

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS**

Civil Case 3587 of 1990

MAGDALINE A. OBOTE & OTHERS.....PLAINTIFFS

VERSUS

MAGDALINE A. OBOTE & OTHERSDEFENDANT

RULING

This is an application by the defendant under Order XVI Rule 5 of the Civil Procedure Rules seeking orders to dismiss the plaintiff's suit for want of prosecution. Rule 5 of the Order XVI provides as follows:

"If within three months after (a) the close of the pleadings; or (b).....

(c) the removal of the suit from the hearing list; (d) the adjournment of the suit generally, the plaintiff does not set down the suit for hearing, the defendant may either set down the suit for hearing or apply for its dismissal."

Mr. Kagucia for the defendant submits that it is a proper case in which the plaintiff's action should be dismissed under Rule 5.

Mr. Kagucia submitted that the cause of action giving rise to this suit occurred on 20th July 1987. The suit was filed on 19th July 1990 which was about 4 years later. The suit was last fixed for hearing on 20th and 21st February 1996 but was not confirmed at the call over conducted. On 30th January 1996 and since that time the plaintiffs have made no attempt to prosecute the suit. That more than 9 years have elapsed without the plaintiff setting down the suit for hearing and this demonstrates that they have lost interest in the suit.

There is no explanation by the plaintiff why no steps have been taken to set down the suit for hearing. In considering whether an action should be dismissed for want of prosecution the court may take into account the delay before the filing of the suit in ascertaining whether subsequent delay after proceedings have commenced is inordinate, inexcusable and prejudicial to the defendant even though the earlier delay was excusable. See NJUKI GACHUGU VS. GITHI 1977 KLR 108 at page 111.

The plaintiff has not taken any steps to set down the case for hearing and was served with this application for dismissal of the suit for want of prosecution and he never filed any papers to oppose the same. With the lapse of more than 19 years from the time when the cause of action arose and a lapse of more than 9 years since it was last taken out of the hearing list, in my view it would be unfair and unjust to call upon the defendant to meet the plaintiff's claim now.

Accordingly I allow the defendant's application and dismiss the suit with costs to the defendant together with costs of this application to be born by the plaintiff.

Dated and delivered at Nairobi this 25th day of October 2006.

J.L.A. OSIEMO

JUDGE