



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET**

Civil Case 72 of 2006

NATIONAL HOUSING CORPORATION:.....PLAINTIFF

VERSUS

COMMISSIONER OF LANDS & OTHERS:.....DEFENDANT

RULING

The 5th defendant/applicant by way of Notice of Motion filed on 12th June, 2005 seeks to have the plaintiffs/Respondents suit filed against him and four others struck out for want of prosecution. It also prays for costs.

Mr. Mwinamo who prosecuted the application on behalf of M/s Khan & Kitiku Advocates told court that the Plaintiff/Respondent has failed to take steps to prosecute the suit against the 5th defendant as provided for. The plaint was filed on 23rd July, 2003 and defence filed on 7th October, 2003. The matter was last in court on 9th October, 2003 and since then the plaintiff has not fixed the case for hearing. He submitted that the delay is inordinate.

Mr. Wasuna opposed the application. Though conceding that they had not taken the necessary steps he said that there were good reasons why they were unable to set the suit down for hearing. He said that there has been correspondences between the plaintiff and the 1st defendant and also director of Kenya Anti-corruption Authority on the issue of how the land in dispute was transferred. Investigations were still going on. He urged the court not to strike out the suit and cited two authorities – **VICTORY CONSTRUCTION CO. LTD –VS- AN DUGAL (1962) E.A 697 AND IVITA VS KIYUMBO (1984) KLR 441** where it was held that courts should be slow to strike out suits unless there are no good reasons given.

I have considered the application, the affidavits and submissions by both counsels. Order 15 Rule 5 CPR provides:-

“ **If within 3 months after:-**

(a) The close of pleadings: or

(c) removal of the suit from the hearing list, or

(d) the adjournment of the suit generally, the plaintiff or the court of its own motion on notice to parties, does not set down the suit for hearing the defendant may either set the suit to down for hearing or apply for its dismissal.”

Thus a party can apply for dismissal of a suit if no steps are taken by the plaintiff within three months. this is what the Defendant did. However the court notes that this suit was initially filed as Nairobi H.CC.NO.64 of 2003. On 14TH July 2006, by consent of the parties it was transferred to this court with an order it be mentioned before the Resident Judge on 21st July,2006. Record shows no mention took place. It is not clear when the file really reached this court and given the new number. This application had been filed in Nairobi on 12th July,2005 before the file was ordered transferred here. The plaintiff has explained that there were correspondences between him and the 1st defendants and investigations are still going on. In any case when the file was ordered transferred to this court the current application had already been filed but not prosecuted. I am therefore satisfied that there could have been good reasons why the plaintiff had not taken steps and the delay was really not inordinate. It would be unjust to strike out the suit against the 5th defendant without giving the plaintiff a hearing. True he had not taken steps within the time prescribed but this was excusable. Of course his reason that there are investigations as to how the land was transferred is not a good reason for it is expected that when he filed the suit he knew his claim and had all the evidence. He cannot delay the hearing of the suit so as to go fishing for evidence.

All in all, from the above, I am satisfied with the explanation of the plaintiff. I decline to grant the application to strike out the suit and dismiss the same. The plaintiff will however bear the costs of the applicant for this application. He is also directed to fix the suit for hearing within 60 days.

It is so ordered.

Dated at Eldoret on 31st day of January,2007

KABURU BAUNI

JUDGE

Ruling delivered in the presence of:-

C/C - David

Mr. Sirtivy for kek for Applicant

N/A - for Respondent.