



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Suit 2163 of 2007**

**ROBERT KAMAU IKEGU.....PLAINTIFF**

**VERSUS**

**SHADRACK THUKU NDUNGU.....1<sup>ST</sup> DEFENDANT**

**MOSES NDUNGU THUKU.....2<sup>ND</sup> DEFENDANT**

**HON. ATTORNEY GENERA.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The application before court is the Notice of Motion dated 16/06/2008 by which the Applicant, the 1<sup>st</sup> Defendant herein, wants the Plaintiff's suit dismissed on grounds of want of prosecution. The grounds in support are that —

(a) *The cause of action arose on or around 6<sup>th</sup> October 1959.*

(b) *It is more than five (5) months since the close of pleadings and the Plaintiff has not set down the suit for hearing.*

(c) *The delay is inordinate, inexcusable and against the policy of expeditious disposal of suits.*

2. The application is also supported by the affidavit sworn by Charles Mbugua Njuguna dated 16/06/2008. The deponent who is an advocate of this honourable court says that the Plaint herein was filed on 26/06/2007 and that pleadings closed on 11/12/2007. That since close of pleadings on 27/12/2007, the Plaintiff has made no efforts whatsoever to set down the suit for hearing. The deponent avers that the Plaintiff's delay in setting down the suit for hearing is against the policy of expeditious disposal of suits.

3. The application is opposed. The Replying Affidavit, dated 18/09/2008 is sworn by Robert Kamau Ikegu, the Plaintiff herein. His main argument against the application is that the 2<sup>nd</sup> Defendant in this case has not been traced so as to be served with the Summons to Enter Appearance. The Plaintiff prays that he be allowed to serve the 2<sup>nd</sup> Defendant through substituted service.

4. At the hearing of the application before Kubo J (as he then was) on 22/09/2008, counsel for the Defendant/Applicant urged the court to dismiss the suit for want of prosecution. Mr. Etemesi for the Plaintiff/Respondent relied on the Replying Affidavit and stated that since the Notice of Motion does not plead limitation of the Plaintiff's suit under sections 4 and 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya, the suit should not be dismissed on that ground. Mr. Etemesi also submitted that the Plaintiff has been diligent in having the suit prosecuted and that there was no inordinate delay on the part of the Plaintiff. Mr. Etemesi also submitted that there is a pending application seeking

leave of the honourable court to serve the 2<sup>nd</sup> Defendant by substituted service.

5. The court has now considered the application, the supporting affidavit and annexures thereto. The court has also considered the Replying Affidavit and the submissions made by both counsel. The question that arises for determination is whether this is a proper case for dismissal under the provisions of Order XVI Rule 5(a) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

6. After considering all the above matters, the court has reached the conclusion that the Plaintiff/Respondent has not been diligent in the way he had handled this case with regard to the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant was served with Summons to Enter Appearance. The 1<sup>st</sup> Defendant entered appearance and filed defence. It is not the duty of the 1<sup>st</sup> Defendant to assist the Plaintiff in effecting service of summons upon the 2<sup>nd</sup> Defendant. The court notes that though there is indeed an application on record dated 18/09/2008, there is no indication by the Plaintiff/Respondent that the said application has a hearing date. The application was not even filed under Certificate of Urgency, an indication that the issue of service of summons upon the 2<sup>nd</sup> Defendant is not a matter of urgency to the Plaintiff.

7. In the circumstances, the 1<sup>st</sup> Defendant's/Applicant's application dated 16/06/2008 has merit. Accordingly, the Plaintiff's suit against the 1<sup>st</sup> Defendant be and is hereby dismissed for want of prosecution with costs to the said 1<sup>st</sup> Defendant.

Orders accordingly.

Dated and delivered at Nairobi this 3<sup>rd</sup> day of December, 2009.

**R.N. SITATI**

**JUDGE**

In the presence of:-

No appearance for the 1<sup>st</sup> Defendant/Applicant

Mr. Ogwe for Mr. Ng'ang'a (present) For the Plaintiffs/Respondents

Weche- court clerk