



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII
Civil Case 170 of 2003

HENRY ONDIEKI ONCHIMBO 1ST PLAINTIFF/RESPONDENT
JOEL MAKORI NYANGWARA GESAKA 2ND PLAINTIFF/RESPONDENT

VERSUS

SAMWEL MAKORI NYATAYA 1ST DEFENDANT/APPLICANT
JOEL MOSE OOGA 2ND DEFENDANT/APPLICANT
HENRY ONKANGI NYANDWAKI 3RD DEFENDANT/APPLICANT
PASKALIA BOSIBORI MAKORI 4TH DEFENDANT/APPLICANT

RULING

The 2nd defendant filed an application dated 1st September, 2009 and urged this court to dismiss with costs the plaintiffs' suit that was filed on 14th November, 2003.

He stated that the last time the suit was in court was on 24th November, 2008 when the plaintiffs applied for adjournment and were ordered to pay court adjournment fees and costs which had so far not been paid. The plaintiffs had also not taken any action to fix a hearing date. He further stated that the suit was filed together with an application under certificate of urgency seeking to delay and or prevent him from getting tea bonuses from Ogembo Tea Factory. After obtaining interim orders the plaintiffs were satisfied and took no further action towards disposal of the suit.

The first plaintiff filed a replying affidavit for and on behalf of himself and the second plaintiff. He stated that the suit was filed on 14th November, 2003 and had not been set down for hearing because the court diary was full since August 2009. He further stated that the second plaintiff had been out of reach and could not give instructions to their advocate.

Regarding the second defendant's costs and court adjournment fees, the plaintiffs alleged that they were paid to his advocate on 9th December, 2009 but no receipt was issued. No evidence was provided to support that allegation. To the contrary, Mr. Momanyi Aunga, the 2nd defendant's advocate, had to pay Kshs. 1000/=, the court adjournment fees that was payable by the plaintiffs before he could be allowed to set down his client's application for hearing.

The court file shows that on 24th November, 2008 when the plaintiffs sought and obtained an adjournment, they were ordered to pay to the first defendant Kshs. 750/=, the second defendant Kshs.3,500/=, and to the third defendant Kshs. 500/= as costs as well as court adjournment fees before another hearing date could be fixed. The second defendant was represented by an advocate but the other defendants appeared in person, except for the 4th defendant who did not attend court. There is no evidence that the plaintiffs paid the said costs. They did not also pay court adjournment fees. The plaintiffs have also not taken any step towards disposal of this suit. There is not a single letter inviting the defendants and/or their counsel to the registry to fix a hearing date. There is no proof that the court diary is full since August 2009. The plaintiffs obtained the interim orders in October 2004 and since then they have not demonstrated any interest in prosecuting this suit. The same is dismissed for want of prosecution with costs to the defendants.

DATED, SIGNED AND DELIVERED AT KISII THIS 8TH DAY OF JUNE, 2010.

D. MUSINGA
JUDGE.
8/6/2010

Before D. Musinga, J.

Bibu - cc

Mr. Oguttu for Mr. Momanyi for the Defendants/Applicants

Mr. Nyawencha for the Plaintiffs/Respondents

COURT: Ruling delivered in open court.

D. MUSINGA
JUDGE.