



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 30 OF 2005

ISAIAH FUNDI KIPLAGAT1ST PLAINTIFF
DAVID SIWA OKEYO.....2ND PLAINTIFF

VERSUS

OTSIENO NAMWAYA IBRAHIM ORUKO & 2 OTHERS.....DEFENDANTS

RULING

The Notice of Motion herein, dated 26/4/06, under Order 16 rule 5(a) of the Civil Procedure Rules seeks:

- (a) Dismissal of the Plaintiff's suit for want of prosecution.
- (b) Costs.

Supported by Nelly Matheka's Affidavit, filed on 3/5/06, the application is on the grounds **inter alia**, that: the pleadings closed on 23/2/05; since then the Plaintiff/Respondents have not fixed the suit for hearing; that the Defendant/applicant stands to suffer loss and prejudice due to the pendency of the suit.

In opposition the Respondents aver, **inter alia**, that: the Plaintiff has not been sleeping and is keen to see the suit finalized; that on 10/3/05, the hearing date would not be given by the Registry because discovery was not completed and issues had not been agreed upon, before which no hearing date could be given, when the above date could not be given due to this application which had been filed on 3/5/06.

Having perused the pleadings herein, and heard learned counsel for both sides, this court dismissed the application with costs, on 11/12/06, but reserved the reasons to today.

These are the reasons for this court's Ruling on 11/12/06.

Close examination of the pleadings leave me with no doubt that the suit was filed in court on 14/1/05, and that the application herein was filed on 3/5/06, that is not inordinate delay, given the efforts made by the Respondent to fix the suit for hearing.

The evidence before me clearly shows that on 7/3/05 the Respondent invited the applicant to fix a hearing date, but the Registry, in keeping with this court's practice, would not grant such a date as discovery and the list of issues had not been completed. The agreed issues was not finalized until 9/5/06.

Despite the above efforts, all within the Applicant's knowledge, the current application was filed on 3/5/06, thus creating a hurdle in fixing a hearing date for the main suit. It is trite hearing that as long as this application was pending, no hearing date could be granted, by the Registry.

In brief, I hold that the Plaintiff/Respondent was not indolent, and the delay is not only explained and excusable, but is not inordinate under the circumstances.

Further, as held in SAGOO V. BHARIJ HCCC No. 675/1989,[1990] K.L.R. 458.

“It is not the practice of the courts to exercise the drastic power of dismissing a suit unless satisfied that there has been intentional, inordinate or inexcusable delay on the part of the Plaintiff and that there is a risk that the delay would inhibit a fair trial or that would cause prejudice to the Defendant.”

In the present case there is no reason to even contemplate of dismissing the suit. The Defendant's application and delay in approving the list of issues contributed to the delay, if any, and in any case, such delay is not inordinate and is satisfactorily explained.

All in all therefore, and for the above reasons, the Notice of Motion herein, dated 26/4/06, is dismissed with costs to the Plaintiff/Respondent and against the Defendant/Applicant.

It is further ordered that the Plaintiff/Respondent moves with speed and fix a hearing date of the suit herein.

DATED and delivered in Nairobi this 27th Day of February, 2007.

O.K. MUTUNGI

JUDGE