



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

**Civil Case 43B of 2006**

**RICHARD WABWILE KHISA )**

**EDWARD SIMIYU )**

**PIUS SITUMA ) ::::::::::::::::::::::::::::::: PLAINTIFFS**

**VERSUS**

**BEN BARNGATUNY )**

**PETER WAFULA WEPUKHULU ).**

**SAMUEL MAYAKA ) ::::::::::::::::::::::::::::::: DEFENDANTS**

**R U L I N G.**

This suit was instituted by way of a plaint dated 24<sup>th</sup> March, 2006, which was filed on that date.

There is an affidavit of service on record, which shows that the defendants were all served with the plaint and summons to enter appearance, on 1<sup>st</sup> April, 2006. Thereafter, the 2<sup>nd</sup> defendant filed his defence on 26<sup>th</sup> April, 2006, whilst the 1<sup>st</sup> defendant's defence was filed on 22<sup>nd</sup> May, 2006.

There was no defence on record for the 3<sup>rd</sup> defendant. That notwithstanding, the plaintiffs have failed to take action against him as at 22<sup>nd</sup> May, 2007.

The state of inactivity prompted the 1<sup>st</sup> defendant to file an application for the dismissal of the suit, for want of prosecution. That application was filed on 14<sup>th</sup> February, 2007, and it was served on the plaintiffs' advocates on 28<sup>th</sup> February, 2007.

When the application came up for hearing on 22<sup>nd</sup> May, 2007, the plaintiffs were represented by Mr. Waweru advocate, who held brief for Mr. Saenyi.

The said counsel sought leave of the court to have the plaintiffs' file a replying affidavit. He expressed the belief that the plaintiffs could not have filed a replying affidavit without leave of the court.

He also notified the court that Mr. Saenyi had lost contact with the plaintiffs.

In response to that application, which if granted would have resulted in an adjournment, so that the plaintiffs could then have an opportunity to file a replying affidavit, Mrs. Kubumba, advocate for the 1<sup>st</sup> defendant expressed the view that the delay in filing a replying affidavit was a clear sign of the plaintiffs' loss of interest in the case.

After giving consideration to the plaintiffs' application, the court held that the plaintiffs' advocate had not made out a case warranting the adjournment of the application. As the advocate for the plaintiffs had lost contact with his clients, the court expressed the considered view that an adjournment would serve no useful purpose, because there was no indication that the plaintiffs were likely to re-appear in the near future.

Later that morning, at 11.00 a.m., when the hearing of the application was scheduled to commence, the plaintiffs advocate was not in court. His absence was un-explained to the court.

However, as the time allocation had been done in the presence of the said advocate, the court allowed the applicant to prosecute the application, even though the plaintiffs were absent.

Having given due consideration to the application, I find that the plaintiffs have failed to offer any explanation for their failure to take any steps to prosecute the suit for the last one year.

Furthermore, as the plaintiffs are accused by their own lawyers, of failing to communicate with them, I believe that that is a manifestation of the plaintiffs' loss of interest in the suit.

Had the plaintiffs continued to have an interest in the prosecution of the case, one would have expected them to have been in touch with their lawyers, with instructions.

In the circumstances, I find no justifiable reason for continuing to keep the case hanging over the heads of the defendants. Accordingly, this suit is hereby dismissed for want of prosecution. The plaintiffs are ordered to pay to the 1<sup>st</sup> defendant the costs of the application dated 12<sup>th</sup> February, 2007, as well as the costs of the suit.

Dated and Delivered at Kitale, this 18<sup>th</sup> day of June, 2007.

**FRED A. OCHIENG.**

**JUDGE.**