



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 40 OF 2001

AMOS MIRAU.....PLAINTIFF/RESPONDENT

VERSUS

JOHN OLE KARIA.....DEFENDANT/APPLICANT

RULING

Amos Mirau, the plaintiff/respondent filed this suit against John Ole Karia on 15/2/2001, through the firm of Ngure Advocate. A defence and counter-claim dated 29/3/01 was filed by the defendant through the firm of Mirugi Kariuki. On 28/3/2011, the defendant/applicant filed the application dated 21/3/2011, seeking the dismissal of the suit for want of prosecution. The application is supported by the affidavit of Lawrence Karanja Advocate who deponed that this matter was last in court on 29/3/07, when it was stood over generally and that since then, no steps have been taken towards its prosecution. At the time of adjournment, the matter was partly heard and it is now 4 years. It is the defendant's contention that the plaintiff/respondent has either neglected or refused to set it down for hearing or has therefore lost interest in the matter; that the continued pendency of the suit is an abuse of the court process.

Amos Mirau filed a replying affidavit in which he deposes that he testified on 22/1/2004 and his 2nd witness, the Assistant Land Registrar, partly testified on 22/1/2004, when he was stood down to produce certain documents; that thereafter, the matter was fixed for hearing but could not proceed for reasons not of his making. He stated that the matter was adjourned on 29/3/07 because the Assistant Land Registrar had not got the documents he needed to produce; that all the times the matter came up for hearing it is the plaintiff who fixed it for hearing; that never has the defendant fixed it for hearing though the defendant has a counterclaim and that by filing this application, the counterclaim should also be dismissed. Mr. Ngure urged the court do allow the plaintiff a chance to call the Land Registrar and close his case.

Mr. Karanja urged that the counter claim only arises because of the suit and if dismissed, nothing will remain and that there are interim orders.

The Land Registrar was stood down on 23/2/2004, that is over 7 years ago. The matter was fixed for hearing several times thereafter but was adjourned for various reasons till 27/3/2007, when it was last adjourned. I do agree that the plaintiff has not been keen to proceed with this matter since 2004 and has done nothing to get the Land Registrar to testify that date. No good explanation has been given as to why no efforts have been made to fix the matter for further hearing since 2007. Further more, that plaintiff has been enjoying interim orders which were issued in 2001. The defendant/applicant had a right either to fix the matter for hearing or seek its dismissal as he has done. The plaintiff/respondent cannot fault the defendant/applicant for the action that has been taken.

The court takes into account the fact that the plaintiff has taken interest in this matter and came to defend this application meaning that he still has some interest in the case and in exercising this court's discretion, the plaintiff/respondent is given one chance to prosecute this matter. The court will give a hearing date in court and if the plaintiff is unable to produce his witness and proceed, he will be forced to close his case so that the defendant's case proceeds. The plaintiff/respondent will bear the costs of this application. It is so ordered.

DATED and DELIVERED this 19th day of October, 2011.

R.P.V. WENDOH
JUDGE

PRESENT:

Mrs Mukira holding brief for Mr. Ngure for the plaintiff/respondent.

N/A for the defendant/applicant.

Kennedy – Court Clerk.