

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Suit 235 of 2000

STANLEY KANYI KIGOTHO PLAINTIFF/RESPONDENT

versus

CHARLES GIKANDI MAINA..... DEFENDANT/APPLICANT

RULING

What is before court is a Notice of Motion dated 7th December 2007. That application is filed by the Defendant. It is brought under Order XVI Rule 5 of the Civil Procedure Rules. It seeks the dismissal of the suit for want of prosecution. In the affidavit in support the Defendant stated that this case was last in court on 29th April 2004. The Defendant deponed that the Plaintiff had not subsequently fixed the case for hearing which was evident that the Plaintiff was not interested in prosecuting his case. In the Plaintiff's replying affidavit the Plaintiff said that he was desirous to prosecute the case. He attributed the delay in prosecuting to lack of documents which he said that he had been trying to get from the Ministry of Lands. The Plaintiff further stated that it was not his responsibility alone to fix the case for hearing.

The plaint in this matter was filed on 13th December, 2000. The Plaintiff simultaneously filed a Chamber Summons application seeking injunction to restrain the Defendant, his servants and agents from entering plot No. 5118/212. That application has never been prosecuted. The case was fixed for hearing on 29th April 2004 and the same was adjourned on that day generally at the instance of the Plaintiff who said that the case could not proceed in the absence of two of his witnesses, one being from the land's office. The Plaintiff sought an adjournment on the basis that the two witnesses were unavailable. As correctly stated by the Defendant the Plaintiff since that date has not fixed this case for hearing. In response to the application the Plaintiff argued that the responsibility of fixing the case did not lie on him alone. For the avoidance of doubt **Order XVI Rule 5** provides as follows:-

“If, within three months after:-

(a) the close of pleadings; or

(b) the removal of the suit from the hearing list; or

(c) 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 the suit down for hearing or apply for its dismissal.

As can be seen from the above Rule there is no responsibility borne by the Defendant to fix the case for hearing. Indeed looking at that order since the Plaintiff had failed to fix the case for hearing for more than three years, the court could on its on motion have dismissed this suit for want of prosecution. I can find no reason why the Defendant's prayers should not be entertained. It does seem clear the Plaintiff has lost interest in this suit and the same should not continue to hang over the head of the Defendant.

Accordingly this suit is hereby dismissed for want of prosecution with costs of the suit and costs of the Notice of Motion dated 7th December, 2007 are awarded to the Defendant.

DATED AND DELIVERED THIS 5TH DAY OF MARCH 2008.

MARY KASANGO

JUDGE