

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

Civil Suit 33 of 1999

**JOHN MARTIN TINDI.....
PLAINTIFF**

VS

DANCAN OKELLO

**BENJAMIN WASHILAKAYA
....DEFENDANTS**

MUMIAS OUTGROWERS CO. LTD

RULING

The subject matter of this ruling is the motion dated 5th August 2002 filed by the defendants. In the motion the defendants are seeking to have this suit to be dismissed and or struck out for want of prosecution on the ground that it has been overtaken by events. The motion was resisted by the plaintiff who filed a replying affidavit in response to the supporting affidavit.

Before considering the grounds in support and against the motion I wish to set out the background of this matter. On the 30th day of March 1999 Dancun Okello the 1st defendant was elected as a director representing Western zone in a hotly contested election where the John Martin Tindi, the plaintiff also participated as a candidate. Being dissatisfied with the results the plaintiff herein filed a plaint dated 22.4.1999 seeking for nullification of the disputed it election in the western zone. The suit was contested but unfortunately it was never heard until the term office of those elected in the disputed election lapsed.

The 1st defendant filed this summons with a view of having the suit dismissed for want of prosecution. His argument is that the pendency of the suit serves no purpose because his term in office as a director has already ended. In response the plaintiff says that he attempted on several occasion to have the suit heard but all in vein. He is in agreement that the pendency of this suit serves no useful purpose.

This matter is a straightforward issue. The parties are in agreement that it is no longer necessary for the suit subsist. The 1st defendant is of the view that the suit should be dismissed with costs to him because he is the one who moved the court. On the other ridge the plaintiff is of the view that the suit should be dismissed with each party bearing his own costs. His argument is buttressed on the ground that he was not to blame for the delay.

I agree with the litigants in this action that this suit should be dismissed for it serves no purpose to continue pending. What remains for me to decide is whether or not to award costs and to who if any? The provisions of section 27 of the civil procedure Act gives this court a wide discretion when it comes to awarding costs. I have perused the court record and the same discloses the fact that the suit was adjourned on three separate occasions i.e. on 23.1.2001, 23.3.2001 and on 15th November 2001 on the instance of the defendants. The suit was also adjourned once on 9/7/2001 on the instance of the plaintiff.

I also note that this summons dated 5.8.2002 was filed in court on 18th March 2003 but was not prosecuted until 9th December 2004. I have formed the view that the defendants were not diligent or vigilant to pursue this matter to its logical conclusion. The defendants condoned and indeed played a role in delaying the prosecution of this case as opposed to the plaintiff. I am of the view that they are not entitled to be awarded costs in view of their conduct in this matter. I think the fairest decision in this case is to dismiss the suit for want of prosecution with each party bearing his costs.

That is the order of the court.

DATED AND DELIVERED THIS 18th DAY OF February 2005

J.K. SERGON

JUDGE