



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KERICHO

CIVIL CASE NO. 9 OF 2008

ZAKAYO KIMETO LELOO.....PLAINTIFF
VERSUS
JULIUS SOI.....1ST DEFENDANT
PAUL SOI2ND DEFENDANT

RULING

The two Defendants, **JULIUS SOI** and **PAUL SOI**, have in their Notice of Motion dated 4th October, 2010 sought dismissal of the suit herein on the grounds, *inter alia*, that for over two years the Plaintiff has failed to set the suit down for hearing. The Defendants aver that they continue to suffer anxiety due to the pendency of the suit. They seek the dismissal of the suit under **Order XVI Rule 5** of the **Civil Procedure Rules** (now **order 17** of the 2010 Civil Procedure Rules). **Rules 5** of the repealed Rules states;

“5. If, within three months after-

(a) the close of pleadings; or

(b) (Deleted by L.N. 36/00)

(c) The removal of the suit from the hearing list; or

(d) The adjournment of the suit generally, the Plaintiff, or the court of its own motion on notice to the parties, does not set down the suit for hearing, the Defendant may either set the suit down for hearing or apply for its dismissal”.

In the **new 2010 Rules**, rule 2(1) of **Order 17** provides;

“ 2(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”

The Plaintiff was served with the application for the dismissal of the suit but did not file grounds of opposition or a replying affidavit. The application proceeded to hearing *ex parte*. **Miss Makori**, learned counsel for the Defendants urged the court to dismiss the suit because it was patent that the Plaintiff had lost interest in it as he has not shown due diligence in prosecuting it. The delay, said **Miss Makori**, was inexcusable. **Miss Makori** relied in the application on the Uganda case of **NILANI VERSUS PATEL AND OTHERS [1969] 1 EA 340 (HCU)** in which the High Court of Uganda (Dickson J) held that there was inordinate delay in that case by the Plaintiff which was inexcusable because the Plaintiff’s suit was filed in August, 1959 and hearing was adjourned thrice at the behest of the Plaintiff between 1960 and 1963. The court dismissed the suit.

The suit herein was instituted on 18th March, 2008. The claim by the Plaintiff against the Defendants is

that the 4th Defendant through “*the District Officer Angata (not named as a Defendant) have threatened to trespass on the Plaintiff’s land No. Angata/Barikoi/421 and also evict the Plaintiff from the said land*”. These allegations were denied by the Defendants who entered appearance and filed defence on 25th April, 2008. The suit was fixed for hearing by the Plaintiff on 10th March, 2009 but, was taken out of the hearing list by the Honourable Lady Justice Mary Ang’awa. It was fixed again for hearing by the Plaintiff on 13th October, 2009 but it did not proceed to hearing. The reason is not discernible from the file. Nothing seems to have happened after this until the Defendants filed the application to have the suit dismissed.

The facts emerging from the record do not support the view that the Plaintiff has totally lost interest in the case. He look initiative on 10th March, 2009 and again on 8th July, 2009 to set the suit down for hearing. The suit should have proceeded to hearing on 13th October, 2009 but it is not clear why it did not.

For the court to dismiss the suit for want of prosecution, it must be patently clear that there is inordinate delay which is not excusable. I am not persuaded that the delay in this case is so inordinate as to be inexcusable. I decline to exercise my discretion to dismiss the suit. Instead, I shall proceed to fix it for hearing and require that the Plaintiff be served with a hearing notice. The costs of this application shall be borne by the Plaintiff in any event.

DATED at KERICHO this 21st day of March, 2011

G.B.M. KARIUKI, sc
RESIDENT JUDGE

Advocates

Mr. P.O. Makori advocate for the Applicant.

No appearance by J.K. Rono for the Respondent

Court Clerk – Mr. Koech