



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**  
**CIVIL SUIT NO. 83 OF 2009**

**JAPHET NGUMBAO MWANYALE.....PLAINTIFF**

**-VERSUS-**

**TEACHERS' SERVICE COMMISSION .....DEFENDANT**

**RULING**

The application dated 8<sup>th</sup> August 2010 is by Notice of Motion under Order XVI Rule 5(a), Order L, Rule 1 Civil Procedure Rules and section 3A. It seeks that this suit be dismissed with costs for want of prosecution. It is based on grounds that:

(a) The pleadings closed on 21<sup>st</sup> November 2009.

(b) The plaintiff has neglected and failed to set down the suit for hearing or even take any steps to prosecute the suit since close of pleadings - which is over ten (10) months ago.

In the affidavit sworn by the applicant's counsel, she reiterates what the appellant has stated, pointing out that the plaint was filed on 25<sup>th</sup> August 2009, and by 2<sup>nd</sup> November 2009, the statement of defence had been filed. Since then the matter has never been set down for hearing.

When the matter came up for hearing, Mr. Mwadilo held brief for Mr. Angima and sought adjournment on grounds:

(a) Mr. Angima had travelled to Kisii to attend a funeral.

(b) Mr. Angima had sent a statement of agreed issues on 5<sup>th</sup> August 2010 which were responded to on

25<sup>th</sup> August 2010 and on that basis, he presumed that applicant/defendant had abandoned the application for dismissal.

The court declined to adjourn the matter – not because I did not empathise with Mr. Angima’s situation of attending funeral, but because there were really no steps taken towards settling down the matter for hearing.

To be fair to Mr. Angima, he had served a statement of issues, just three days before the present application was filed, and the respondent replied on 25<sup>th</sup> August 2010 – several weeks after filing the application. Miss Ruto for the applicant submitted that the plaintiff had failed to file an appropriate response – which ought to be interpreted to mean indolence and a lack of interest in the matter it is of course true that plaintiff had not taken steps to set down the statement for hearing BUT I cannot say it is entirely correct that plaintiff had lost interest in the matter – if that were so, then the question of issues being framed and served on the defence counsel would not have arisen – and that step – although a baby step – at least demonstrates to me the conduct of one who wishes to pursue his claim, although with a dragging of the feet.

And it would appear to me, it is not really the plaintiff/respondent to blame for this state of affairs, rather, it is his counsel who acted on the wrong presumption, that having received a response to the issues he had drawn, would perhaps communicate to the applicant the respondent’s intention and interest in the matter, and persuade applicant to abandon the pursuant for dismissal, that perhaps explain why no papers were filed in response to the application. I hesitate to dismiss the suit from what I have observed.

I however direct plaintiff to take steps in setting down the matter for hearing within the next ninety days (and these days are given bearing in mind that the court diary for 2010 is closed, the 2011 diary is already in late February).

The respondent shall bear the costs of this application.

Delivered and dated this 9<sup>th</sup> day of **December 2010** at Malindi.

**H. A. Omondi**  
**JUDGE**

Miss Chepkwony holding brief for Angima for respondent  
No appearance for applicant