



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

Civil Case 4462 of 1986

JAMES KAREGI KIRATHE.....

PLAINTIFF

VERSUS

GEORGE KANGETHE NYORO & ANOTHER.....

.....PLAINTIFF

RULING

This is the second defendants application dated 12.5.97 and filed on 16.7.97 for an order if the suit against 2nd defendant be dismissed for want of prosecution.

The original plaint was filed on 24.11.86 by plaintiff in person. The cause of action is shown to have arisen on 16.7.97 for an order that the suit against the 2nd defendant be dismissed for want of prosecution.

The original plaint was filed on 24.11.86 by plaintiff in person. The cause of action is shown to have arisen on 16.4.82. Plaintiff then engaged the firm of Muchui & co. Advocates who overhauled the plaint by a major amendment.

The summons to enter appearance was served on the applicant on 24.3.87. The applicant entered appearance and filed Defence.

On 8.4.87 plaintiff engaged M/S Gakuhi & company Advocates who filed Notice of change of Advocates on 5.1.85. On 29.2.98 M/S Gachomba & Co., Advocates filed a Notice of change On 23.2.90, M/S Salim Dhanji & Company Advocates There is correspondence attached to plaintiffs documents that M/S J Thongori & company Advocates were acting for plaintiff though there is no Notice of change of Advocates. M/s Rumba Kinuthia & company Advocates on 6.3.97. The present application was served on M/S Rumba Kinuthia Advocates who filed grounds of opposition on 11.9.97. Plaintiff also filed a replying affidavit sworn on 11.9.97 in opposition of the present application. The application came for haring on 6.11.98 but plaintiffs Advocates did not attend. The applicants counsel then prosecuted the application. The Ruling was fixed for 11.11.98. Before I prepared the Ruling I noticed that there were documents filed by M/S John Kamau Stompie Advocates on 27.10.98. those documents are an application for consolidation of the suit but that is not a formal and competent application under XI CP Rules.

The second document is a consolidated plaint. It appears that no leave was obtained to file that plaint and

that filing fees has not been paid. It is not a valid plaint.

I considered for interest of justice that although M/S John Kamau Stompie Advocates had not filed a notice of change of advocates it was just that plaintiff should be given a chance to be heard on the application. As a result I adjourned the application to 2.12.98 and ordered that the advocates be served with the application. I am satisfied that the advocates were served as shown in the affidavit of service. The advocates filed grounds of opposition and replying affidavit on 24.11.98 but failed to attend the hearing. I note also that on 17.11.98 the advocates filed what appears to be a notice of change of advocates.

There was also an application for urgency filed on 18.11.98 asking that the three consolidated suits be heard urgently but as I have said there is no valid formal application for consolidation of the suits and the suits have not been formally consolidated.

Mr. Justice Khamoni had on 26.9.97 fixed the suit for hearing for 28.10.97 but plaintiff applied for adjournment saying that he wanted the Firms of Rumba Kinuthia & Company Advocates and Waweru Gatonye and company Advocates to team up to prosecute his suit.

The reason given for not prosecuting the suit is that the court file has been missing for a long time. But by a letter dated 23.12.96 the Deputy Registrar informed plaintiff that the file was available. But a further letter dated 27.5.97, the Deputy Registrar informed plaintiff that the file was being kept in the strong room so from January 1997 plaintiff could have fixed a hearing date. It would appear that the file had been available up to sometime in 1995 2nd defendants advocates filed an application.

No action was ever taken between the date of filing the suit and 1995 to fix the suit for hearing. Even after the Deputy Registrar confirmed to plaintiff in December 1996 that the file was available plaintiff has never fixed the suit for hearing. Mr. Justice Khamoni fixed the suit for hearing on his own motion when he was dealing with pre 1990 suits but plaintiff applied for adjournment. Since the filing of the suit in 1986, plaintiff has never fixed the hearing date of the suit.

The court can even on its own motion dismiss the suit for want of prosecution even where there are unreasonable cumulative delays the court can dismiss the suit for want of prosecution under its inherent powers even if the circumstances do not fall under order XVI CP Rules – see *Mulusa Biscuits W versus West End Distributors* (1969) EA 698

It appears that plaintiff has no immediate intention of prosecuting the suit. He has changed lawyers for a couple of times and it seems that he intends to apply that this suit be consolidated with other suit.

The application is well merited and although the first defendant has not filed the application for dismissal of the suit, the court can dismiss the suit against 2nd defendant on its own motion It is just to do so.

Consequently I allow the application with costs and dismiss the suit against both defendants with costs.

E. M. Githinji

Judge

4.12.98

Mr. Gichuhi present

Mr. Kamau Stompie absent