

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 498 of 1993

NDATHI MUGUNDA PLAINTIFF

VERSUS

WILSON NDERITU NGIRI & OTHERS DEFENDANT

RULING

The application before court is a Notice of motion dated 9th October 2007. That application seeks the dismissal of the defendant's application dated 18th September 2001 for want of prosecution. The plaintiff deponed that the defendant was guilty of undue delay in prosecuting the said application despite an order of the court of 28th December 2001 ordering that the application be heard by way of viva voce evidence. In the affidavit in support the plaintiff stated that the defendant by the application dated 18th September 2001 was seeking for the election done on 14th September 2001 of the plaintiff's officials to be nullified. That the defendants have used the subsistence of that application as a reason to refuse to recognize the duly elected directors of the plaintiff. In so refusing to recognize them, the defendants had withheld necessary documents to enable the incumbent officials to run the plaintiff company. That the application was ordered to be heard by way of viva voce evidence. In opposition to the application the defendants argued that the application is incurably defective, incompetent and devoid of merit. In submissions counsel for the defendant did not elaborate why the application was said to be defective. She however submitted that the plaintiff instead of seeking the dismissal of that application should set the main suit for hearing. Defence counsel argued that the plaintiff's application was made in bad faith. In response to that argument the defendants filed that application way back in the year 2001. An order was made in December 2001 for the application to proceed by way of viva voce evidence. Since that date there has not been any attempt by the defendants to proceed as ordered by the court. It is argued that the defendants are using that application as a means of frustrating the work of the plaintiff. The defendant did not rebut that statement and the court accepts it as the correct position. The plaintiff in seeking the dismissal of the defendant's application moved under section 3A of the Civil Procedure Act. That section gives the court wide discretion to grant orders to meet the ends of justice. I am of the view that the orders sought are merited. The defendant's advocate did not elaborate on the other grounds of opposition filed. The court will take it that the same were abandoned. In the end the orders of the court are that the defendant's application dated 18th September 2001 is hereby dismissed for want of prosecution. Further the court grants the costs of the Notice of motion dated 9th January 2007 to the plaintiff. Orders accordingly.

Dated and delivered at Nyeri this 26th day of June 2008.

MARY KASANGO

JUDGE