



**REPUBLIC OF KENYA**

**High Court at Nakuru**

**Civil Suit 113 of 2011**

**JOSEPH KIPROTICH YEGON.....PLAINTIFF**

**VERSUS**

**TABARNO CHEPKIYENG.....DEFENDANT**

**RULING**

Coming before me for hearing on 15/4/2013, is the application dated 2/10/2012 filed by Erick Chepkियeng who acts in person. The application was brought pursuant to **Order 17 Rule (2), (3) and (4)** of the **Civil Procedure Rules** in which the applicant seeks an order that the suit be dismissed for want of prosecution and the costs of the suit be awarded to the applicant. The applicant swore an affidavit dated 2/10/2012 in support of the application; that he holds the power of attorney and is the administrator of the estate of Mrs Tabarno Chepkियeng. He depones that since the filing of this originating summons, the respondent has never listed it for hearing and yet the respondent has failed to comply with the court's order dated 25/7/2012 to have the originating summons listed for hearing. The applicant contends that the originating summons has not been set down for hearing for over three months and it has been costly for the applicant who has kept coming to court to pursue this case.

The respondent did not file any reply nor did the counsel, Mr. Kimatta, attend court for the hearing of the application. The applicant filed an affidavit dated 15/4/2013 which confirms that the firm of Kimatta was served with the instant application on 24/1/2013. The court being satisfied about the service and the fact that the application was also listed on the cause list and Mr. Kimatta had been before me on another matter before this case was called out. The application was therefore not opposed.

**Order 17 Rule 2(3)** of the **Civil Procedure Rules** empowers any party to a suit to apply for dismissal of the suit if, for one year, no steps have been taken towards the prosecution of the suit by either party. In the instant case, the originating summons was filed by the respondent on 24/5/2011. The respondent also filed an application seeking orders of injunction seeking to restrain the applicant from evicting the respondent/plaintiff from 2 acres of the suit land. This court considered the said application and found it to be unmerited and dismissed it on 18/11/2011. The applicant/respondent then filed the application dated 21/3/2012 seeking to be allowed to execute orders issued by the court on 18/11/2011. This court considered the said application and found it to be premature as no order had been made in this originating summons. The court then directed that the parties do take directions on the originating summons and then take a hearing date. No time lines were given. So far, no directions have been taken. This court would have expected that Mr. Kimatta, counsel for the respondent/applicant, would make the first move for such directions as the applicant/respondent is a lay person and acts in person. He may not know what directions to take in an originating summons. It is clear the respondent/applicant is not in any hurry to have this matter heard.

Since the applicant/respondent's application dated 31/5/2011 was dismissed on 25/7/2012, the respondent has not taken any steps towards prosecution of this originating summons. However, from 25/7/2012 to 2/10/2012 when the applicant/respondent filed this application was not yet a period of one year. **Order 17 Rule 2(3)** requires that there be inaction in the case for one year before a party can move the court to have the suit dismissed. In the result, I find that the instant application is premature and an order of dismissal cannot be granted under **Order 17 Rule 2(3)** as prayed. The court, however, wishes to note that the respondent/applicant does not seem to be keen on prosecuting this originating summons forcing the applicant/respondent to keep moving the court to take action. The applicant is, however, keen to have it finalized. For that reason, I will give time lines on how this originating summons should be conducted. I

direct that directions herein be taken within 60 days hereof and it is the respondent's counsel who should move the court for the said directions. If the respondent's counsel fails to take steps, the applicant will be at liberty to move the court for the directions within the specified period. Thereafter, the matter be fixed for hearing within 60 days of taking of directions. The applicant will bear his own costs. This order be served on Mr. Kimatta, counsel for the respondent/applicant.

**DATED and DELIVERED this 26<sup>th</sup> day of April, 2013.**

**R.P.V. WENDOH**  
**JUDGE**

**PRESENT:**

N/A for the plaintiff/respondent

Erick Chepkuyeng in person - the defendant/applicant

Stephen Mwangi – Court Clerk