



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

Civil Case 101 of 2002

VIHIGA FARMERS CO. LTD. & 38 OTHERS
PLAINTIFFS

-VERSUS

**ATTORNEY GENERAL (Suing of Behalf of Survey
Department**

Ministry of Lands and 28 Others)
DEFENDANTS

RULING

This is a Notice of Motion purported to be brought under Order XVI Rule 5(d) of the Civil Procedure Rules and 3A of the Civil Procedure Act (Cap.21). It brought by the 12th defendant and is dated 24th March 2005. It seeks for two orders –

1. That the plaintiffs'/respondents' suit against he applicant be dismissed for want of prosecution.
2. That the costs of the suit be borne by the plaintiffs/respondents.

The application has grounds on its face and is supported by an affidavit sworn on 24th March 2005 by Isaac Simiyu Kuloba advocate. The grounds of the application are firstly, that since October 2003 the plaintiffs had not taken any step to list the case for hearing. The second ground is that it was clear that the plaintiffs/respondents were not interested in prosecuting the matter. The third ground was that litigation ought to be concluded and hence the application.

The application was served on Messrs. Gikonyo and Company Advocates for the plaintiffs on 8th April 2005. The said advocates signed and stamped for receipt of the service. However, on the hearing date of the application, they did not attend in court.

This is an application brought by one of the defendant in this suit. There are 29 defendants in the suit, including the Attorney-General. The application is brought under Order 16 rule5(d) of the Civil Procedure Rules which reads –

“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 the suit down for hearing or apply for its dismissal.”

The 12th defendant has applied for the dismissal of this case. The plaintiffs are Vihiga Farmers Company Limited and 38 others. They are represented by Messrs. Gikonyo and Company Advocates, who were

served with the application, but who did not attend court.

According to the record, the matter was last mentioned in the court registry on 21st May 2003. On that day counsel for the plaintiffs, Mr. Mwaniki, was present holding brief for Mr. Gikonyo advocate. There was no appearance for the respondents. The registry fixed the application dated 6th February 2002 for hearing on 29th October 2003.

No further action was taken by the applicant for the prosecution of the said application or the suit. That application dated 6th February 2002 was not heard on 29th October 2003. There is no indication in the file as to why it was not heard.

This is a matter involving land and one of the plaintiffs is a company, that is Vihiga Farmers Company Limited. Their lawyers Messrs. Gikonyo and Company Advocates were served with the application for dismissal of the suit for want of prosecution. They neither filed any response to the application nor did they attend court for the hearing of the application. Nor did they instruct another lawyer to hold their brief.

It is apparent to me from the foregoing that the plaintiffs are not serious with prosecuting the case. Service on their counsel on record is satisfactory service. Litigation must be prosecuted with the intension of finalizing the same.

Having taken into account the above considerations, I am persuaded that the plaintiffs are not interested in prosecuting the case. From May 2003 to the time that this application was filed on 4th April 2005 is a period of about two years. That is a long time for a case to lie dormant. Additionally, when the application for dismissal of the suit for want of prosecution was filed and served, counsel for the plaintiffs never bothered to file a response or to attend court.

I find merit in this application. It is my finding that the plaintiffs are not interested in prosecuting the case.

For the above reasons, I allow the application and dismiss the case of the plaintiffs for want of prosecution. Costs will be to the defendants.

Dated and delivered at Eldoret this 13th day of July 2005.

George Dulu

Ag. Judge

In the Presence of: Mr. Machio for 28th defendant