



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 3017 of 1990

DAVID MBAGU KINGECHE

JAMES MUGO WAWERUPLAINTIFFS/RESPONDENTS

KARUTHI KARANJA & 2 OTHERS

VERSUS

KARURA FARMERS COMPANY LIMITED.....1ST DEFENDANT

SAMUEL KUNGU..... 2ND DEFENDANT/APPLICANT

FESTUS KANDENGE..... 3RD DEFENDANT

**GRACE GATHURI & 5 OTHERS.....
DEFENDANTS**

RULING

By notice of motion dated 21.07.08 stated to be brought under Order XVI rule 5(d) of the Civil Procedure Rules and section 3A of the Civil Procedure Act, Cap.21, the 2nd and 9th defendants applied for the following orders:-

1. That the plaintiffs' suit be dismissed for want of prosecution.
2. That the costs of this application and those of the entire suit be borne by the plaintiffs jointly and severally.

The grounds upon which the application is based are:-

- a) That the suit herein was filed sometime in 1990.
- b) That the plaintiffs have failed to set down the suit for hearing and/or taken any steps to prosecute their suit since the last time it was listed down for hearing on 25th and 26th February, 2008 but taken out at the call over on 24.01.08.
- c) That the delay in prosecution of the plaintiff's case is inordinate and inexcusable.

d) That the 2nd and 9th defendants have suffered prejudice as some of their witnesses cannot be traced.

The application is supported by the affidavit of Samuel Kungu, 2nd defendant/applicant, who erroneously described himself therein as 3rd defendant/applicant, sworn on his own behalf and on behalf of 9th defendant on 21.07.08.

At the hearing of the application on 12.11.08 the 2nd and 9th defendants/applicants were represented by learned counsel, Mr. S.O. Oyugi who also held brief for Mr G. Kamonde for 5th defendant. Learned counsel, Mr S. Gitonga held brief for Miss Kiniti for plaintiffs/respondents while there was no appearance for 1st, 3rd, 4th, 6th, 7th and 8th defendants.

Applicants' main ground articulated at the hearing of the dismissal application was that since the suit was taken out of the cause list on 24.01.08, the plaintiffs have not taken steps to set it down for hearing and that no explanation for the delay was given by Hannah Nyambura Mbagu in her replying affidavit sworn on 04.11.08. Applicants' counsel trashed the medical report on Hannah Nyambura, 4th plaintiff (Annexure

' B ' to her aforesaid replying affidavit) giving a history of hypertension on her part. It was applicants' counsel's contention that the medical report was unsatisfactory as an explanation for the delay in setting down the suit for hearing. Applicants' counsel urged the court to dismiss the suit with costs.

On the other hand, plaintiffs'/respondents' counsel opposed the application, relying on Hannah Nyambura Mbagu's replying affidavit sworn on 04.11.08. Plaintiffs'/respondents' counsel pointed out that there has been no affidavit response to the depositions in Hannah's replying affidavit. Plaintiffs'/respondents' counsel also pointed out the following:-

a) That when the case was taken out of the hearing list for 24th and 25th February, 2008, it was at the instance of the court.

b) That one of the reasons for the delay is that advocates previously representing the 2nd, 3rd, 4th and 9th defendants applied to cease acting for those defendants and that the application remained pending for 2 years.

I have given due consideration to the application, the opposition thereto and the reasons for each.

I note from the medical report on the 4th plaintiff, Hannah Nyambura that she attended Kiambu District Hospital on diverse dates in February, March, April, June, August and October, 2008 principally in connection with hypertension. I also note from Hannah Nyambura's deposition that an application by advocates previously representing the 2nd, 3rd, 4th and 9th defendants applied to cease acting for those defendants and that this held up the case for 2 years. No evidence was tendered to counter these depositions.

While trashing the medical report on Hannah Nyambura (4th plaintiff), applicants' counsel commented that hearing dates are taken by counsel. This implied that counsel can take hearing dates without due regard to their clients' status. This is an exaggeration as the status of clients is an important consideration in fixing hearing dates for cases involving them.

One of the grounds cited for the application is that the 2nd and 9th defendants have suffered prejudice as some of their witnesses cannot be traced. The witnesses alluded to were not specified.

After weighing the respective merits or demerits of the rival arguments of the parties, I have come to the conclusion that, on balance, the wider interests of justice are in favour of the suit being allowed to proceed and be determined on merit. Accordingly, the notice of motion application dated 21.07.08 is

dismissed.

Costs shall be in the cause.

Orders accordingly.

Delivered at Nairobi this 9th day of December, 2008

B.P. KUBO

JUDGE