



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**CIVIL SUIT NO 362 OF 2011**

**DENNIS APAA.....PLAINTIFF**

**VERSUS**

**1. PATRICK LUMUMBA**

**2. KENYA ANTI-CORRUPTION COMMISSION.....DEFENDANT**

**R U L I N G**

1. The 1<sup>st</sup> Defendant has applied by **notice of motion dated 3<sup>rd</sup> April 2013** for dismissal of the Plaintiff's suit for want of prosecution. The application is brought under **Order 17, rule 2(3) of the Civil Procedure Rules, 2010 (the Rules)**. By that subrule (as read with subrule 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. The grounds for the application are that the Plaintiff has not taken any material steps to prosecute his claim yet the plaint was filed on 26<sup>th</sup> August 2011 and the defence filed on 21<sup>st</sup> October 2011. It is the 1<sup>st</sup> Defendant's case in this application that the continued existence and uncertainty of the suit is prejudicial to him. These grounds are buttressed by a very brief supporting affidavit sworn by the 1<sup>st</sup> Defendant's advocate, **Donald B Kipkorir**.
3. The 2<sup>nd</sup> Defendant filed an affidavit in support of the 1<sup>st</sup> Defendant's application on 20<sup>th</sup> September 2013. It is sworn by its advocate, **Julius M Muraya**. As in the case of the 1<sup>st</sup> Defendant, prejudice has been pleaded on account of the continued pendency of the suit.
4. On 18<sup>th</sup> September 2013 the Plaintiff changed its advocates. The new advocates filed a replying affidavit on 24<sup>th</sup> September 2013 sworn by the Plaintiff. Grounds of opposition to the application emerging from that replying affidavit include –
  - (i) That since his former advocate, **Haron Ndubi**, filed this suit on his behalf on 24<sup>th</sup> August 2011, and the defence having been filed on 21<sup>st</sup> October 2011, the Plaintiff has been trying without success to see Mr Ndubi in order to discuss the case with him.

(ii) That the inability to see his former advocate made him change his advocates to the present firm of advocates.

(iii) That before the new advocates could come on record they sought the consent of Mr Ndubi by letter dated 30<sup>th</sup> of August 2012, and that despite several reminders Mr Ndubi never gave his consent.

(iv) That Mr Ndubi never informed the Plaintiff of the application for dismissal, and his new advocates came to learn about it upon perusing the court file.

(v) That upon his new advocates coming on record they interviewed him and prepared witness statements and list of documents which are ready for filing.

(vi) That he has a good case and the delay having been caused by his former advocates, and bearing in mind that in 2013 the court was busy hearing elections petitions and would not have heard his case, it is meet and just that he be allowed to prosecute his case.

5. The application was canvassed by way of written submissions. The 1<sup>st</sup> Defendant's submissions were filed on 20<sup>th</sup> November 2013 while those of the Plaintiff were filed on 26<sup>th</sup> June 2014. I have considered those submissions together with the authorities cited.

6. No judgment, interlocutory or otherwise, has ever been entered in this suit. It was therefore not necessary for the Plaintiff's new advocates to seek the consent of his former advocate before coming on record. By doing so, further delay was occasioned. But I note that the new advocates sought the former advocate's consent upon grounds of courtesy, and that of itself is a good thing. Courtesy among advocates is of importance in the course of rendering their services to their clients. I will therefore not hold against the Plaintiff the interlude that passed while his new advocates sought the consent of the former advocate who did not bother to respond.

7. The new advocates have moved with speed since coming on record. They interviewed the Plaintiff, prepared his witness statement and also his list and bundles of documents. All these have been exhibited in the replying affidavit.

8. I pointed out the brevity of the 1<sup>st</sup> Defendant's supporting affidavit. Beyond stating that the continued pendency of the case is prejudicial to the 1<sup>st</sup> Defendant, there is not anymore. The nature of this prejudice is not stated. It has not been averred for instance that because of the passage of time a fair trial of the action will no longer be possible. It has not been alleged that witnesses or documents will no longer be available at the trial.

9. I am satisfied from the material now before the court that a fair trial of this suit is still possible without any further undue delay. It is therefore meet and just that the Plaintiff be accorded a last opportunity to prosecute his case.

10. It is in this spirit that I will decline the application at hand. It is hereby dismissed. The Plaintiff is directed to take discernable steps within the next 30 days after delivery of this ruling in order to propel his case towards hearing. To this end a date for taking pre-trial directions ought to be taken as soon as possible.

11. The Plaintiff shall bear the costs of the present application. He shall pay to the 1<sup>st</sup> Defendant costs of KShs 15,000/00 within fourteen (14) days of delivery of this ruling. The Plaintiff shall also pay to the 2<sup>nd</sup> Defendant costs of KShs 5,000/00 within the same period. In default of payment the Defendants shall be at liberty to execute. Those will be the orders of the court.

**DATED AND SIGNED AT NAIROBI THIS 30<sup>TH</sup> DAY OF SEPTEMBER 2014**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF OCTOBER 2014**