



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISC. SUCCESSION NO. 61 OF 2006

BETWEEN

**STEPHEN KIMELI KOECH
NATHAN KIBET KOECH APPLICANTS**

AND

WILLIAM KIPLAGAT KOECH RESPONDENT/APPLICANT

R U L I N G

A Notice of Motion taken pursuant to the provisions of Order XVI Rule 5 of the Civil Procedure Rules prays that the Cause herein be dismissed for want of prosecution and the costs for the application be provided for. That the cause has not been moved since 26th January, 2007 and the pendency of the cause is prejudicial to the Applicant/Respondent and it is unfair to continue to subject the applicant/respondent to such prejudice are the grounds upon which the application is brought. It is sworn in the supporting affidavit that the cause was instituted during 2006 and that there has been no action since January, 2006 and the same should therefore be dismissed to end the prejudice being meted out to the applicant/respondent.

In the replying affidavit sworn by the respondent/applicant it is sworn that the cause for the delay has been that the court file has not been available in the registry when the respondent attempted to fix a date. Similarly even the applicant/respondent was unable to fix a hearing date for the same reasons.

I heard submissions from both counsel for the warring parties herein in support of their respective positions. I have thoroughly perused the court file and the proceedings. It is true that for a while the court file appeared to be misplaced and could not be traced in the registry. That is borne out by the letters from the Respondent's counsel as well as the court file notes by the counsel's clerk's attendances at the registry to fix a hearing date. Once the file was traced the applicant changed advocates who needed time to prepare. In the meanwhile a different case being HCCC. No. 102/2006 was filed by the applicant and he wanted this latter case to proceed first. The applicant thereby caused a temporary delay of this present cause.

The court will dismiss a case/cause for want of prosecution if there be delay which is prolonged and unexplained and inexcusable and if such delay prejudices a fair trial.

The court file went missing and in those circumstances there was not much the respondent/applicant could have done short of making an application for leave to open a skeleton file or wait for the court staff

to trace the court file. He chose the latter. The respondent cannot be said to have gone to sleep, his counsel was actively pursuing the fixing of a hearing date. The applicant did not himself set the matter down for hearing which was an option open to him. This is a succession matter which, as is clear from this application, is contested. I do not find that any prejudice has been caused that can now not be remedied by an early hearing date. I am satisfied that the delay is not inordinate in the circumstances of the case and that the same is in any event well excusable. In the result I dismiss the application under consideration with costs being in the cause. It is accordingly ordered.

DATED AND SIGNED AT ELDORET THIS 31ST DAY OF DECEMBER, 2010.

**P.M. MWILU
JUDGE**

DELIVERED AND SIGNED AT ELDORET THIS 19TH DAY OF JANUARY, 2011.

**F. AZANGALALA
JUDGE**

In the presence of;

Advocate for Applicant
Advocate for Respondent
Court Clerk

**F. AZANGALALA
JUDGE**