

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL CASE NO. 20 OF 2003**

ELIUD THYAKA MUTISYA :::::::::::::::::::: PLAINTIFF

VERSUS

JOEL NGUI MWEU :::::::::::::::::::: DEFENDANT

R U L I N G

The defendant applicant has moved this court Under Order XVI Rule 5 (a), Order L Rule 1 and 3 of the Civil Procedure Rules, Section 3A Civil Procedure Act, asking the court to dismiss the plaintiff's suit for want of prosecution and that costs be awarded to the defendant/applicant.

The grounds upon which the application is founded are that the plaintiff's suit was filed on 8.5.2003 and summons served on defendant on 13.5.2003, an appearance was filed and defence filed on 28.5.2003 and 10.6.2003 respectively and it is over 3 months since the close of pleadings and the plaintiff has not taken any steps towards the prosecution of the suit.

The application was opposed and a replying affidavit sworn by Mr. Kitonga Advocates for Respondent in which he depones that on 27.6.2003 he posted a letter to the defendant asking them to meet them at the registry on 17.7.2003 for fixing a hearing date (MKI) but on going to the registry was informed that the diary for 2003 was full. Another letter was done to defendant on 21.10.2003 inviting defendants to take a date on 14.11.2003 (MK2) and it is then he realised that the defendant had appointed the firm of Mbindyo Advocates to act for him who had filed this application and that the plaintiff had therefore taken the necessary steps to have the suit prosecuted.

From the record it is true that the plaintiff filed this suit while acting in person. Mr. Mbindyo was later retained by the defendant on 29.10.2003 whereas the pleadings had closed much earlier in June 2003.

I have seen the 2 annexures to the replying affidavit in which the plaintiff/respondent claims to have invited the defendant in to fix hearing dates. They are dated 27.6.2003 and addressed to the plaintiff in person. However I do note that the address is cancelled and the correct address which that the plaintiff gave in the plaint inserted. As per plaint the correct address was P. O. Box 1377 Kangundo. MKI and MK2 had been addressed to Box 1495 Kangundo. Both are crossed out and the correct address inserted. If the mistake had been made in the first letter, the same could not have been repeated in the second letter dated 21.10.2003. It seems these corrections were made later and either these letters were sent to the wrong address or they were made for purposes of this application. The letter dated 21.10.2003 bears a stamp of 14.11.2003 after this application was already filed whereas the stamp on the letter dated 27.6.2003 cannot be seen. There is no evidence that the letters were actually posted as there is no certificate of postage. The court can not say with certainty whether the plaintiff took any steps towards prosecution of this case.

The plaintiff has however moved and taken a positive step of opposing this application for dismissal. For that reason above, the court will grant the plaintiff a chance to have the suit set down for hearing and should do so when the court diary re-opens in the month of October 2004.

The court will not allow the application at this stage and allow the plaintiff a chance to prosecute his case. Costs will be in the cause.

Dated, read and delivered at Machakos this 27th Day of May, 2004.

R. V. WENDOH

JUDGE