



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL SUIT NO. 63 OF 2002**

**LEVY WAFULA & OTHERS.....PLAINTIFF**

**VERSUS**

**KENYA RED CROSS SOCIETY LTD.....DEFENDANT**

**RULING**

The application dated 8<sup>th</sup> August 2004 is made by way of Notice of Motion under order XVI Rule 5 and order L Rules 1, 2, and 3 CPR. It seeks that the suit be dismissed for want of prosecution and costs of this application be awarded to the defendants.

It is premised on grounds that

(1) The plaintiffs have no interest in the suit because from 3/4/96 when the suit was filed, no serious steps were taken to prosecute the case.

(2) The suit was last in court on 1/4/03 when it was listed down and no date so far has been fixed for hearing.

(3) It is over seven (7) years since that suit was filed, many of the plaintiffs are no longer alive and defendants cannot trace its witnesses.

(4) The defendant has been prejudiced by the delay in failing to present the case and the court should dismiss the case for lack of prosecution for over 13 years now.

The application is supported by the affidavit sworn by the Defendant's Secretary General Mary Kuria who states that no steps have been taken to prosecute the case and in any event the defendant has lost many of its witnesses.

When the application came up for hearing, Mr. Mwadilo who is on record for the firm of Khaminwa and Khaminwa informed the court he had filed an application seeking to cease acting for the plaintiffs, so he was seeking adjournment. The adjournment was opposed by defence counsel Mr. Masika who said that would only add to more delay. The court read mischief and agreed with Mr. Masika. Mr. Mwadilo requested the court to be allowed to leave the court room saying he had not received any instructions. The court granted his request. Really there can be no justification in sustaining this suit which was filed in court in 1996 in Mombasa, later transferred to Malindi when a High Court became operational and that is why it has a 2002 registration.

The last time the matter was in court on 25/10/04 before Hon. Justice Ouko and even then it was for prosecution of the Notice of Motion dated 8<sup>th</sup> August 2004. The same scenario repeated itself. Mr.

Mwadilo sought adjournment saying there was a misunderstanding between him and his clients and he intended to file an application to cease acting in the matter, ever since then nothing has happened.

The suit is actually 13 years in court, with little to show. I agree with Mr. Masika that there is absolutely no reason for retaining this matter, plaintiffs seem to have lost interest in the matter and they were not in court to prosecute the application.

The application is granted and the suit filed herein is dismissed with costs to defendants.

The plaintiffs/respondents to bear the costs of this application.

**Delivered and dated this 16<sup>th</sup> day of December 2010 at Malindi**

**H. A. OMONDI**

**JUDGE**

Mr. Wambua Kilonzo holding brief for Masika for applicant

No appearance for plaintiff/respondent



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