

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

Civil Case 360 of 2006

MATHEW LEKIDIME LEMPURKEL PLAINTIFF

VS.

LOISABA RANCH LIMITED 1ST DEFENDANT

THE HON. ATTORNEY GENERAL 2ND DEFENDANT

RULING

The plaintiff herein brought this suit against the two defendants claiming general damages for wrongful arrest and malicious prosecution.

After the pleadings were closed, the plaintiff did not list the case for hearing or take any steps to facilitate expeditious disposal of the same. That being the case, the 1ST defendant, by an application dated 17th April 2007 under **Order XVI rule 5** of the **Civil Procedure Rules** moved the court for the dismissal of this suit for want of prosecution. The main reason for seeking that order is that, the plaintiff has not taken any steps to prosecute his claim after the pleadings were closed.

The plaintiff has filed a reply to that application and the two learned counsel appearing for the parties have made their respective submissions and cited several authorities. These I have read.

Before any suit is dismissed the party seeking dismissal thereof must demonstrate that there is inordinate delay which is inexcusable and that the said delay is prejudicial.

In this particular case, the claim is for general damages and it is premised on some prosecution upon which court records will be relied upon. That is to say, the record will form the basis of the plaintiff's claim and if the record is still subsisting then there is no risk of disappearance of evidence.

There is no doubt that any defendant brought to court will entertain some anxiety over the impending suit. But in this particular case, I believe the period of eleven (11) months though apparently long, should not be viewed to be inordinate in the circumstances of this case.

Additionally, the plaintiff has given a plausible explanation as to why this delay has occasioned the non-completion of this suit and that being the case, I believe an excuse has been advanced that persuades this court to sustain this suit. This is in conformity with the practice that, the courts should always endeavour to sustain a suit rather than to dismiss the same unless any prejudice will be occasioned to the other party.

And so, whereas I appreciate the anxiety on the part of the applicant to have this matter disposed off, I am of the view that the plaintiff should be given a chance to prosecute his suit to finality. However, he is to blame for the delay and whereas I am inclined to dismiss this application which I hereby do, I order that the plaintiff shall pay the costs of this application.

Having said so, and considering that the pleadings have been closed, I direct that the plaintiff shall institute measures to have this suit listed for hearing expeditiously and in any case not later than three months from the date hereof.

Orders accordingly.

Dated, signed and delivered at Nairobi this 21st day of July, 2009.

A. MBOGHOLI MSAGHA

JUDGE

Mr. Mose for Mr. Nyaberi for the 1st Defendant/Applicant

No appearance for the Respondents