REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CIVIL CASE NO. 90 OF 1996

ELIUD BARASA IMAYO …………….. PLAINTIFF

VS

JOHN OMUSE EMOIT ……………. DEFENDANT

R U L I N G

The Respondent/applicant by a summons dated 24th May 2004 sought to have this suit dismissed for want of prosecution. The summon is supported by the affidavit of John Omuse Emoit sworn on 24th May 2004. The application was served upon the applicant/respondent's advocate on 3.6.2004 but the said advocate did not file any grounds of opposition or a replying affidavit. Consequently the Respondent/applicant was granted leave to proceed ex parte pursuant to the provisions of order L rule 16(3) of the Civil Procedure rules.

The record shows that this matter started its journey at the High Court Registry at Kakamega when the applicant/respondent filed an originating summons dated 27th January 1988 on the 28th day of January 1988 in which he sought for inter alia to be declared that he has acquired L.R. No. North Teso/Kolanya/408 measuring 7 ½ acres registered in the name of the Respondent/applicant by adverse possession. Directions in the matter were taken on 30th September 1996 whereupon the suit was transferred to this court for hearing and determination. It appears not much has taken place since then to have the matter heard. This obviously provoked the Respondent/applicant to file the summons now under consideration.

The summons does not state the provisions it is based. However the same seeks to invoke the inherent jurisdiction of this court to have the suit dismissed for want of prosecution. It is obvious that the inherent power of this court to dismiss an action for want of prosecution can only be exercised under Order XVI of the civil procedure rules. However, the Respondent/ applicant has not bothered to cite that legal provision. The failure to state the statutory provision under which the application has been brought is not fatal. The same is excused under Order L rule 12 of the Civil Procedure rules.

I will therefore take it to mean that the Respondent/applicant's application has been brought under Order XVI rule 5 of the Civil Procedure rules. It therefore means that the Respondent/applicant should have approached this court by way of a motion and not by summons as he did in this matter. This defect consequently renders the whole application incompetent and improperly before this court. However it would also appear that the Law under order VI rule 12 of the Civil Procedure rules gives this court discretion to hear and determine the matter if the defect only relates to form. The law enjoins the court to consider each application on its own merits by placing aside technical objections if the defect was made in excusable circumstances. In my opinion the law does not envisage a situation where an application is dismissed on the basis of such a defect alone. However the court may invoke its inherent power to strike out the same instead.

I am inclined to excuse the defect on form but the application does not comply with the provisions of Order L rules 3 and 7 of the Civil Procedure rules. The summons does not contain the grounds it is based. This renders the whole application fatally defective. In the end the application is ordered struck out with no order as to costs.

DATED AND DELIVERED THIS 23rd DAY OF July 2004

J.K. SERGON

JUDGE