

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 362 of 2005

MICHAEL KIGOTHO KAMOREPLAINTIFF

V E R S U S

JOSEPH KANYI GACHOGUDEFENDANT

R U L I N G

The Plaintiff filed this suit on 30th March, 2005 seeking orders of eviction and permanent injunction against the Defendant who had allegedly trespassed onto his land parcel **LR. No. LARI/ESCARPMENT/T.92**. The Defendant filed defence and counterclaim on 11th May, 2005 which prompted the Plaintiff to file reply to defence and to the counterclaim on 12th October, 2005. Nothing else happened to the case until the Defendant filed the present motion on 23rd September, 2008 seeking to have the Plaintiff's suit dismissed with costs for want of prosecution. His contention was that the Plaintiff has not set down the suit for hearing since pleadings closed. The application was served but elicited no response.

The application was brought under **Order 16 rules 1(1), 5 and 6** of the **Civil Procedure Rules**. If it is taken that pleadings closed 14 days after the reply to defence and counterclaim, the Defendant had to wait for three years before bringing the application under **Order 16 rule 6** of the **Civil Procedure Rules** to have the suit dismissed for want of prosecution. But, under rule 5, the Plaintiff was obliged to set down the suit for hearing within three months of the close of proceedings. When he failed to do that the Defendant had two options: either to set down the suit for hearing or apply to have it dismissed for want of prosecution. He took the later option. Over 2½ years had passed when the application was filed. Since the application, another period of over two years has elapsed. The Plaintiff has not shown any excuse for not setting down the suit for hearing, and, in my view, the delay is inordinate. (**See IVITA –VS- KYUMBU [1984] KLR 441**). Under **Order 16 rule 5** I dismiss the suit with costs.

DATED AND DELIVERED AT NAIROBI

THIS 1st DAY OF MARCH, 2010

A. O. MUCHELULE

J U D G E