



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

**Civil Case 183 of 1991**

**NATIONI MAYIKA LUMBASI :::::::::::::::::::: PLAINTIFF/RESPONDENT**

**VERSUS**

**1. INDECHE MUKUNDU**

**2. JAPHETH MULUPI KETI::::::::::::::::::**

**DEFENDANTS/APPLICANTS**

**RULING**

The Defendants, Indeché Mukundu and Japheth Mulupi Ketí, made an application on 25.10.2005 by Notice of Motion dated 21.10.2005 seeking dismissal with costs of the suit herein under Order XLI Rule 5 of the Civil Procedure Rules on the grounds that the Plaintiff had not taken any steps to prosecute the suit since 26/6/1997 when he obtained inhibition orders and that all dates taken in the suit had been taken by the second Defendant. This was reiterated in the affidavit sworn by the Defendants' advocates, Mr. Calvin Onyari Samba, sworn on 21.10.2005 in support of the application.

The Plaintiff's advocate, Mr. Dan Omukunda, swore on 2.3.2006 the replying affidavit in opposition to the application. He averred that he had been informed that the 1<sup>st</sup> Defendant had died in 2004 and that he believed that to be true. In paragraph 6 of the said affidavit, he averred that:

**6. *"if this claim lapses or is dismissed, the applicant should not be entitled to costs from the Plaintiff/Respondent."***

Mr. Samba who acts for the Defendants does not say his clients or any of them has died. Indeed if they had, he would not have further instructions to act in the matter. It seems patently clear that the Plaintiff has lost interest in the suit but he has fear that he might be condemned to pay costs. It is unconscionable to allow the suit to hang over the head of the Defendants indefinitely. No action has been taken to prosecute it for more than 3 years.

It is my finding that the Plaintiff has lost interest in prosecuting the case and for this reason I hereby dismiss the suit with costs for want of prosecution.

***Delivered, dated and signed at Kakamega this 8<sup>th</sup> day of November, 2007.***

**G. B. M. KARIUKI**

**J U D G E**