



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI**

Civil Case 81 of 2006

IRENE DELINA KENGAPLAINTIFF

VERSUS

SAMSON KAZUNGU SHINDADEFENDANT

RULING

The application made by way of Chamber Summons dated 16-3-09 under Order XVI Rule 5(d) Civil Procedure Rules, Section 3A Civil Procedure Act, seeking that the suit against defendant herein be dismissed with costs for want of prosecution and the costs of this application also be awarded to the applicant.

It is premised on grounds that:

- (1) Plaintiff and his advocate have not set down this suit for hearing since 28-8-07 when it was adjourned at the instance of the plaintiff's advocates.
- (2) It is clear that plaintiff has neglected and/or otherwise failed to set down the suit for hearing and/or prosecute their application for injunction and is guilty of inordinate delay and latches having taken no action for a period of one and a half years (1 ½) to prosecute the suit or the application from the last time when it was adjourned.
- (3) This continued delay is prejudicial to the defendant.

The same is supported by the affidavit sworn by the applicant wherein he points out that the suit was filed on 11-10-06 and on the same day an application under certificate of urgency was filed seeking restraining orders against the defendant/applicant.

The orders were granted on a temporary basis pending interpartes hearing.

Respondent then entered appearance and filed defence on 13-11-06, along with instructions to his counsel to oppose the application for injunction.

The matter then came up for hearing on 14-11-06 when it could not proceed because plaintiff/respondent needed leave to file a further affidavit. It was thus stood over to 19-2-07 when again it did not proceed as parties were negotiating with a possibility of arriving at a settlement and so it was placed for mention on 20-3-07, 25-4-07, 24-5-07, 18-6-07 and 11-7-07 – on all these dates, the matter was adjourned at the plaintiff's instance.

On 28-8-07, the matter came up for hearing of the plaintiff's application but the plaintiff's advocate sought an adjournment and an extension of leave since they had not filed the supplementary affidavit. The adjournment was allowed but the court declined to extend the interim orders – that was the last time any activity took place in this matter.

The application was served on the respondent's counsel and an affidavit of service duly filed – however there was no response filed or served in relation to the application.

I have perused the record and confirm that the status of events is as stated by the applicant and there has been no explanation offered for the 1 ½ year inactivity under Order XVI Rule 5(d).

“If within three months after 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 down for hearing or apply for its dismissal”

More than three months have lapsed since this matter was adjourned, the defendant has opted to exercise the latter option and justifiably so. There is merit in the application and I order that the suit filed vide plaint dated 11-10-06 and the application dated 11-10-06 also filed on the same date, be and are hereby dismissed with costs of the application and costs of the suit to the defendant/respondent.

The defendant (who is the applicant in the present application) is awarded costs of this application.

Delivered and dated this 9th day of **June 2009** at Malindi.

H. A. Omondi

JUDGE

Miss Chepkwony for defendant/applicant

No appearance for plaintiff/respondent