



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**Civil Case 863 of 1993**

**TITUS KIGO MAINA.....PLAINTIFF**

**VERSUS**

**EDWARD M. MUNENE & ANOTHER.....DEFENDANTS**

**RULING**

The Notice of Motion herein, dated 13/10/03, seeks dismissal of the suit herein under Order 16 rule 5 of the Civil Procedure Rules. The application is supported by affidavit of Charles Ayako Nyachae, an Advocate of this court, of even date.

On record, the application is unopposed, there being neither a Replying Affidavit nor grounds of opposition despite the plaintiff being duly served. However, the Plaintiff's Counsel appeared on 14/6/05, during the hearing of this application, and made oral submissions in opposition to the application for dismissal.

The grounds for the application are, **inter alia**, that, the suit, which was filed on 22/2/1992, was last in court on 17/6/1994 for hearing of summons for directions. On 5/12/95, the Plaintiff invited the Defendant to take a hearing date. But the matter was not confirmed for hearing during the call over because the Plaintiff had taken out the matter out of the Day's cause list. The same ritual was repeated on 29/10/96, and again on 8/10/01, when the Plaintiff did not appear for the fixing of a hearing date, even though the Defendant appeared. The result was that no hearing date was fixed.

In the cause of his submissions, counsel for the Plaintiff raised very interesting issues, all of which, are, in my view, geared to derail this application for dismissal; and nothing else, as illustrated by the following events.

On 20/5/04, the Plaintiff claimed to have invited the Defendant to fix a hearing date. Even though the Defendant turned up, he did not participate as the Defendant's clerk informed the Plaintiff's clerk that there was already this application, dated 13/10/034, seeking dismissal of the suit. Despite that, the Plaintiff went ahead and fixed, **EXPARTE** hearing date for 24/11/04.

The plaintiff submitted that he did not receive the notice of the application, formally, until 17/6/04, by which date, he had fixed the suit for hearing on 24/11/04. I find this strange because, as observed herein earlier, the Plaintiff had been clearly told on 20/5/04 that this application was already filed by the Defendant. Instead of perusing the file to confirm whether or not the Defendant had indeed filed the dismissal application, the Plaintiff went ahead and fixed, **exparte**, the hearing date for 24/11/04. This is

strange because the application was filed on 18/5/04 and served on 17/6/04, and it was to be heard on 26/7/04. For the Plaintiff to invite the Defendant to fix a hearing date on 20/5/04, which he proceeded to fix **exparte** is unacceptable under the above circumstances.

Worst of all, on 7/6/04 Plaintiff again invited the Defendant to fix a hearing date. Yet the Plaintiff had already fixed, albeit *exparte*, a hearing date on 26/5/04. And on 21/6/04, the Plaintiff served the Defendant with a hearing notice for 24<sup>th</sup> and 25<sup>th</sup> November, 2004, which Defendant received **without prejudice**, stating **“there is an application to dismiss the suit.”**

Considering the pleadings by the Defendant/applicant, and the submissions by counsel for both sides, I have no doubt in my mind that the Plaintiff has chosen the path of untruths about the fixing of the hearing dates for the suit herein. The truth is that no hearing date has been fixed for the suit herein since 17/6/1994.

Accordingly, the suit herein is dismissed for want of prosecution in terms of Order 16 rule 5 of the Civil Procedure Rules.

The Plaintiff is ordered to pay costs of both this application and the suit herein.

DATED in Nairobi this, 4<sup>th</sup> day of July, 2005.

**O.K. MUTUNGI**

**JUDGE**