



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL SUIT 20 OF 2002

LAIKIPIA COUNTY COUNCIL.....PLAINTIFF

Versus

GICHOHI WAHOME.....1ST DEFENDANT

MAINA WAWERU.....2ND DEFENDANT

GEOFFREY KING'ORI.....3RD DEFENDANT

PETER KABURUGO.....4TH DEFENDANT

NDUNG'U GICHERU.....5TH DEFENDANT

GATARAGWA FARMERS CO. LTD.....6TH DEFENDANT

RULING

The application presented to the court is a Notice of Motion dated 18th January 2007. The same is brought under *Order XVI Rule 5* of the Civil Procedure Rules. The application seeks the dismissal of this suit for want of prosecution. The application although brought by the 6th Defendant is supported by all the Defendants.

The Plaintiff filed this action on 4th February 2002 and at the time of filing the plaint also simultaneously filed a Chamber Summons seeking for injunctive orders against all the Defendants. That application was fixed for inter partes hearing on 19th March 2002. On that day the application was adjourned generally since the 4th Defendant had not been served. The Plaintiff did not thereafter re-fix that application for hearing. The pleadings hereof closed on 20th August 2002. The case was fixed for hearing by consent for 28th July 2003. The 1st to 5th Defendant's counsel obtained an adjournment to enable him complete a hearing in Nairobi High Court. The Plaintiff did not thereafter take an initiative to fix the case for hearing. The Defendant's counsel obtained a date for hearing for 26th October 2006. The Defendant deponed in the Affidavit in support that they attempted to serve a hearing notice on the Plaintiff's counsel. Plaintiff's counsel informed the Defendants' counsel that he no longer had instructions of the Plaintiff in this matter. He so informed the Defendants by a letter dated 8th November 2005. That letter was in the following terms:-

“We acknowledge receipt of your letter dated 1st November 2005. We no longer act for the Plaintiff in this matter, you can deal with them directly.”

The Defendants proceeded to effect service of the Hearing Notice on the Plaintiff directly and indeed on 15th December 2005 the clerk to the Plaintiff was served whereby he acknowledged service and signed and stamped the hearing Notice. On 26th October 2006 when this matter came up for hearing the Plaintiff and its representative were absent. The matter was adjourned generally with the court directing the Defendant to serve the firm of G. O. Ombachi & Co. On an application by the firm of G. O. Ombachi the court granted leave to the said firm to cease to act for the Plaintiff.

The application is opposed by the Plaintiff which has filed an affidavit in reply. In order to understand the Plaintiff’s opposition to the application it is necessary to reproduce some paragraphs of that affidavit.

“That the plaintiff instructed its former advocates on record the law firm of G. O. OMBACHI & CO. ADVOCATES to institute this suit and proceed with it until conclusion.

That the plaintiff has always been keen to have this matter disposed off expeditiously and such were the instructions which were given to its former counsel on record in view of the urgency of the matter and its importance to this council.

That any delay in setting down the suit for hearing was occasioned by the former plaintiff’s counsel inaction in this matter and the interest of justice would dictate that such fault not be visited upon plaintiff.

That the firm of G. O. OMBACHI & CO. ADVOCATES was still on record for the plaintiff in this matter until the 21st March 2007 when application seeking to cease acting for the plaintiff was allowed.

That it was therefore inappropriate for the aforesaid lawyer to insist not being on record for the plaintiff while they had not formally withdrawn from acting.

The Plaintiff present counsel argued that the action involved land and if dismissed the Plaintiff will be left with no remedy. If indeed that is so the court would then pose the question then why did the Plaintiff drag its feet in having this matter concluded? The blame being laid on the previous advocate who acted for the Plaintiff is no defence to the present action and much more the Plaintiff fails to explain why even after its clerk of the council was served with a Hearing Notice the Plaintiff failed to attend court.

Having thoroughly examined the proceedings herein I am left with no doubt that the Plaintiffs have lost interest in this matter or it was a matter that was filed without serious consideration. The case of **IVITA - V- KIUMBU (1984) KLR 441** held that:

“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.”

There has undoubtedly been ordinate delay and a display of lack of interest of this suit by the Plaintiff. Delay in proceeding with a suit will invariably lead to prejudice to the Defendant. This action was started with an application for injunction. The Plaintiff lost interest in that application from March 2002. The plaintiff itself seeks permanent injunction against the Defendant. To have such a prayer ‘hanging’ over any one’s ‘head’ is itself restrictive in the enjoyment of the land concerned and is also prejudicial. The Defendants has nothing to do with the misunderstanding, if any, between the Plaintiff and its advocates. The court finding in this matter is that this is a fit and proper case for the dismissal of the suit for want of prosecution. I do therefore grant the following order:-

That the suit herein is dismissed in respect of the 6th Defendant. The costs of the suit and the cost of Notice of Motion dated 18th January 2007 are awarded to the 6th Defendant.

Orders accordingly.

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

MARY KASANGO

JUDGE