

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Civil Case 292 of 1999

MICHAEL MURIUKI NGIBUINI PLAINTIFF

VERSUS

EAST AFRICA BUILDING SOCIETY DEFENDANT

RULING

What is before court is a notice of motion dated 7th April 2006. That application seeks the dismissal of this suit for want of prosecution. The defendant in the affidavit in support stated that the plaintiff filed this case on 18th October 1999. A defence was filed on 14th January 2000. The plaintiff simultaneously when filing this suit filed an injunction application. The plaintiff obtained *ex parte* orders on 20th September 2001 and the application was supposed to be heard *inter partes* on 3rd October 2001. To date it has not been heard and the last time this suit was in court was on 7th February 2002. In the interim period the defendant bank had sold the plaintiff's charged property in exercise of its statutory powers of sale. The defendant opposed the application. In so doing the defendant relied on his replying affidavit. After setting out what had taken place in this suit the defendant then stated that action had been taken by attempting to fix the case for hearing. All the three letters of invitation annexed to the replying affidavit emanated from the defendant's counsel's office. The last of those letters is dated 31st March 2003. The defendant relied on the case of *JOASH SOITA & 30 OTHERS V AFROLITE INDUSTRIES LIMITED CIVIL CASE NO. 2007 OF 1994* where Hon. Mr. Justice Lenaola had this to say in a similar application;-

“I am persuaded by the submission of learned counsel for the applicant that the delay of more than three years is not just inordinate but certainly inexcusable. No sound reason has been advanced by the respondent to warrant a finding to the contrary.”

In the case of *IVITA vs KYUMBU Civil Suit No. 340 of 1971 (1984) (K.L.R.)*. Justice Chesoni (as he then was) considered an application similar to this one. He held as follows:-

“The test applied by the courts in an application for the dismissal of a suit for want of prosecution is whether the delay is prolonged an inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time. It is a matter in the discretion of the court.”

I have considered the defendant's application, the affidavit in support and the plaintiff's replying affidavit. I find that there is no reasonable explanation given why the plaintiff has taken no action to set down this suit for hearing for the last four years. I find that the prayers sought are indeed merited. Accordingly I grant the following prayers:-

1. ***That this suit be and is hereby dismissed for want of prosecution.***
2. ***That the cost of the suit and the cost of notice of motion dated 7th April 2006 are granted to the defendant.***

Dated and delivered at Nyeri this 22nd day of October 2008.

MARY KASANGO

JUDGE