

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

HCC NO 104 OF 2000

MBAIKA MASILA MBATHAAPPLICANT

VERSUS

OBADIAH NZUKI KIMONGO.....RESPONDENT

RULING:

This is an application by defendant/applicant seeking to have the plaintiff suit dismissed with costs for want of prosecution. It is brought under Order 16 rule 5 Civil Procedure Rule and section 3A Civil Procedure Act. The grounds upon which the applicant relies are that this case was last adjourned on 29/5/03 and it is over 3 months since the plaintiff took any steps towards having the matter fixed for hearing and hence this application for dismissal of the suit. O.N. Makau advocate swore an affidavit in support of what has happened in the case so far.

A replying affidavit was filed by Mrs Nzei for the respondent who contends that the matter had been adjourned on 29/5/02 because it was not listed and thereafter the file went missing from the registry as efforts to fix a hearing were fruitless. Counsel annexed a letter to the court dated 13/11/02 indicating that efforts to trace the court file in order to fix the matter for hearing had been fruitless. This letter is however being filed after the present application had already been filed way back on 20/9/02. This application though filed on 20/9/02 was only served on the respondent's counsel on 9/7/03. It was deponed that plaintiff are still keen on how the matter heard.

The hearing date of this application had been given by the court on 17/9/03 in the presence of both counsels. At the hearing of the application on 4/12/03 however, the respondent's counsel did not attend. No reason was given for the absence. It was noted that the respondent had changed counsels vide the notice of change of advocate dated 23/9/03 soon after the court gave a hearing date. The new counsel by name Wyne Associates did not attend. The application proceeded because respondents were aware of the hearing date.

From the court record, it is apparent that indeed the file was last fixed for hearing on 29/5/02. It seems it was never called out or placed on cause list as there are no entries for that date. It is not until the application for dismissal was filed. Though in the affidavit, counsel for respondent alleges that the file was missing from May 2002, yet counsel for the applicant filed the application and it is only after the filling of that application that a letter was written by Nzei advocates alleging the file to be missing. There is no evidence that the file had been sought before that date of 13/11/02. If the respondent were keen in having the matter proceed, the least they should have done is to be present in court for this application which they have failed to come and defend. It seems the plaintiff's is not keen on prosecuting the case and since it is over 3 months since the matter was ever set down for hearing, the suit is hereby dismissed with costs to the defendant/applicant.

Dated, read and delivered at Machakos this.....day of.....,2004.

R.V. WENDOH

JUDGE