plaintiff's action is still possible, particularly in light of the fact that the defences of the 1<sup>st</sup> and 3<sup>rd</sup> Defendants were struck out. I will therefore refuse the application. But the Plaintiff must take demonstrable steps towards prosecution of its suit within thirty (30) days of delivery of this ruling. In this regard there will be liberty to apply. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants shall also have costs of this application, hereby assessed at KShs 20,000/00. Those will be the orders of the court.

**DATED AT NAIROBI THIS 11<sup>TH</sup> DAY OF MARCH 2014**

**H P G WAWERU**

**JUDGE**

**DELIVERED THIS 17<sup>TH</sup> DAY OF MARCH 2014**