

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 552 of 2008

PETER YAHUMA OKOKO..... PLAINTIFF

VERSUS

MARAGIA JOHNSTON OMWEGA.....DEFENDANT

RULING

The defendant moved this court by notice of motion pursuant to provisions of **Order XVI Rule 5** of the **Civil Procedure Rules** seeking the order of the court that the suit be dismissed with costs for want of prosecution. The defendant states that from the time pleadings were closed on 2nd December 2008, and further from the time this court rendered its ruling on 27th March 2009, the plaintiff had not taken any steps to prosecute the suit. The application is supported by the annexed affidavit of the defendant. The application is opposed. Ray Tollo, the advocate of the plaintiff swore a replying affidavit in opposition to the application. In the said affidavit, he explained that the plaintiff had concluded discovery and had also filed his list of agreed issues. He stated that the plaintiff listed the case for mention on 17th November 2009 with a view to fixing a suitable hearing date once the court diary for 2010 was opened. It is the plaintiff's case that he had done all that is required of him to fix the case for hearing.

At the hearing of the application, I heard rival submissions made by Mr. Kajwang for the defendant and Mr. Tolo for the plaintiff. The issue for determination by the court is whether the defendant established to the required standard of proof that indeed the plaintiff has been indolent in the prosecution of this suit. I have evaluated the defendant's contention in light of the principles laid down in the case of **Ivita vs Kyumbi [1984] KLR 441**. It is evident that the plaintiff has done all that is within his powers to make the suit ready for hearing. The plaintiff cannot be blamed for failure to fix the hearing of the case within this calendar year. This is because the court diary had been closed. It is now that the plaintiff will have the opportunity to fix the hearing of the case in the year 2010. The court diary is now open. I therefore find no merit with the defendant's assertion that the plaintiff has been indolent in the prosecution of this suit as to attract sanction from this court by having the suit dismissed for want of prosecution.

The defendant's application dated 23rd October 2009 is hereby dismissed with costs. The court registry is ordered to fix the hearing of this case on priority basis. It is so ordered.

DATED AT NAIROBI THIS 18TH DAY OF NOVEMBER 2009

L. KIMARU

JUDGE