



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**Civil Case 44 of 2004 (OS)**

**ERNEST KEMBOI.....PLAINTIFF**

**VERSUS**

**REUBEN KIPROTICH CHEBUTICH.....DEFENDANT**

**R U L I N G**

The applicant/Defendant seeks the court to dismiss the suit for want of prosecution.

The Respondent did not file any grounds of opposition or a replying affidavit. The application was therefore heard ex-parte. In the grounds in support of the application and the affidavit by SIMON SHIVAJI counsel for the applicant it is stated that the matter was last in court on 14<sup>th</sup> June 2004. Since then the respondent/plaintiff has not taken any steps to prosecute it.

Order 16 rule 5 CPR provides as follows:-

**“If within three months after**

**a) .....**

**b) .....**

**c) .....**

**d) The adjournment of the suit generally, the plaintiffs or the court on its own motion on notice to be parties, does not set the suit for hearing, the defendant may set the suit down for hearing or apply for its dismissal.”**

Record shows that the suit was last in court on 14<sup>th</sup> June 2006 when it was adjourned generally. Since then no action has been taken by the plaintiff to fix the case for hearing. This application was filed on 10<sup>th</sup> May 2007 which was almost 11 months after the matter was last in court. Three months provided for in order 16 rule 5(d) CPC had clearly lapsed and no action taken. The defendant had the option of setting the suit for hearing or applying for its dismissal. He chose the matter which was within his rights. The application was served on the defendants but they have not filed any affidavit to explain why no action has been taken. The court therefore take it that he is no longer interested in prosecuting the suit.

In the circumstances I allow the application and dismiss the suit with costs.

Dated and Delivered at Eldoret on 6<sup>th</sup> July,2007.

**KABURU BAUNI**

**JUDGE**

**DELIVERED IN THE PRESENCE OF:-**

C/C - David

Mr. Songa for Shivaji for Applicant

N/A for Respondent.