



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT BUNGOMA**  
**CIVIL CASE NO.10 OF 2009**

**LEONARD JOSHUA IKAROT & 4 OTHERS** .....  
**: PLAINTIFFS**

**VERSUS**

**HUMPHREY OJILONG ESUBA & 2 OTHERS** .....  
**: DEFENDANTS**

**R U L I N G**

In his notice of motion dated 1<sup>st</sup> July 2010 the 2<sup>nd</sup> and 3<sup>rd</sup> defendants seek for orders for dismissal of the plaintiffs' suit for want of prosecution. The grounds in support are that since the filing of the suit, the Respondent has failed to take any steps to fix a hearing date. The Respondent has since filed another suit Bungoma CMCC No.20 of 2009 and removed caution placed on land parcel No.Malakisi/Mwalie/300.

The Respondent did not file a replying affidavit and this application was formally unopposed. He appeared in court in person but did not respond to the issues in question. He denied that Athunga & Co were his advocates and that the 3<sup>rd</sup> defendant ought to have been served with the papers of the case he alleges was filed.

The record shows that this suit was filed on the 03/02/09. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants through their advocate Elungata & Co entered appearance and filed defence on the 18/02/09 and 06/03/09 respectively. The plaintiff has not fixed the suit for hearing or taken any steps to prosecute his case for over one and a half years.

Order XVI Rule 5(1) allows dismissal of a suit where the plaintiff has not taken action for a period of three months. When the Respondent was served with this application, he did not bother to reply to the allegations raised. It would be assumed that he had no reasonable explanation to offer for failure to prosecute his case.

It was held in the case of **E.T. Monks Co Ltd Vs Evans HCCC No.77 of 1971** – Nairobi that for a court to exercise its discretion in allowing a sleepy plaintiff to fix his case for hearing, the plaintiff must show that the delay was not lengthy, inordinate or inexcusable. In the application before me, no reason for the delay was given. The delay of almost two years is by no reasonable standards lengthy. It is therefore inordinate, inexcusable and prejudicial to the defendants who have to keep waiting indefinitely.

I find the application merited and allow it as prayed. The plaintiffs' suit is hereby dismissed with costs to the defendant.

**F.N. MUCHEMI  
JUDGE**

Ruling dated and delivered on the 9<sup>th</sup> day of March 2011 in the presence of Mr Elungata for Defendant/Applicant.

**F.N. MUCHEMI  
JUDGE**