

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU

Civil Case 80 of 2007

NELEAH RWAMBA.....PLAINTIFF

VERSUS

ALPHAXAD NJERU.....1ST DEFENDANT

MUNICIPAL COUNCIL EMBU.....2ND DEFENDANT

RULING

This suit was filed before this court on 25/6/2007. The 2nd defendant filed his defence on 26/7/2007 while the 1st defendant filed his defence on 10/8/2007. There was no reply to the defences and so pleadings closed 14 days after the filing of the defence. From the record, it is clear that after pleadings closed, the plaintiff's counsel did not serve his documents on counsel for the defendant. Essentially therefore, no documents were filed and discovery as provided for under Order X Rule 11A was not done. Instead of doing discovery or of taking a hearing date for hearing of the suit, the 2nd defendant rushed to court with the application dated 13/3/2008 seeking for the dismissal of the entire suit for want of prosecution under Order XVI Rule 5.

I have considered the said application, the grounds, the Preliminary Objection raised by the counsel for the plaintiff which was argued out within the application. I have also considered the relevant provisions of the law. I agree with Mr. Mugo for the plaintiff that this matter was infact not ripe for hearing since discovery had not been done. I further note that Order XVI Rule 5 gives an aggrieved defendant the 1st option to fix the matter for hearing himself, before seeking orders for dismissal. The defendant herein never took that option. Counsel for the 2nd defendant should have taken the first option under Order XVI Rule 5 and taken a hearing date and served a hearing notice on the plaintiff. If after serving such notice the plaintiff still failed to attend court or take any other action, then in those circumstances the defendant would be justified to seek a dismissal of the case. The delay in this matter was not inordinate or inexcuseable. The same has been adequately explained. My finding is that it would be draconian to dismiss the matter for want of prosecution. The application for dismissal was in my considered view rash and seemingly premature. The same ought to and is hereby dismissed with costs to the plaintiff.

W. KARANJA

JUDGE

Delivered, signed and dated at Embu this 17th day of June 2009.

In presence of:-Mr. Maina for applicant.

W. KARANJA

JUDGE

17/6/2009