



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT EMBU

Civil Case 54 of 2004

JOEL MWANGI MUNDIA.....PLAINTIFF

VERSUS

**THE HON. ATTORNEY GENERAL OF
KENYA.....1ST DEFENDANT
THE DIRECTOR AND THE DEPARTMENT OF
WILDLIFE CONSERVATION AND MANAGEMENT SERVICE.....2ND DEFENDANT**
R U L I N G

By his application dated 16th March 2009, the applicant is asking the court to dismiss this suit for want of prosecution. The last time the matter came up for hearing was on 23/4/2008.

It is instructive to note that on that date, the matter could not proceed because counsel for the defendant were not in court. Although counsel for the plaintiff was also absent, the court was informed that his motor vehicle had broken down on the way. At least he sent somebody to hold his brief. The Judge when adjourning the matter ordered the court adjournment fee of 1,000/= be paid by the defendant.

The defendant did not pay that money and there is no receipt in the court file to show that the said order was ever complied with. This alone would disentitle the defendant from filing any application, let alone one for dismissal of the suit. The application ought not to have been accepted for filing or hearing date given. That one reason would suffice for me to dismiss his application.

On its merits or otherwise however, I note that the delay complained of is only 10 months. Previously on 19/12/2006 when the matter came up for hearing, both counsel were not present.

It is not therefore like it is not therefore like the defendant has always come to court ready to proceed but the plaintiff has occasioned the adjournments.

In deciding whether to dismiss the matter or not for want of prosecution the principal issue that the court should consider is whether the delay is prolonged and inexcusable, and if such as to do grave injustice to one side or to the other or to both.

The Defendant/Applicant must satisfy the court that he will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff. Even if the delay is prolonged or inordinate if the court is satisfied with the plaintiffs excuse for the delay and that justice can still be done to the parties notwithstanding the delay the suit will not be dismissed. (See **IVITA –V- MUTUA (Civil Case 340/1971)**)

In this case, the delay is actually in my view not inordinate. The delay of 10 months has been plausibly explained. As stated

earlier, the applicant himself is not blameless. He failed to attend court the last 2 occasions when the matter was slated for hearing. He even failed to comply with the court order on adjournment of court fees. He has not therefore come to court with clean hands. It is noted further that he has not even once tried to fix the matter for hearing himself and served the other party before moving the court for dismissal. The Defendant/Applicant has in my view failed to secure the exercise of this court's discretion in his favour.

The only prejudice he says he will suffer is that of escalating costs- This in my view is not enough reason for me to dismiss this matter.

In sum, having made the above considerations, my finding is that his application is not merited. Accordingly the same is dismissed with each party being ordered to meet its own costs.

W. KARANJA
JUDGE

I have also looked at the plaint herein. The cause of action is said to be Thome Farm which is in Laikipia District, and the Aberdare Forest which is in Nyandarua District- These 2 districts fall squarely within the jurisdiction of the High Court sitting in Nyeri.

I therefore order that this file be transferred to the High Court sitting in Nyeri for hearing and final disposal.

W. KARANJA
JUDGE

Delivered, dated and signed at Embu this 28th day of April 2010

In presence of:-Mr Kagoni for Plaintiff/Respondent.