



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 284 OF 2003**

1. JOSEPH KIMATU (alias CHADA KAZI)  
2. PATRICK NGUGI  
3. ELIJAH MSAGHA  
4. JOSEPHINE KASYOKA  
5. PETER KAMAUN NG'ANG'A ..... PLAINTIFFS

*(To sue in their own behalf and in a  
representative capacity)*

- Versus -

1. MRS. RUKIYA SOUD ALI BASHIRI  
2. SOUD HAFIDH RASHID  
3. HAIDER SOUD  
4. HEMED MOHAMED SOUD ..... DEFENDANTS

**RULING**

By a motion filed on 19<sup>th</sup> January 2012 the Defendants herein pray that this suit be dismissed for want of prosecution.

The application is predicated on the grounds revealed on the face of application and the affidavit of Philip Ojode, Counsel for the Defendants. In the main it is argued that this suit was instituted in June 2003 and has remained unprosecuted for 8 years. That this has prejudiced the Defendants as the plaintiff is not paying rent in respect to the suitland.

In their reply, the plaintiffs have given a history of the proceedings herein. They blame the non-prosecution hereof-

***(a) Partly on the inaction of their initial advocates.***

***(b) Partly on the delay in conclusion of interlocutory proceedings which allowed the setting aside of the exparte judgment they had obtained and which granted the defendants leave to file their defence.***

Order 17 of The Civil Procedure Rules 2010 governs the prosecution of suits. Those rules are intended to ensure that litigation is disposed of expeditiously. And although the Defendant does not expressly state under what provisions of the law the application has been made, applications for dismissal for want of prosecution are governed by Order 17 Rule 2 which reads as follows-

***“(1) In any suit in which no application has***

*been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.*

*(2) If cause is shown to the satisfaction of the*

*court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.*

*(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.*

*(4) The court may dismiss the suit for non-compliance with any direction given under this Order.”*

While the Defendants have correctly pointed out that this matter has been pending for far too long, their application is premature. The application was filed on 19<sup>th</sup> February 2012 and it can only succeed if no application has been made or step taken in the suit in the 12 months preceding that date. A narrative of events from 14<sup>th</sup> March 2011 shows that the file has been active.

This suit was due for hearing on 14<sup>th</sup> March 2011 but there is nothing on record to show what took place on that day. Instead on 17<sup>th</sup> March 2011 the advocates for the 5<sup>th</sup> plaintiff took a mention date of 28<sup>th</sup> March 2011. On this day the 1<sup>st</sup> – 4<sup>th</sup> plaintiffs requested for time to engage services of a new advocate. This was granted and the matter listed for mention on 4<sup>th</sup> May, 2011. On 4<sup>th</sup> May 2011 Mrs Kipsang, now instructed by the plaintiffs, sought two months to prepare for the hearing. A mention date of 6<sup>th</sup> July 2011 was given for purposes of confirming the readiness for hearing. The matter does not seem to have been mentioned on 6<sup>th</sup> July 2011 and so on 2<sup>nd</sup> February 2012 the Defendants fixed this application for hearing on 8<sup>th</sup> March 2012 when it was heard.

Clearly then the file has not been dormant in the 12 months preceding the date of the application or indeed the date of this ruling. For this reason I cannot grant the orders sought by the Defendants.

Nevertheless there has been no tangible progress made in resolving the substantive issues herein. The intermittent movement herein has so far been dominated by interlocutory applications and this court is dutybound to make such orders as it thinks fit to obtain the expeditious disposal hereof. For this reason I hereby order that the parties herein comply with pre-trials within 30 days hereof and the main suit be listed for hearing within 14 days of compliance.

At any rate, the application of 19<sup>th</sup> January 2012 is dismissed with costs.

*Dated and delivered at Mombasa this 19<sup>th</sup> day of April, 2012.*

**F. TUIYOTT**  
**JUDGE**

**Dated and delivered in open court in the presence of:-**

**Wafula for Kipsang for Plaintiff**

**Wafula for Ojode for the Defendant**

**Court clerk - Moriasi**

**F. TUIYOTT**  
**JUDGE**