



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**

**Civil Case 17 of 2005**

**JOSEPH PETER GICHOYA MBOGO.....PLAINTIFF**

**VERSUS**

**PATRICK DENNIS O'KEEFE**

**ADAM JAMES O'KEEFE ..... DEFENDANTS**

**REASONS FOR R U L I N G**

On the 24<sup>th</sup> of April 2007, I dismissed the Plaintiff's suit and reserved my reasons for doing so, which I hereby give, do but first the background.

By an application by way of Notice of Motion dated 28<sup>th</sup> February 2007, under Order XVI Rule 5 of the Civil Procedure Rules, the applicant seek orders:

- 1. That the Plaintiff's suit be dismissed with costs for want of prosecution.***
- 2. That costs be provided.***

The application is based on the grounds:

- 1. That the Plaintiff has since 28<sup>th</sup> of February, 2006 not set down the suit for hearing.***
- 2. That the delay in setting down the suit for hearing is inordinate and inexcusable.***

The application is predicated upon the annexed affidavit of Patrick Dennis O'Keefe sworn on the 20<sup>th</sup> day of February, 2007.

The application was filed on the 2<sup>nd</sup> day of March 2007. It was subsequently served on the 6<sup>th</sup> day of March 2007 on the firm of Ms S M Kimani & Company Advocates, Mombasa.

Hearing was scheduled inter-partes on 24<sup>th</sup> April 2007. When the matter came up for hearing Ole Kina Advocate for the applicant applied for leave to proceed ex-parte upon striking out the replying affidavit filed on the 24<sup>th</sup> day of April 2007 without leave. In this regard counsel invoked the provisions of Order L Rule 16 (3) of the Civil Procedure Rules.

Mr Odongo, for the applicant, urged me to save the replying affidavit on the grounds that it had been

difficult to get instructions from his client.

Having heard the rivaling arguments, I exercised my discretion in favour of the applicant. I struck out the belatedly filed replying affidavit. The application thus proceeded ex-parte.

For the applicant, it was argued that the action was filed on 23<sup>rd</sup> February 2005. On 26<sup>th</sup> February, 2005, an application filed by the plaintiff for committal of the defendant for contempt was disallowed. Since then no action has been taken by the plaintiff. That this is a period of over one (1) year and two(2) months. That the delay is thus inordinate.

Order XVI Rule 5 of the Civil Procedure Code provides:

*“If within three months after –*

*(a) the close of proceedings pleadings; or*

*(b) deleted by L.N. 36/2000.*

*(c) the 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 the parties, does not set down the suit for hearing, the defendant may either set down the suit for hearing or apply for its dismissal.”*

In this case the replying affidavit was struck out having been filed out of time and without leave as enjoined by the provisions of Order L Rule 16 (3) of the Civil Procedure Rules.

Order XVI Rule 2(2) of the Civil Procedure Rules provides:

*“(2) if cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain the expeditious hearing of the suit.”*

In the absence of any evidence on the part of the respondent, no cause has been shown to the satisfaction of the court why the suit should not be dismissed. In the premises, the only order which commends itself to me is to dismiss the suit, which I hereby do.

**Dated and delivered at Malindi this 20th Day of June 2007.**

**N.R.O. OMBIJA**

**JUDGE**

Mr. Ole Kina } for defendant.

Mr. Mrima } for Odongo