



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Suit 174 of 2000

JOSEPH TUITOEK & SAMSON KIMUGE.....PLAINTIFF

VERSUS

JOSEPH KAMANDE KURIA.....DEFENDANT

RULING

Joseph Tuitoek and Samson Komen Kimuge the plaintiffs instituted this suit on 29th March, 2000 against **Joseph Kamande Kuria** the defendant.

Simultaneously with the filing of the suit the plaintiffs also filed a Chamber Summons under a certificate of urgency seeking for orders of injunction restraining the defendant from letting to a third party and or entering, occupying the suit premises on **LR No. Nakuru Municipality Block 5/90**.

The orders of injunction were issued on 8th day of May, 2000. The statement of defence was filed on 15th May, 2000 and no action was taken until 7th October 2003 when the defendant moved the Court to dismiss the suit for want of prosecution. The Court allowed the plaintiff a chance to prosecute the matter within 60 days. On 2nd December, 2003 the plaintiff fixed the matter for hearing on 10th February, 2004 but when the matter came up for hearing Counsel for the plaintiff Mr. Mugambi applied for an adjournment ostensibly to be able to get an opportunity to amend the pleadings. No action was taken until 1st February, 2006 when the defendant filed the present application seeking for orders that the plaintiff's suit be dismissed for want of prosecution.

This Notice of Motion is dated 30th January, 2006 and it is brought under the **Provisions of Order XVI Rule 5 (d) of the Civil Procedure Rules**. The grounds in support of the application are that the plaintiff has not taken any steps to have this case fixed for hearing. As a consequence the defendant has borne the burnt of the orders of injunction and moreover the plaintiff has failed to comply with the orders of the Court made on 7th October, 2003 where they were ordered to pay Kshs.3,000/= being the defendant's thrown away costs and to fix the matter for hearing within sixty days.

The Counsel for the defendant urged the Court to dismiss the suit pursuant to the **Provisions of Order 16 Rule 5 of the Civil Procedure** which in any event empower the Court to dismiss the suit on its own motion if no steps have been taken to prosecute the matter.

On the part of the plaintiff, Mr. Kurgat, Counsel for the plaintiff, opposed this application while relying

on the grounds of objection filed on 28th June, 2006. It was the argument by Counsel for the plaintiff that the present application was only served upon them on 28th June, 2006 and that was not sufficient time to enable them file a replying affidavit. In the absence of a reasonable notice, the plaintiffs were denied an opportunity to present to Court facts to show how they complied with the orders of this Court regarding the fixing of the matter.

I have carefully considered the rival arguments presented in this matter.

Since the plaintiff's Counsel adjourned this matter on 10th February, 2004 no further steps have been taken. Order XVI of the Civil Procedure Rules sets out the steps to be taken if a matter has not been prosecuted after a certain period.

On 7th October, 2003 this Court gave the plaintiff a chance to prosecute this matter, that notwithstanding the plaintiff's have taken no steps since February, 2004. Since the plaintiff has not complied with the orders of this Court directing the mater to be fixed for hearing expeditiously, I am of the considered view that the Court should not be seen to be the one imploring the plaintiff to fix this matter for hearing by giving them any further opportunity when they have not shown that they have an interest in prosecuting this matter. The plaintiffs were given an opportunity to prosecute the matter and that was sufficient and failure to fix the matter subsequently for a period of two years is an indication that the plaintiffs have lost interest in the matter. I see not justification in extending more time to the plaintiff.

For the above reasons, I am satisfied that this suit should be dismissed for want of prosecution with costs to the defendant.

It is so ordered.

Ruling read and signed at Nakuru on 28th July, 2006.

MARTHA KOOME

JUDGE