



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 7 of 2006

EMBAKASI RANCHING FARMERS COMPANY LTD

GODFREY MUHURU MUCHIRI

KARIUKI WA MWAGANU

ESTHER W. KIMANI

MWANGI THUITA

JEREMIAH GITANGU

WANJIRU RICHU

JAMES KARANJA MWANGI

LUCY NYOKABI MATHENGE

RAPHAEL KIRUMWA THIMBA

ANTHONY JAMES MUHORO

JIDRAPH KARANJA MUCHURUGA PLAINTIFFS

VERSUS

EUSTACE WAMURIA MAHINDA

SIMPSON JAMES SAKA

JOHN NJARIA MUTUNGA

JAMES BANGA

MAINA KARUU

LUCY MUTHONI NJOKA

ESTHER WANJIRU JAMES

RULING

The 1st, 2nd, 4th, 5th, 7th and 8th defendants filed a Notice of Motion on the 22nd day of November, 2006. The said motion is brought under Section 3A of the Civil Procedure Act, Order XVI Rule 5(d) and order L rule 1 of the Civil Procedure Rules. The motion seeks two orders as follows:

1. That the Plaintiff's suit against the 1st, 2nd, 4th, 5th, 7th and 8th defendants be dismissed for want of prosecution with costs.
2. That cost of this application be to the defendants.

The motion is supported by the affidavit of the 1st defendant Eustace Wamuria Mahinda, sworn on behalf of the applicants herein. The 6th defendant filed an affidavit in support of the said application on her behalf and that of the 3rd defendant.

On their part the Plaintiffs with the exception of the 2nd Plaintiff (who is now deceased) filed a replying affidavit on the 8th May, 2007, opposing the said application.

Mr. Onyango for the defendants submitted that since the close of the pleadings in February, 2006 the Plaintiffs, have not taken any steps to set the suit down for hearing. He argued that the Plaintiffs have not been keen on prosecuting the matter. He urged the court to dismiss the suit and for costs of the suit and the current application.

Mr. Kamau for the Plaintiffs on the other hand, submitted that there has been no inordinate delay in prosecuting the suit the same having been filed in 2006. He admitted that discovery had not been done by either of the parties in compliance with Order X rule 11A, nor issues agreed, filed or exchanged. In his submissions, he asked the court to take judicial notice of the fact that by June, court diaries are normally full. Mr. Kamau urged the court to dismiss the application as the same is premature and with no merit.

The issue before the court is whether there has been inordinate delay on the part of the Plaintiff in prosecuting the matter. The matter having been filed over 3 years ago.

Order XVI rule 5 provides:

“If with three months after

- (a) the close of pleadings, or**
- (b) ---**
- (c) The removal of the suit from the hearing list; or**
- (d) The adjournment of the suit generally, the Plaintiff, or the court of its own motion on notice to the parties, does not set down the suit for hearing, the defendant may either set the suit down for hearing or apply for its dismissal.”**

The application before the court is based on rule 5(d) above.

In considering the application, the Court observes that none of the parties had taken the necessary steps in the preparation of the suit for hearing.

Order X rule 11A provides:

“Notwithstanding anything contained in rule 11, within one month after the pleadings are closed in a suit in the High Court, every party shall make discovery by filing and serving on the opposite party a list of the documents relating to any matter in question in the suit which are or have been in his possession or power.”

None of the parties have complied with the said order. It is also noteworthy to state that the parties have not framed and/or agreed on the issues either. In short the parties have not taken necessary pre-trial steps.

Although there has been delay in setting the case down for hearing, it is obvious that both parties ought to comply with Order X rule II A, by making discovery and serving the opposite side with a list of documents, furthermore there is need for the issues to be framed, agreed upon and/or exchanged.

I therefore agree with the Plaintiff's counsel only to the extent that, vital steps need to be taken before the case is set down for hearing and that the current application is premature. Having made the above observation I disallow the application and make orders as follows:

1. That the parties herein do comply with Order X rule 11A with a variation that, discovery be made by the parties filing and serving the opposite side with their list of documents within 14 days of the date hereof.
2. That the issues be framed, agreed upon or exchanged between the parties within the next 21 days of the date hereof.
3. That the Plaintiff do fix a hearing date on priority basis.
4. That the Plaintiff do pay the costs of this application.

Dated and delivered at Nairobi this 14th day of May, 2009.

ALI- ARONI

JUDGE