



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 2170 OF 1998

E.M. KITHIMBA T/A KITHIMBA & ASSOCIATES.....PLAINTIFF

VERSUS

J.S. GATHUMBI T/A PRIME AUCTIONEERS.....DEFENDANT

RULING

1. The defendant herein has taken out the notice of motion dated 10th April, 2014 seeking dismissal of this suit for want of prosecution. The application has been brought under **order 17 rule 2(3)** of the **Civil Procedure Rules, 2010** and **section 1A** and **3A** of the **Civil Procedure Act, Cap 21 Laws of Kenya** seeking the following orders:
 - i. That this suit be dismissed with costs for want of prosecution.
 - ii. That costs of the application be provided for and paid by the plaintiff in any event.

The application is premised on grounds that:

- a. This suit was filed on 29th September, 1998.
- b. The matter was last in court on 19th May, 2009.
- c. There has been no application or any action whatsoever on the matter for a period of almost four (4) years.
- d. The parties herein are not engaged in any negotiations on the matter.

The supporting affidavit of Tom O. K'opere, Counsel who has conduct and is conversant with this matter reiterates the grounds of the application.

2. The application was served but did not elicit any response hence the same remains unopposed.
3. When this application came up for interparties hearing on 1st October, 2014, Counsel for the defendant relied entirely on the grounds on the face of the application.
4. I have considered the application and the averments in support thereof. **Order 17 rule 2 (3)** provides that any party to the suit may apply for dismissal of a suit where no application has been made or steps taken by either party for one year.
5. Certain conditions have to however be met before a suit can be dismissed for want of prosecution. The test for dismissal of a suit for want of prosecution is whether the delay is inordinate and inexcusable and whether prejudice shall be occasioned to the party applying for such dismissal. I have taken liberty to peruse the file. In deed this matter has stalled for almost four years. The plaintiff despite being served with the application has taken no step to avail himself to explain the delay. The defendant cannot therefore continue to be burdened by this suit.

In the circumstances the application is allowed with costs to the defendant. It is so ordered.

Dated, Signed and delivered in open court this 10th day of October 2014.

J.K.SERGON

JUDGE

In the presence of:

N/A for the Defendant/Applicant

N/A for the Plaintiff/Respondent

With notice.