REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Civil Case 156A of 2000

JARED ZAKAYO ASALA .....PLAINTIFF/ RESPONDENT

VERSUS

JOSEPH INDIMULI ASALA .....DEFENDANT/ APPLICANT

RULING

The Defendant, Joseph Indimuli Asala, applied on

2-11-05 to have the suit herein dismissed for want of prosecution on the grounds inter alia, that the Plaintiff has failed or neglected to prosecute the suit. In his affidavit sworn on 1-11-05 in support of the application, the applicant averred that the suit was last in court on 1-11-04, a period of over 11 months prior to the filing of the application seeking dismissal of the suit.

Rule 5 of Order XVI stipulates:-

"*if within three months after*

(a) the close of pleadings; or

(b) ……..……..……..……..……..……..……..

(c) *the removal of the suit from the hearing list; or*

(d) the adjournment of the suit generally, the plaintiff, or the court of its own motion on notice to the parties does not set down the suit down for hearing, the defendant may either set the suit down for hearing or apply for its dismissal.

In his replying affidavit, the plaintiff averred that the suit was taken out of the hearing list when it last came up for hearing on 1-11-04 because both counsel for the parties were negotiating settlement. He exhibited copies of several letters by his advocate to the Defendant's advocates dated 27/4/05 and 2/11/05 seeking confirmation whether the matter could be settled.

Has the Defendant made out a case for the dismissal of the suit for want of prosecution? Firstly, the application ought to have been made by way of Notice of Motion and not by Chamber Summons. For that reason, it is not competent ***(see MUKISA BISCUIT CO. v. WESTEND DISTRIBUTORS (1969) EA 696.)*** Secondly, the circumstances of this case show that the Defendant, by not responding to

correspondence seeking to confirm whether the matter could be settled as previously intimated contributed to the delay in the prosecution. It was not unreasonable for the Plaintiff to enquire, as he did through his counsel, whether the intimated settlement subsisted. But when the Plaintiff's counsel got no reply, he ought to have set down for hearing instead of writing endlessly. The point however is that the Defendant did contribute to the wait during which the plaintiff put the matter on hold. However, without in any way wishing to appear to condone the delay in the prosecution of the suit, I think in the circumstances of this case both parties have contributed to the delay. For this reason, I would be disinclined to grant the order sought. I think the court ought to dismiss a suit for want of prosecution where the delay is inordinate or inexcusable or where in the words of ***Trevelyan J in Sheik v. Gupta (1969) EA 140*** the inactivity on the part of the Plaintiff has been culpable and flagrant.

As regards Order 36 Rule 3D (2), the Originating Summons herein appears to be in compliance with the rule as the certified extract of the title to the land which is the subject matter of the suit has been annexed.

Turning to Order VI, this order does not have rule 13A, B, C and D. I think the Defendant intended to refer to Rule 13(1) (a) (b) (c) and (d) of that order. The Originating Summons herein does not appear to offend order VI Rule 13(1) (a) (b) (c) and (d).

In view of the above, I hereby strike out the application as being incompetent. But even if I was wrong in so holding, the application on the material before me has no merit and I would have had to dismiss it.

I give the costs of the application to the Plaintiff. I direct that within two months the suit be fixed for hearing.

Dated at Kakamega this 5th day of May, 2006.

G. B. M. KARIUKI

J U D G E