

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
CIVIL CASE 1236 OF 2001

SOLOMON M. MATERI & 14 OTHERS.....PLAINTIFF

VERSUS

SAMSON KIEFA NJOROGE & 2 OTHERS.....DEFENDANT

RULING

The 3rd defendant has brought this application under Order XIV Rule 5 of the Civil Procedure Rules for the dismissal of the suit filed by the plaintiffs against him on the ground that the plaintiffs have not taken any step to set down the suit for hearing since July 2001 when the same was stood over generally. Order XVI Rule 5 provides

“5” If within three months after:-

(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 for hearing, the defendant may either set suit down for hearing or apply for its dismissal.”

The suit was filed on 25th July 2001 under certificate of urgency and was stood over to 30th July 2001 for interparties hearing. On 30th January 2001, Mr. Mbuthia appeared for the 2nd respondent/defendant while Mr. Eboso appeared for the 3rd respondent/defendant. But there was no appearance for the 1st respondent/defendant.

The application was marked stood over generally to facilitate service of the 1st respondent. Since then no step has been taken by the plaintiff to set the application nor the suit for hearing although the record shows that the applicant had filed his defence on 25th January 2002 where parties to an action are called upon to show cause why an action should not be dismissed for want of prosecution, the court should be slow to make an order if satisfied that the suit can be heard without further delay; that the defendant will suffer no hardship, and that there has been no fragrant and incapable inactivity on the part of the plaintiff.

The question of delays in bringing civil actions to speedy conclusion was exhaustively considered by the Court of Appeal in the case of NJUKI GACHUGU VS. GITHI [1977] KLR 108 quoting the case of ALLEN VS. SIR ALFRED MCALPINE & SONS LTD [1968] 1 ALL ER 543, where it was held that when the delay is prolonged and inexcusable, and as such as to do grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. On the other hand this power should not be exercised unless the court is satisfied (1) that the default has been intentional and contumelious (2) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers and (3) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues inaction or is such as it likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and third party.

In the present case the suit was filed under certificate of urgency on 25th July 2001 simultaneously filed with the plaint was a chamber summons seeking orders restraining the defendants from continuing to erect their houses until this suit is heard and determined.

The 2nd and 3rd were served with summons. The parties appeared before the court on 30th July 2001 when the suit was marked stood over generally to facilitate service of the 1st Respondent. Nothing has been done since then nor was the 1st Respondent served. Bearing this in mind the delay here is inordinate. It is inexcusable, and there is serious prejudice to the 3rd defendant/applicant.

Accordingly I allow the 3rd defendant's application and dismiss the suit with costs to the 3rd defendant together with the costs of this application to be borne by all the plaintiffs jointly and severally.

Orders accordingly.

Dated and delivered at Nairobi this 14th day of February, 2005.

J.L.A. OSIEMO

JUDGE