



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

**Civil Case 123 of 2001**

**CHARLES KOIMUR ..... PLAINTIFF.**

**VERSUS**

**RICHARD CHEROGOI ARAP SANG..... DEFENDANT.**

**R U L I N G.**

On the 25<sup>th</sup> day of May, 2009, the High court issued a Notice, pursuant to order XVI Rule 2(1) of the Civil Procedure Rules to M/s. C.K. Yano & Co. Advocates for the plaintiff and Richard Cherogoi Arap Sang, to show cause why the suit herein should not be dismissed for want of prosecution.

The notice was served on both the advocates for the plaintiff and the defendant by Monica Njuguna. The affidavit of service sworn on 2<sup>nd</sup> June, 2009 is evidence of such service.

In reaction the plaintiff filed an affidavit sworn on 24<sup>th</sup> June, 2009 through his advocate, Charles Yano. The highlights of that affidavit are that the file went missing from the Registry from 22<sup>nd</sup> May, 2007. That counsel made frequent visits to the Registry with a view to having the matter fixed for formal proof in vain. That failure to take steps in the matter for a period of over a year was due to the unavailability of the file. That the plaintiff is still keen to have the case heard and determined. It is instructive to note that the said affidavit has no annexures showing correspondence between the Registry and the firm of Yano & Co. advocates with regard to unavailability of the file.

From the court record, it is clear to me that this case was filed on 8<sup>th</sup> August, 2001. Summons were issued on 8<sup>th</sup> August, 2001, service was effected on the defendant on 8<sup>th</sup> August, 2001 on the defendant herein. Subsequently, request for judgment was made on 12<sup>th</sup> September, 2001 Memorandum of Appearance was entered on 22<sup>nd</sup> August, 2001. There is no indication where judgment was entered for the plaintiff against the defendant. However, there is an order that formal proof was scheduled for 6<sup>th</sup> February, 2006.

On 6<sup>th</sup> February, 2002 the matter did not go on. Formal proof was re-scheduled for 23<sup>rd</sup> October, 2002.

On 23<sup>rd</sup> day of October, 2002, by record of proceeding, Mr. Yano, counsel for the plaintiff, was present in court but the defendant was absent. Mr. Yano is recorded as having said

***“We are likely to settle this matter and  
pray that this matter be stood over generally”***

The court then stood over the matter generally.

On the 3<sup>rd</sup> day of September, 2005 Yano & Co. Advocates fixed the case for formal proof on 3<sup>rd</sup> November, 2003. Nothing happened on that day.

On 16<sup>th</sup> June, 2008, once again the firm of Yano & Co. advocates attempted to fix the matter for hearing but no date was actually given.

Order XVI Rule 5 of the Civil Procedure Rules provides:-

*“If within three months after –*

*(a)the close of pleadings; or*

*(b) deleted by L.N. 36/00]*

*(c)the removal of the suit from the hearing list; or*

*(d)the adjournment of the suit generally, the plaintiff, or the court of its own motion on notice to the parties does not set down the suit for hearing, the court may order the suit to be dismissed; and in such a case the plaintiff may subject to the law of limitation, bring fresh suit”*

Given the history of this case, from the year, 2001, it is plain and obvious that the plaintiff has lost interest in this matter. Accordingly the order that commends itself to me is to dismiss the suit for want of prosecution, which I hereby do under order XVI rule 5 of the Civil Procedure Rules. There shall be no orders as to costs.

Dated and delivered at Kitale this 1<sup>st</sup> day of July, 2009.

**N.R.O. OMBIJA.**

**JUDGE.**

Mr. Yano for plaintiff.

Richard Cherogoi Arap Sang for defendant in person.