



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL SUIT NO.175 OF 2007**

**NAKURU WATER & SANITATION SERVICES.....PLAINTIFF**

**VERSUS**

**THE BOARD OF TRUSTEES, AGRICULTURAL**

**SOCIETY OF KENYA (NAKURU..... DEFENDANT**

**RULING**

The application dated 12/11/2013 is made pursuant to **Order 17 Rule 2(1)** and **(3)**, and **Order 51 Rule 1 Civil Procedure Rules** seeking that the plaintiff's suit be dismissed for want of prosecution and costs of the suit be awarded to the defendant.

The reasons for seeking such orders are that:-

*(a) The plaintiff has not made any application for taken any steps towards prosecuting this matter since it was last adjourned on 16<sup>th</sup> March 2011.*

*(b) No valid reasons exist for the inordinate inaction on the part of the plaintiff.*

In a supporting affidavit sworn by the Defence Counsel, the history of this suit is set out to the effect that it was filed on 30/07/2007. The last time it was in court was on 16/03/2011 when it came up for hearing, but was adjourned generally because the plaintiff was not ready to proceed. Since March 2011, the defence counsel has on a number of occasions sent reminders to the plaintiff's counsel to fix the matter for hearing, to no avail.

There was no response filed in respect of the application and the court directed the defendant's counsel to restrict his submissions to issues of law. Mr. Biko who appeared on behalf of the defendant argued that on 16/03/ 2011, the suit did not proceed because no discoveries had been

done and there was no compliance with **Order 11**, so the suit was not ripe for hearing. He blames the defendants for failing to carry out any discoveries.

Further that the defendant stands to suffer no prejudice if the suit is not dismissed as the plaintiff is a public body, and public interest will be affected.

In response, Mr. Kisila contends that **Order 11** is what makes it a ground why the suit should be

dismissed - because no step, including preparing the suit for hearing, has been taken, saying inaction for seven years is inexcusable.

It is not in dispute that this suit was filed in the year 2007 and to date, it has not been heard. A perusal of the record shows that when it last made an appearance before a Judge on 16 / 03/2011 for hearing, the counsel holding brief for plaintiff's advocate indicated to the court:-

**"Mr. Kipkoech is unable to proceed today. We have yet to file our documents. We need at least one month to complete discovery."**

Even then, Mr. Kisilah on behalf of the defendant complained that:-

**"This is the oldest matter scheduled for hearing today. This matter was filed 4 years ago... The matter was fixed for hearing last November 2010. This too means they were ready, I made an effort and called my colleagues yesterday and they were not even aware of today's hearing."**

The court indulged the plaintiff's counsel and granted an adjournment. From that date, the file has been inactive. On 14<sup>th</sup> December 2011, the defence counsel wrote to the plaintiff's counsel requesting them to fix the matter for hearing or withdraw it, in the event that the plaintiff had lost interest. The letter elicited no response. Indeed even this application did not seem to jolt the plaintiff into action, as no reply was filed.

If the suit was premature for hearing, then what steps should the plaintiff (who was the one who brought the matter to court) have taken? I have perused the provisions of **Order 11 vis a vis** the provisions of **Order 17 Rule 2 (1)**.

It is important to bear in mind that four years before the existence of Order 11 came into force; the plaintiff had not taken any serious steps towards settling down the matter for hearing. This means that the loud refrain about non-compliance with Order 11 as a reason for not setting down the matter for hearing, in the earlier years, rings hollow. However, even if the matter got caught up in the 2010 Civil Procedure Rules then the objective of Rule 11 of the Civil Procedure Rules was to achieve expeditious disposal of cases and case management, and the realisation of the pre trial conference under **Rule 11 (3) (2)** depends on the participation of every party and his counsel to strictly comply - (Refer to Rule 11 (7) (2))

This is further confirmed by **Rule 11 (7) (3)** to the effect that:-

**"Any party or his advocate who willfully fails or omits to comply with the provisions of this Order shall be deemed to have violated the overriding objective as stipulated in section 1A and 1B of the Act. . . ."**

For purposes of this suit, it was incumbent on the plaintiff's counsel to file the documents it required, expeditiously, so as to have the matter set down for hearing. They requested for a month to do so, but after that, **"went into deep slumber like the Alaskan fox who forgot that the winter was over."** This **"slumber"** definitely violated the overriding objectives contemplated by section 1A and 1B of the Civil Procedure Act.

No reasonable explanation has been given for the inordinate inactivity and I am satisfied that what is envisaged under Order 17 Rule 1(2) that:-

**"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).....

**(3)Any party may apply for its dismissal**

**As provided in sub-rule 1."**

I need not belabour the matter, no satisfactory explanation has been given for the over 3 years period in which no steps have been taken to have the matter heard. In fact the plaintiff has demonstrated every step of the way, definite lack of interest in this matter.

The upshot is that this matter does not deserve another day in the court or at the registry and I hold that the application is merited. I order the suit dismissed with costs to the defendant. The plaintiff shall also bear the costs of this application

**Delivered and dated this 7<sup>th</sup> day of October 2014 at Nakuru.**

**H.A. OMONDI**

**JUDGE**