REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Civil Case 53 of 2008

CALVARY MINISTRIES INTERNATIONAL

THROUGH REGISTERED TRUSTEES ……..…….. PLAINTIFF

VERSUS

EUSTACE NYAGA NGATUNI …….. 1ST DEFENDANT

JESUS TABERNACLE INTERNATIONAL MINISTRIES

THROUGH REGISTERED TRUSTEES ……. 2ND DEFENDANT

RULING

The plaintiffs filed this suit in April 2008 and simultaneously filed an interlocutory application seeking amongst other orders an injunction to be issued against the defendants not to interfere with parcel No. MWIMBI/CHOGORIA/2150 and plaintiff's bank accounts. The court after hearing the interlocutory application gave a ruling on 20th June 2008. That ruling was in favour of the plaintiffs. Further the plaintiffs by that ruling were ordered to fix the main suit for hearing on priority basis after discovery. It is not clear whether discovery has been undertaken as ordered in that ruling but on 3rd October the defendants filed a Notice of Motion of the same date seeking an order for dismissal of this suit under Order XVI Rule 5 of the Civil Procedure Rules, for want of prosecution. In the affidavit in support of that application, the 1st defendant stated that the plaintiffs had lost interest in this matter since orders were issued by the ruling of 20th June 2008 in their favour. That since the plaintiffs were in occupation of the suit property and were making use of the church equipment that they were not in hurry to have this suit concluded. The defendant further deponed that three months had passed and the suit had not been fixed for hearing. The plaintiff responded by stating that it had not lost interest in this suit but that the suit had not been fixed for hearing because the high court registry had been instructed not to fix fresh matters for hearing. That deposition was not controverted by the defendants. The plaintiff relied on the case of Agip (Kenya) Limited –Vrs – Highlands Tyres Ltd (2001) KLR 630. In that case, it was held:-

"*The principles governing applications for dismissal for want of prosecution that must be shown are that:-*

(a) the delay is inordinate;

(b) the inordinate delay is excusable; or

(c) the defendant is likely to be prejudiced by the delay.

Delay is a matter of fact to be decided on the circumstances of each case. Where a reason for the delay is offered, the court should be lenient and allow the plaintiff an opportunity to have his case determined on merit. The court must also consider whether the defendant has been prejudiced."

In this case, there are two reasons why I would say that the defendant's application cannot succeed. Firstly and most importantly, the ruling of 20th June 2008 clearly indicated that the suit was to be fixed for hearing after discovery was undertaken. Discovery has not been undertaken hereof and both the plaintiff bare the responsibility to do the discovery. The suit was therefore not ripe for fixing for hearing when the defendant filed the application for dismissal of suit. Secondly the plaintiff's contention that the high court registry was under instructions not to fix cases was not controverted. I am of the view the defendant's application in those circumstances cannot succeed.

The orders that commend themselves to this court are:-

(i) That the Notice of Motion dated 3rd October 2008 is dismissed with no orders as to costs.

(ii) *At the reading of this ruling, the parties will be given a hearing date for this suit within which time the parties will have to have undertaken discovery.*

MARY KASANGO

JUDGE

Dated and delivered at Meru this 3rd …..day of …July 2009.

M.J.A. EMUKULE

JUDGE