



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CIVIL SUIT NO. 198 OF 1998**

**JOSEPH MUTAVUTA KINYUA.....PLAINTIFF**

**VERSUS**

**PAUL K. CHEMWENO.....DEFENDANT**

**RULING.**

This application which was brought to court on 9.4.2003 by way of a Notice of Motion was heard by the Hon. Justice Omondi Tunya on 15.7.2003, and though he deferred his ruling, it was not delivered and upon request by counsels, I decided to peruse the proceedings and prepare the ruling. The applicant, who is the 2nd defendant herein, seeks an order for the dismissal of the suit, for want of prosecution.

The application was brought under orders XVI rule 5 of the Civil Procedure Rules. It does not specifically state which particular sub-rule it has been brought under. However Order XVI rule 5 stipulates that

“If, within three months after -

*(a) the close of pleadings; or*

*(b) the removal of the suit from the hearing list; or*

*(c) 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.”*

One of the conditions, prerequisite for the hearing of this type of an application, is that all parties be served prior to the date of hearing.

I have noted that the 1st plaintiffs counsel was served on 10.4.2003. however, there is no evidence that the 2nd plaintiff was ever served.

I do therefore find that the matter should not have proceeded in the absence of the 2nd plaintiff. Therefore the proceedings of 15.7.2000 were not proper as the honourable Judge allowed the applicants to make submissions in the belief that service had been effected on the 2nd respondent, a fact which had been erroneously confirmed by counsel for the 1st defendant.

I am therefore unable to deliver the expected ruling and it is up to the parties to consider withdrawing their earlier application, or settling the matter in the most appropriate manner.

**Dated and delivered at Eldoret this 17th day of May 2004.**

**JEANNE GACHECHE**

**JUDGE**

**Delivered in the presence of:-**