



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KITALE**

**Civil Case 32 of 2006**

**JAIRUS JUMA WAFULA .....PLAINTIFF**  
**VERSUS**  
**BARASA MAKHANU .....DEFENDANT**

**RULING**

By a notice of Motion dated 22<sup>nd</sup> October, 2009, pursuant to the provisions of order XVI rule 5(d) of the Civil Procedure Rules, the applicant seeks orders:-

1. **THAT** this honourable court be pleased to dismiss this suit for want prosecution.
2. **THAT** costs be borne by the plaintiff/respondent.

The application is based on the grounds:-

- (i) **THAT** it is over 3 months since the plaintiff set down the suit for hearing.
- (ii) **THAT** the suit was last in court on 12/11/2007.
- (iii) **THAT** the pendency of this suit is prejudicial to the applicant
- (iv) **THAT** the plaintiffs have lost interest in the suit.

The application is predicted upon the annexed affidavit of Barasa Makhanu sworn on this 22<sup>nd</sup> day of October, 2009.

It was contended on behalf of the applicant, that this matter was last in court on the 12<sup>th</sup> day of November, 2007. That it is now over 20 months since, yet the plaintiff has failed to set down the suit for hearing. That the delay is prejudicial to the defendant's interest hence this application.

I have perused the court record and found as a fact.

- (i) The plaint was filed on 16<sup>th</sup> March, 2006
- (ii) Memorandum of appearance was entered on 12<sup>th</sup> April, 2006.
- (iii) Defence was filed in early April 2006.
- (iv) Reply to defence was filed on 12<sup>th</sup> May, 2006.
- (v) On 5<sup>th</sup> April, 2007 the application by way of Notice of Motion dated 22<sup>nd</sup> October, 2006 was listed for hearing on 10<sup>th</sup> July, 2007.
- (vi) On 10<sup>th</sup> July, 2007 Mr. Wambua for the defendant sought for an adjournment on the grounds that it skipped his attention that the replying affidavit and grounds of opposition in respect of the matter was filed in wrong court file.  
Mr Saenyi, for the defendant in his rejoinder contended that the hearing date was taken by consent yet the defendant was not ready. Adjournment was granted subject to payment of costs.
- (vii) On 15<sup>th</sup> October, 2007 Mr. Wambua again sought an adjournment on the grounds that there was an out of court settlement. That negotiation were on-going. On that note the application dated 24<sup>th</sup> October, 2006 was then stood over to 12<sup>th</sup> November, 2007 to ascertain if the plaintiff's advocate had filed their application to cease acting.
- (viii) On 12<sup>th</sup> November, 2007 the case could not proceed because the plaintiff had not paid the court adjournment fees as ordered on 15/10/2007.
- (ix) On 3<sup>rd</sup> February, 2010 it transpired that there was a replying affidavit and grounds of opposition to resist the application.

That foregoing is a correct chronology of events that preceded the filing of the application herein to dismiss the entire suit.

Order XVI Rule 2(1) provides:

**“In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit”.**

In the disclosed circumstances of this case there is ample evidence that the plaintiff has lost interest in this case.

Therefore no cause has been shown to me why the suit should be spared. Accordingly, this application succeeds. The up-shot is that the suit is struck out with costs to the defendant.

Dated and delivered at Kitale this 2<sup>nd</sup> day of March,2010

**N R OMBIJA**

**JUDGE**

Mr. Wasike for Mr. Wafula for applicant

N/A for respondent.