



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

CIVIL SUIT NO. 104 OF 1996

ALICE WANJIKU MUTHAMIA1ST PLAINTIFF

JAMES KIMATHI MUTHAMIA.....1ST PLAINTIFF

VERSUS

NEHEMIAH MUTHAMIA.....1ST DEFENDANT

FRANKLINE KINOTI GIKUNDA.....2ND DEFENDANT

R U L I N G

[1] This application is dated 09/10/2014 and seeks orders:-

- (1) ***THAT the suit be dismissed for want of prosecution.***
- (2) ***THAT the costs of the suit and application be provided for.***

[2] The application is supported by the Affidavit of NEHEMIAH MUTHAMIA and has the following grounds:-

- (1) ***THAT there has been inordinate delay on the part of the plaintiffs' in the prosecution of this suit.***
- (2) ***THAT is over three (3) years since the Plaintiff last took any step towards the prosecution of the suit.***
- (3) ***THAT plaintiff has evidently lost all desire to prosecute the matter/claim.***
- (4) ***THAT the defendant has been greatly prejudiced and continues to suffer from the Plaintiff's demonstrated delay in prosecuting the matter.***
- (5) ***The plaintiff is under a statutory duty to prosecute this matter expeditiously.***
- (6) ***A dismissal order in the circumstances would not be draconian or unreasonable.***
- (7) ***THAT delay defeats justice and the plaintiff's indolence cannot be rewarded with an order against dismissal.***

[3] The application has been canvassed by way of Written Submissions with each party giving diametrically opposed assertions.

[4] I have considered the parties propositions . This Court takes umbrage in the Court of Appeal's erudite guidance, which although it concerned the way Injunctive Orders ought to be handled, is good guidance regarding how all Interlocutory applications should be handled. In *Mbuthia Versus Jimba Credit Corporation [1988] KLR1*, the Court opined as follows:-

“The correct approach in dealing with an application for an interlocutory injunction is not to decide the issue of fact, but rather to weigh up the relevant strength of each side's propositions. The lower court judge had gone beyond his proper duties and made final findings of fact on disputed affidavits.”

[5] Some of the issues the parties have canvassed can only be ascertained at the hearing of the main suit. Whether the Plaintiff is intent on prosecuting his case expeditiously will be determined once this case is given a hearing date. This case is a 1996 case. It merits being heard to establish the veracity of substantive issues. All the parties have agreed that they have fully complied with Order 11, CPR. I find that it is ready for hearing. For this reason, this case will not be dismissed.

[6] It is ordered as follows:-

(1) The application for dismissal of the suit dated 9th October, 2016 is not allowed.

(2) The suit will be heard on 17th November, 2016.

(3) Costs shall be in the cause.

[7] It is so ordered.

DELIVERED IN OPEN COURT AT MERU THIS 21ST DAY OF SEPTEMBER, 2016 IN THE PRESENCE OF:-

CA Daniel /James

Mwenda Mwarania for Plaintiffs

J.M Mwangi h/b Mutinda for the defendant

P. M NJOROGE

JUDGE