



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 309 OF 2008

ELECTORAL COMMISSION OF KENYA.....PLAINTIFF

VERSUS

PETER SOITA SHITANDA.....DEFENDANT

R U L I N G

This is an application (**notice of motion dated 22nd June 2011**) for dismissal of this suit for want of prosecution. It is brought under **Order 17, rule 2(1) and (3)** of the **Civil Procedure Rules** (the **Rules**).

The grounds for the application are that the matter was last before a judge on 3rd February 2009 when it was stood over generally due to non-attendance by Plaintiff and that since that date the Plaintiff has not fixed the suit for hearing or taken any other step towards prosecution of the same. The Defendant therefore pleads that he is prejudiced by the suit remaining in abeyance, and that therefore it is in the interests of justice and public policy that the litigation be brought to an end by dismissal of the suit. There is a supporting affidavit sworn by the Defendant.

There is no replying affidavit filed on behalf of the Plaintiff. But there are grounds of opposition filed on 14th September 2011. The grounds taken are: -

- 1) That the application is premature and lacks legal substratum.
- 2) That under Order 37 of the Rules the trial process in originating summons is outside the control of the Plaintiff.
- 3) That the orders sought are not available to the Defendant.
- 4) That the overriding objective of the case demands that it proceeds for directions as provided for in the law.

I have considered the submissions of the learned counsel appearing. No authorities were cited.

The Plaintiff does not dispute the fact that since 3rd of February 2009 it has not taken any step toward prosecution of the case. But it argues that it could not have taken any such steps on account of directions in the suit not having been given by the court, and that it was not its business to move the court for such directions. **Rule 16** of Order 37 was cited for this proposition. That rule states: -

“16. The Registrar shall, within 30 days of filing of the originating summons and with notice to the parties, list it for directions before a judge in chambers.”

That may be so, but ours is an adversarial system of justice. A plaintiff must actively pursue his case to ensure that it is expeditiously heard and determined. A plaintiff cannot be heard to say that because a court officer has not taken a certain administrative action he is entitled to sit back and wait forever for such officer to act.

The Plaintiff himself cannot believe this to be so because on 19th November 2008 it filed chamber summons dated 29th September 2008 under the then **Order XXXVI, rules 8A, 8B and 12** of the **Rules** for such directions as are contemplated in the present Order 37, rules 16 quoted above. So, why did the Plaintiff not pursue and prosecute that application for appropriate directions to be given by the court for hearing and disposal of the suit?

The Plaintiff cannot now hide under the new Order 37, rule 16 when it had already sought directions under the old Order XXXVI, rule 8A and failed to prosecute the application for direction.

It appears that the Plaintiff went to sleep after 3rd of February 2009. It has not sought to explain its inactivity for over two years by way of replying affidavit.

I find no reason to let this suit remain in abeyance any further, notwithstanding that dismissing a suit unheard is a drastic remedy not to be lightly exercised. Public policy demands on the other hand that litigation ought to be expeditiously pursued and brought to an end.

In the circumstances, I find merit in the application and it is hereby allowed. The Plaintiff's suit is hereby dismissed for want of prosecution under Order 17, rule 2(1) of the Rules with costs to the Defendant. It is so ordered.

DATED AT NAIROBI THIS 16TH DAY OF NOVEMBER 2011.

H.P.G. WAWERU
JUDGE

DELIVERED AT NAIROBI THIS 18TH DAY OF NOVEMBER 2011.