



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 206 OF 1998**

**KYALO MUNYAO**

**PETER MULI**

**BERNARD MASAI KAVOI ..... PLAINTIFFS**

**VERSUS**

**JUSTUS NGILA MOSA**

**MULEI MATU**

**MUTISO KATHUMA**

**MUASA KATIKU .....RESPONDENTS**

**RULING**

The defendants applicants have come to this court by way of notice of motion under order 16 rule 5(d) of the CPR and section 3A of the CPA seeking an order that the plaintiffs suit herein be dismissed for want of prosecution and that costs be paid to them. The grounds are set out in the body of the application, supporting affidavit and oral submissions in court and the major ones are that the suit was filed on 11.8.1998. On 13.8.98 an application for an injunction was filed seeking the reliefs indicated. The application was heard inter-parties and a ruling given on 27.5.1999 dismissing the same. Since then no action was taken by the plaintiffs in the matter till 3.9.2002 when the application under consideration was filed, that

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a period of two years had lapsed without any action being taken by the plaintiffs, that the plaintiffs have lost interest in the suit and the pendency of the same is duly oppressive to the defendants and it should be brought to an end, that the plaintiffs have not given any reasonable explanation for the delay, they rely on the authorities cited.

The plaintiffs responded through an affidavit filed by their advocate which is to the effect that no action was taken in the matter because on 23.2.2000 the applicants counsel filed an application seeking to withdraw from the matter which application had not been disposed off by the time the current application was filed, that they could not list the matter for hearing before that application was disposed off, that the plaintiffs are interested in prosecuting the suit and that the applicants should not be allowed to benefit

from their own mischief.

On the courts assessment of the facts herein it is clear that indeed no action was taken by the plaintiffs towards the prosecution of the suit from 27.5.1999 until the application under consideration was filed. They have responded to that by saying that there was an intervening application filed by the defendants counsel seeking to withdraw from acting in the matter which they could not over reach and therefore they were not at fault.

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I have perused the record and I find that indeed there is an application to withdraw filed by counsel currently appearing for the defendant seeking to withdraw from acting filed on 25.2.00 dated 14.2.2000. A perusal of the record further shows that the said application was withdrawn on 6.11.2002 long offer the current application had been filed in September, 2002. It is correctly submitted by the plaintiffs counsels that they could not overreach that application. As long as that application was pending the plaintiff could not take action in the matter. It was removed on 6.11.2002 and so the plaintiff had 3 months from 6.11.2002 to take action in the matter by which time the application under consideration had been filed which application was filed prematurely. It is correctly submitted by counsel for the plaintiffs that the applicants should not be allowed to benefit from their own wrong. They are the ones at fault.

The application dated 3.9.2002 which was filed prematurely be and is hereby dismissed with costs to the plaintiff respondent.

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Dated, read and delivered at Machakos this ..... Day of ....., 2003.

**R. NAMBUYE**

**JUDGE**