

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

Civil Case 133 of 1998

KIPTERER ARAP RUTO & OTHERS PLAINTIFFS

VERSUS

KIPTARUS TORICH & 10 OTHERS DEFENDANTS

RULING

The 1st and 2nd Defendants/Applicants in the suit herein applied under Order XVI Rule 5 of the Civil Procedure Rules by Notice of Motion dated 24.8.04 for an order that the suit be dismissed with costs for want of prosecution. The application was supported by the 3rd to the 11th Defendants. It was opposed by the Plaintiffs. The applicants averred in the affidavit of John Okwi, the 2nd Applicant that the plaintiffs were no longer interested in prosecuting the suit and had taken no steps to set it down for hearing from the time an earlier application dated 3/10/01 for the dismissal of the suit for want of prosecution was withdrawn sometime in the year 2002.

The Plaintiffs' reply to defence in the suit was filed on 3/10/98. Pursuant to Order VI Rule 11, the pleadings were closed fourteen (14) days after service of the reply to defence. The parties should thereafter have proceeded to crystallize the issues and to make discovery to facilitate the hearing.

Discovery under Rule 11A (1) of Order X is mandatory and the court can order production of any document by any party. Before discovery, a suit is not ripe for hearing. In the present suit, no discovery had been made after the close of pleadings. Order XVI Rule 5 under which the application for dismissal of the suit for want of prosecution was brought presupposes that all the steps necessary prior to hearing such as directions, where applicable, discovery, and to a lesser extent framing of the issues for trial had been taken. Framing of issues however can never be an impediment to the setting down of a suit for hearing considering that issues can be framed at any time before the hearing though ideally this should be done well before the hearing.

In the circumstances of this case the suit was not ripe for hearing as all the steps necessary had not been taken. The duty to make discovery and frame issues was as much the Plaintiffs' as it was the defendants'. It is my considered view that inspite of the considerable delay in the prosecution of this suit, the application for dismissal was premature. It is dismissed with costs.

Dated at Kakamega this 3rd day of November, 2005.

G. B. M. KARIUKI

JUDGE