



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 43 OF 2004 (ELC 333 OF 2012)

ROBERT GACHUHI MWATHI.....1ST PLAINTIFF/RESPONDENT

VERSUS

PETER WAWERU MWANGI.....1ST DEFENDANT

SAMUEL NJOROGE MIKUI.....2ND DEFENDANT

JOSEPH MWANGI MACHARIA.....3RD DEFENDANT/ APPLICANT

RULING

1. This is the **3rd defendant's Notice of Motion** dated **23rd August, 2012** seeking an order of this court that this suit be dismissed for want of prosecution and that costs of the suit be provided for.
2. The Application is expressed to be brought under **order 51 rule 1** and **order 17 rule 2 of the Civil Procedure Rules 2010**.
3. The application is anchored on a Supporting Affidavit deponed by **George Kirumba Mbiyu** Counsel for the 3rd defendant sworn on **23rd August, 2012** and on the grounds on the face of the application.
4. The 3rd Defendant sets out his case as follows; that the suit was last fixed for hearing on **20th May, 2009** for an application for leave to amend the plaint. That since then, no action has been taken by the plaintiff in this matter. Therefore, the plaintiff is not interested in prosecuting the suit and the same should be dismissed with costs.
5. An affidavit of service was sworn by **George K. Mbiyu**, an advocate of the High court of Kenya , on **14th January, 2014** in which he depones that he served the plaintiff's Counsel **M/S Muthanwa & Co Advocates** who acknowledged service on **5th December, 2013**. The plaintiff did not respond to the application nor appear despite service.
6. Counsel for the 1st and 2nd defendants did not oppose the application. He supported dismissal of the suit stating that they had filed a similar application dated **8th October, 2009**. He urged the court to dismiss the suit with costs.
7. I have perused the court record and heard submissions by counsels for the defendants. I take the following views on the matter.

8. It is true to say that the court should be slow to dismiss a suit for want of prosecution if the suit can be heard without any further delay, if the defendant will not suffer any hardship and if there has been no flagrant and culpable in activity **Victory Construction Company vs. A. N. Duggan (1962)** E.A. 697. But in this case where the Plaintiff has taken no action to move the court since 2009, I am persuaded that the plaintiff has lost interest in the suit.

8. I therefore find the Notice of Motion dated 23rd August, 2012 merited and dismiss the plaintiff's suit for want of prosecution with costs to the defendants.

Dated, signed and delivered in open Court at Nakuru this 16th day of May 2014.

L N WAITHAKA

JUDGE

PRESENT

N/A for plaintiff

N/A for defendants

Emmanuel Maelo: Court Assistant

L N WAITHAKA

JUDGE