



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KITALE  
CIVIL SUIT NO.69 OF 2004

JOSHUA KIMAITA

SAMUEL CHEGE.....PLAINTIFFS

VERSUS

1. JASON PHILIPUS

2. INTERNATIONAL RESCUE COMMITTEE (IRC)

3. WORLD FOOD PROGRAMME (WFP)

4. GETELSHAFT FRO TECHNISSE

ZURSAMMEN – ARBERT (GTZ) & 4 OTHERS.....DEFENDANTS

**RULING**

By an application by way of Notice of Motion pursuant to the provisions of Order XV1 Rule 6 of the Civil Procedure Rules and sections 3 and 3A of the Civil Procedure Act, the applicant seeks orders:

1. That the plaintiffs' suit be dismissed for want of prosecution.
2. That costs of this application and suit be provided for.

The application is based on the grounds:

1. It is over 3 ½ years since this suit was last in court over a ruling on an application to amend and which was dismissed.
2. Since 9<sup>th</sup> May 2005 the plaintiff has not taken any step to have the suit prosecuted.
3. The plaintiff has lost interest in the suit and is not keen on having it prosecuted.
4. The delay in setting the suit down for hearing is inordinate and unexplainable hence inexcusable.
5. The delay in prosecuting the suit is likely to prejudice the defendants.
6. It is trite law that litigation has to come to an end within a reasonable time.
7. It is just and fair in the circumstances of this case to dismiss it.

The application is predicated upon the annexed affidavit of P.N. Kiarie Ndarwa advocate sworn on the 19<sup>th</sup> day of November 2008.

On behalf of the applicant it was argued that the plaintiff instituted this suit against the defendant on or about 8<sup>th</sup> June 2004. The plaintiff's application to amend the plaint was dismissed on 9<sup>th</sup> May 2005. That since then the plaintiff has not taken any steps to have the suit prosecuted. That it is now 3 ½ years since the suit was last in court.

In the premises, it was the applicant's case that the plaintiffs have lost interest in the suit. That the delay in prosecuting the suit prejudices the 7<sup>th</sup> and 8<sup>th</sup> defendants who have since lost touch with their key witnesses.

Order XV1 Rule 5 provides;

**“If within three months after-**

- (a) the close of pleadings; or**
- (b) (deleted by L.N. 36/00)**
- (c) the removal of the suit for the hearing**  
**list, or**
- (d) the adjournment of the suit generally,**  
**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”.**

I have scanned through the record. Having done so I have discovered that:

1. The reply to the 1<sup>st</sup> and 2<sup>nd</sup> defendants' statement of defence dated 6<sup>th</sup> July 2004 was filed by Ms Hamilton Harrison & Mathews on 6<sup>th</sup> July 2007.
2. The reply to the 3<sup>rd</sup> defendant's defence was not filed.
3. The reply to the 4<sup>th</sup> defendants defence dated 30<sup>th</sup> June 2004 was filed on 30<sup>th</sup> June 2004.
4. The reply to the 5<sup>th</sup> defendant's defence dated 13<sup>th</sup> July 2004 was filed on 13<sup>th</sup> July 2004.
5. The reply to the sixth defendant's statement of defence dated 11<sup>th</sup> July 2004 was filed on 14<sup>th</sup> July 2004.
6. The reply to the 7<sup>th</sup> and 8<sup>th</sup> defendants statement of defence was not filed.

Order VI Rule 11 of the Civil Procedure Code provides as follows:

**“The pleadings in a suit shall be closed fourteen days after service of the reply to defence to counterclaim, or if neither is served, 14 days after service of the defence, notwithstanding that any other order or request for particulars has been made and not complied with”.**

In the premises, it is clear to me that the pleadings closed in the year 2004. Since then the plaintiff has not taken any action to facilitate the fixing of the suit for hearing. As it were, the plaintiff went to sleep.

By reason of the foregoing, I am of the persuasion that this is a fit and proper case for dismissal of the suit for want of prosecution in terms of the provisions of Order XV1 Rule 5. Accordingly, the suit is dismissed with costs to 7<sup>th</sup> and 8<sup>th</sup> defendants only.

Dated and delivered at Kitale this 30<sup>TH</sup> day of JUNE 2009.

**N.R.O. OMBIJA**

**JUDGE**

**Mr Kiarie for 7<sup>th</sup> & 8<sup>th</sup> defendant**

**N/A for respondent/plaintiff**