



**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**HCC NO. 90 OF 1996**

ELIUD BARASA IMAYO.....APPLICANT

VERSUS

JOHN OMUSE EMOIT..... RESPONDENTS

**RULING**

1. The issue for determination before me is an application dated 26<sup>th</sup> September 2011. In this application, the applicant seeks for the following orders;

1. The application be certified as urgent

2. The honourable court be pleased to review, vary and/or set aside the ruling/order delivered on the 8.3.2010.

3. Costs be in the cause.

2. The application is premised on the five grounds on the face of it and on the affidavit of Eliud Barasa Imayo. One of the grounds raised is that there is an error apparent on the record as the suit was dismissed when parties had not complied with Order X of the Civil Procedure Rules. Secondly that this application was filed without undue delay. In the supporting affidavit, it is stated that the orders sought will not prejudice the defendant. The defendant did not file any documents but in reply the application stated this suit was already finalized.

3. I have perused the record/file. The defendant/respondent had filed an application dated 24<sup>th</sup> May 2004 seeking to dismiss the suit for want of prosecution. This application was not opposed by the plaintiff but it was struck out on want of form on 23.7.04 having failed to specify the grounds on which it was premised. On 30<sup>th</sup> September 1996 directions were taken before Tanui J (as he then was). Subsequently the matter was listed for hearing on diverse dates but the same was adjourned for the various reasons given. From the record, none of the reasons given for adjournment was because order X had not been complied with.

4. The defendant made a second attempt at having the suit dismissed and succeeded. In his application dated 6<sup>th</sup> April 2010 heard on 29<sup>th</sup> November 2010, he asked the court to dismiss the suit for non-prosecution. The trial judge having considered the submissions offered allowed the application vide her ruling delivered on 8<sup>th</sup> March 2010. It is this ruling the applicant wants me to vary, review and or set aside.

5. The reasons for reviewing orders is set out under order 45 of the Civil Procedure Rules. The error as submitted by the applicant is that the suit was not ripe for hearing as discovery or inspection of documents had not been done. The first application for dismissal was filed after directions were taken. The applicant did not take any steps towards complying with order X. He proceeded to fix this matter for hearing for instance on 8<sup>th</sup> March 2000, that matter was stood over to 17<sup>th</sup> April 2000 for hearing. On 30<sup>th</sup> June 2005, in the registry the case was fixed to be heard by the plaintiff's representative on 7<sup>th</sup> August 2006, 12<sup>th</sup> November 2007, 8<sup>th</sup> June 2009. There cannot be error on the face of the record when this matter had been listed severally for hearing irrespective of non-compliance of that order and

therefore that ground fails.

6. The applicant has also indicated the present was brought without undue delay. The suit was dismissed on 8<sup>th</sup> March 2010. The application to vary those orders was filed on 29<sup>th</sup> September 2011. this was one year and six months later. In my view, this is extreme delay and equity does not aid the indolent.

7. lastly, the applicant asked this court to set aside the orders of dismissal. The application to dismiss the suit was heard interpartes. No reason has been advanced why those orders should be set aside. If the applicant was unhappy with the orders of 8.3.2010, he ought to have commenced appeal process. At it were, this courts hand are tied as I cannot sit an appeal on orders issued by my learned sister judge whom we have concurrent jurisdiction.

8. Consequently, I find the application as lacking in merit and dismiss it with costs to the defendant.

**DATED and DELIVERED** this 30<sup>th</sup> day Sept. 2014.

**A. OMOLLO**

**JUDGE.**