

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

Civil Suit 250 of 1992

ELIAS MWANGI.....PLAINTIFF/RESPONDENT

Versus

NYERI COUNTY COUNCIL.....1ST DEFENDANT/APPLICANT

RIAMUKURWE SECONDARY SCHOOL.....2ND DEFENDANT/APPLICANT

RULING

The Defendant has moved this court by way of Notice of Motion dated 7th September 2006. The application is brought under *Order XV1 Rule 5* of the Civil Procedure Rules. The Defendant seeks an order that this suit be dismissed for want of prosecution. The Defendant had previously filed a similar application dated 18th June 2001. That application was withdrawn on 15th February 2006 on the understanding that the Plaintiff would proceed to prosecute his case. It is argued on behalf of the Defendant that the Plaintiff has neglected to prosecute this suit despite the aforesaid withdrawal. When the present application came up for hearing, the Plaintiff had not filed a replying affidavit and when the Plaintiff's counsel's application for adjournment to enable him file a replying affidavit was rejected, counsel did not offer any opposition to the application. The background of the application is that this suit was filed on 15th September, 1992. The Plaintiff on obtaining an interim injunction neglected to prosecute the suit. That the Plaintiff has continued to hold the Defendant at ransom with this suit. The Defendant further stated in the Affidavit in support that the existence of this suit prevents them from exploiting the suit parcel of land fully which even an award of costs cannot compensate. The Defendant gave the example of the loss it is incurring, that donors have been reluctant to give money to the 2nd Defendant school in the light of this present suit.

I have considered the Defendant's application and I have looked at the record of the proceedings in this file. It is clear that this matter went to sleep on 12th May 1999 when the same was stood over generally. The next activity in the file was by the Defendants when they filed the first application for dismissal for want of prosecution. On 19th December 2001 that application was fixed for hearing on 7th October 2002. On that date it does seem that the court was not sitting. It was again fixed for hearing on 8th December 2003. On that date it was adjourned on the application of the Plaintiff's counsel who was said to have been unwell. The matter was adjourned generally. Thereafter the Defendants continued to take dates for their application which dates were adjourned always at the instance of the Plaintiff until the same was withdrawn in February 2006 on the understanding the Plaintiff would proceed with the matter. It is pertinent to note that in all that time the Plaintiff was not moved to take a hearing date of the suit. Even after the withdrawal in February 2006 the Plaintiff has made no such attempts. From what is seen in the ruling herein above it is clear to the court that the Plaintiff has lost interest in this suit. As it often happens, Plaintiffs, on obtaining interim orders particularly injunction they soon enough lose interest in the suit. This does seem to have happened here. In the case of **IVITA -V- KYUMBU** the court considering an application for dismissal for want of prosecution held as follows:-

“The test applied by the courts in an application for the dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and, if it is, whether justice can be done despite the delay.”

I find that there is inordinate delay on the part of the Plaintiff in proceeding with the prosecution of this suit. That delay as deponed by the Defendant is causing prejudice to them, in that they cannot improve the suit property and donors, who would otherwise assist in developing the school thereof, are kept away by the existence of the suit. What then ought to be the orders of the court? The court will grant the following orders:

1. That the suit hereof is hereby dismissed with costs of the suit and of the Notice of Motion dated 7th September 2006 being granted to the Defendants in any case.
2. For the avoidance of doubt the injunction granted to the Plaintiff on 16th December 1993 is hereby discharged and set aside.

Orders accordingly.

Dated and delivered at Nyeri this 8th day of June 2007.

MARY KASANGO

JUDGE