



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KERICHO

Civil Case 95 of 2006

ESTHER MUTAI.....1ST PLAINTIFF

JOEL RONO2ND PLAINTIFF

BENARD RONO.....3RD PLAINTIFF

VERSUS

HENRY KIPTERER ROTICH
DEFENDANT

RULING

Application to dismiss case for want of prosecution

I: Civil practice and procedure

1. The Civil Procedure rules provide under **order XVI r 5 cpr** where no action has been taken in a matter before Court for three (3) months after it has been dealt with last, that the other party may apply to court to have the suit dismissed for lack of prosecution.
2. In this originating summons that concerns land parcel LR. Kericho/Cheptal/1336 for a claim in adverse possession, the plaintiff 1,2, and 3 who are a widow and her two sons filed this matter on 8th November, 2006 claim a right to the said property.
3. The defendant objected to this and filed replying affidavit.
4. As required under **Order XXXVI r 8a, 12 cpr** the advocate for plaintiff parties appeared to court for directions on 12th April, 2007. These directs were unfortunately taken before the Deputy Registrar who gave direction that “vivo voce” evidence be taken. Namely, that the cause be treated as a Plaint and proceed to hearing.
5. Procedurally **Order XXXVI r 8a, 12 cpr** requires that directions be taken, but this must be done by the Hon. Judge in the High Court. A Deputy Registrar would deal with matters in the High Court file that are listed under **Order XLXVII cpr** giving the said Deputy Registrar ministerial powers to so deal with the said files and make orders. Order **XXXVI r 8a, 12 cpr** does not fall under this category.
6. The application before court is to have the whole suit be dismissed for lack of prosecution.

II: Application dated 27th February, 2009

7. The reasons given by the defendant/applicant to dismiss the suit is that for 1 year and 2 months no action on this file had been taken by Plaintiff 1, 2 & 3 as such the matters be dismissed.

8. A further argument was raised that the replying affidavit to the application by one Joel Rono was not deponed to with authority of the other plaintiffs.

9. This court noted that there was no reply to the replying affidavit nor was this argument pleaded anywhere in the application.

10. In reply the respondent/plaintiff advocate stated that the reasons no action had been taken, the post election violence occurred at the start of 2008. The said High Court at Kericho had no judge.

11. After directions were taken the parties proceeded to exchange documents and do pre trial with the former advocate for the defendant. On 23rd March, 2009 the current new advocate M/S Obondo Koko & Co. advocate came on record and made this application without first responding to the pre trials on being required to be done.

III: Finding

12. This Court would accept the reasons given by the plaintiff/respondent of the issue on the post election violence and the pre trials preparation to have been one by parties.

13. This application is dismissed with costs to the plaintiff/respondent.

14. As directions were taken ex parte and so done irregularly before a Deputy Registrar, the court hereby orders that directions be taken anew. That the plaintiff/respondent do file an application under order **XXXVI r 8 a 12 cpr** within seven (7) days and set the same down for hearing.

DATED this 11th day of June, 2009 at **KERICHO**

M.A. ANG'AWA

JUDGE

Advocates

F.O. Koko advocate instructed by M/S Obondo Koko & Co. advocates for the Defendant/Applicant – present

E.M. Orina advocate instructed by M/S E.M. Orina & Co. advocates for the Plaintiffs/Respondents – present