



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 1082 of 2003

PROFESSOR JOSEPH KAMUYA MAITHA.....PLAINTIFF

VERSUS

ELIZABETH KAMENE NDOLO (sued as the Executor of the last will of

JOSEPH MUSYIMI LELE NDOLO).....1ST DEFENDANT

JUSTIN KASIMU NDOLO.....2ND DEFENDANT

SILA MUSYIMI NDOLO.....3RD DEFENDANT

MWAANI ENTERPRISES LIMITED.....4TH DEFENDANT

RULING

The plaintiff brought this suit against the 4 defendants.

The suit was filed on 21st October 2003. The 4 defendants on being served with summons filed defences.

The defences were that the issues raised in the plaint were dealt with in MACHAKOS HCC NO. 56 OF 1995. On 24th August 2004 the 3rd defendant brought this Notice of motion expressed to be brought under Order XVI Rule 5 of the Civil Procedure Rule seeking orders that the plaintiff's suit be dismissed for want of prosecution.

The application is based on the ground that the plaintiff has not taken steps to set the suit down for hearing since the close of the pleadings on 5th February 2004. The plaintiff has failed to the steps to set the suit down for hearing.

This is despite the fact that on 28th April 2004 he had written the plaintiffs requesting him to prepare the suit for hearing. Order XVI Rules of the Civil Procedure Rules provides thus:-

“5” If within three months after:-

- a) *the close of pleadings*
- b)
- c) *the removal of the suit from the hearing list; or*

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

The plaintiff on being served with this Notice of Motion filed a reply in which he stated that the defences filed herein intend to rely on previous cases namely – MACHAKOS HCCC NO. 56 OF 1994 and HCCC NO. 504 OF 1998 and it has been necessary to obtain the records of those case before doing final preparations but the same could not be readily found. He accordingly instructed his advocate to request for the copies of those pleadings, proceedings and the rulings and his advocate made the request accordingly in his letter dated 11th August 2004. What this simply means is that discoveries have not been done in compliance with Order X Rule 11 of the Civil Procedure Rules. Order X Rule 11 provide:-

“11” (1) Any party may request any other party to the suit to make discovery on oath of the documents which are or have been in his possession or power relating to any matter in question in the suit”.

Before discovery is made, the suit is not ready for trial and therefore the same cannot be set down for hearing.

This application to dismiss the suit on the ground that the plaintiff has failed to take steps to set the suit down for trial is pre-mature and it is therefore dismissed.

The parties are directed to make discoveries before any step can be taken to set the suit down for hearing. The plaintiff is entitled to the costs of this application.

Order accordingly.

Dated and Delivered at Nairobi this 14th day of June, 2006.

J.L.A. OSIEMO

JUDGE