

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL CASE NO. 14 OF 2007

PLAINTIFF:.....ELIJAH KIPTUI TARAGON

VERSUS

DEFENDANT:.....GEORGE KIPTANUI CHEBOI

RULING

The application brought a notice of motion seeking to have this suit dismissed for want of prosecution. The applicant depones in his affidavit in support of the motion that the suit herein has been pending unprosecuted for a period of over twelve (12 years.) The applicant also contends that the respondent has previously brought a multiplicity of suit against him all of which have been dismissed.

The respondent has opposed the application by the applicant on the grounds that the supporting affidavit contains falsehoods and that he has been desirous of prosecuting this case were it not for his ill health and relocation from Trans-Nzoia to Uasin Gishu. The respondent contends that he has been acting in person but has now hired a lawyer and that he is keen on prosecuting the suit.

I have gone through the records and I have to determine whether this suit ought to be dismissed for want of prosecution. The suit herein was filed on 12.2.2007. It is therefore not true that the same has been pending for over 12 years as the applicants alleges in his supporting affidavit.

On 20.1.2010 an application seeking to stay this suit pending the hearing and determination of a similar one being Kitale HC.CC. NO.152 OF 2000 WAS ARGUED. In a ruling delivered on 3.2.2010, Justice Ombinja stayed the current suit pending hearing and determination of Kitale HC.CC.NO.152 of 2000.

Kitale HC.CC.NO.152 of 2000 was dismissed for want of prosecution on 6.12.2011. This in effect meant that the respondent was at liberty to prosecute the present suit. The respondent never took any step to prosecute this case pending the applicant to bring the present application seeking to dismiss the same

Under the provisions of order 17 Rule 2(b) any party to a suit is at liberty to apply for its dismissal as provided under sub-rule (1). Sub rule (1) of Rule 2 provides that if any step is not taken by either party for one year, an application may be made by any party for the suit to have it dismissed. It is therefore clear that the applicant had the liberty of either fixing the sit for hearing or apply for its dismissal. The applicant opted for the latter option.

As the current suit had been stayed pending determination of Kitale HC.CC.NO.152 of 2000 and the suit having been dismissed on 6.12.2011 the period of one year lapsed on or about the December 2012. The applicant was therefore at liberty to either fix it down for hearing or apply for its dismissal. The present application was filed on 13.12.2012. The question which I pose is this, was this delay so inordinate as to warrant dismissal of the suit? The provisions under which the present application was brought requires that the respondent shows cause why the suit ought not to be dismissed. The respondent has explained that he was acting in person and that non prosecution of the suit was due to this fact coupled with the fact that he had relocated from Trans-Nzoia to Uasin Gishu and partly because of his ill health. The suit had not remained unprosecuted for a period which can be taken as excessive. There is no way the respondent would have taken

any step in this case earlier than 6.12.2011 when Kitale HC.CC.NO.152 of 2000 was dismissed because there were orders staying this suit pending conclusion of Kitale HC.CC.NO.152 of 2000, It is apparent that the applicant was keenly waiting for the one year period to end and bring in the application for dismissal. Though the applicant was perfectly in order to bring the application for dismissal, it is good practice to first exhaust the first option that is of fixing the case for hearing before going to the one for dismissal. I find that the respondent has explained himself as to why he did not set down the use for hearing as received. The application for dismissal of the case for hearing as required. The application for dismissal of the case for want of prosecution is disallowed. The respondent should however be penalized to pay costs of this application to the applicant as he was the one who prompted the applicant to bring the same as he failed to prosecute his case in time as required. The respondent shall proceed to take a hearing date for the suit within 14 days from the date of this ruling.

Dated, signed and delivered at Kitale on this 15th day of January, 2014.

E. OBAGA

JUDGE

IN THE PRESENCE OF:-

Mr. Chebii for plaintiff

Court Clerk – Kassaachuon

Mr. Bundi for the defendant

E. OBAGA

JUDGE.