



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 225 OF 2002

MARY CHEPKEMOI TERES.....1ST PLAINTIFF/APPLICANT
KOSITANY ARAP TERES.....2ND PLAINTIFF/APPLICANT

VERSUS

CATHOLIC DIOCESE OF NAKURU.....1ST DEFENDANT/RESPONDENT
THE TRUSTEES KERINGET CATHOLIC CHURCH.....2ND DEFENDANT/RESPONDENT
FATHER ANTHONY KINUTHIA.....3RD DEFENDANT/RESPONDENT
JOHN TOLOLWA.....4TH DEFENDANT/RESPONDENT

RULING

This Ruling relates to an application brought by way of a Chamber Summons dated 6th August and filed on 15th August for prayers that the order dismissing the suit for want of prosecution be set aside and the suit proceed to hearing on its merits.

Mr. Olonyi represented the Applicant, while Mr. Orege represented the Respondents. Mr. Orege prayed that the application be dismissed as it lacks any merit.

I think this application should be dismissed for being incompetent. It is incompetent because the suit herein was not dismissed for non-attendance by counsel for the plaintiff/applicants herein. The suit dismissed was for want of prosecution. That is the order of court made on 25th October 2007.

That order was made under Order IXB rule 2 (*now Order 12, rule 1*) of the Civil Procedure Rules, 2010 which says -

2. "If on the day fixed for hearing, after the suit has been called on for hearing outside the court, neither party attends, the court may dismiss the suit."

Where a suit is dismissed for non-prosecution, the remedy under Order IXB Rule 7(1) now Order 12, rule 6(1) is for the Plaintiff to bring a fresh suit. Rule 7(1) provided -

"7(1) Subject to sub-rule(2) and to any law of limitation of actions, where a suit is dismissed under this Order the plaintiff may bring a fresh suit."

It seems to me that the discretion conferred upon the court under Order 12, rule (7) of the Civil Procedure Rules (*formerly Order IXB Rule (2)*) to set aside, is reserved for situations where only one or

some of the parties, attend court, but where none of the parties attends court, the plaintiff's remedy, subject to the Limitation of Actions, is to file a fresh suit.

In this regard this provision is similar to the court's power under Order XVI rule (6) to dismiss suit for non-prosecution over a period of three years, now reduced to one order under Order 17, rule (2) of the Civil Procedure Rules 2010.

Finally, the suit having been dismissed for non-prosecution on 25th October 2007, there is no explanation for the delay of over one year in bringing the application 6th August 2008, not by the two Plaintiffs but by one of them. There is no explanation as to status of the other plaintiff. It is probable this Plaintiff is testing waters. I see no merit in this application.

For those reasons, the application is dismissed with costs to the Defendants/Respondents.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 24th day of June 2011

M. J. ANYARA EMUKULE
JUDGE