



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CIVIL CASE 34 OF 2006

RINA SHEM MBAYE.....PLAINTIFF/RESPONDENT

VERSUS

FREDRICK L. NAMUSENDE.....1ST DEFENDANT/APPLICANT

SIMON AKALA KAITANO.....2ND DEFENDANT/APPLICANT

LAND REGISTRAR, KAKAMEGA.....3RD DEFENDANT

RULING

The application by way of Notice of Motion dated 21.7.2011 seeks orders for dismissal of the suit herein for want of prosecution.

The application is supported by the annexed affidavit of ALUBALA A. ANDAMBI, the counsel for the 1st and 2nd Defendants/Applicants.

The main ground of the application is that the Plaintiff/Respondent has shown no interest in prosecuting this matter nor taken any step to list the case for hearing for more than three years.

The application is opposed to as per the replying affidavit by Mrs. Rina Shem Mbaye, the Plaintiff/Respondent. In the said affidavit, the Respondent laments about the affidavit in support being sworn by the applicant's advocate and not by the party and that 1st and 2nd Defendants/Applicants have not complied with the new rules under the Civil Procedure Act Cap 21 Laws of Kenya. The Respondent saw the application as a means of causing delay by the filing a multiplicity of applications.

I have considered the application and the reply to the same. The 3rd Defendant/Respondent was not present during the hearing of the application although he was duly served.

It is apparent from the record that no step has been taken in this suit for the last three years. The Plaintiff/Respondent is the one who filed this suit and therefore ought to be the prime mover when it comes to the fixing of hearing dates. The same applies to the compliance with the new Civil Procedure Rules. The 1st and 2nd Defendants/Applicants were therefore at liberty to apply for the dismissal of the suit.

Although the affidavit in support of the application has been sworn by the advocate and not by the party, the matters deponed on are within the advocate's knowledge. This is however a trend that ought to be discouraged. An advocate would be put in an awkward situation if the opposing party applied to cross-

examine him as the deponent.

The subject matter of this suit is a parcel of land. This is an emotive subject which would not be conclusively determined by way of technicalities of procedure.

I will therefore give the Respondent sixty days within which to comply with the new Civil Procedure rules and to fix the case for hearing.

Costs of this application to the 1st and 2nd Defendants/Applicants.

Delivered, dated and signed at Kakamega this 22nd day of March , 2012

B. THURANIRA JADEN
J U D G E