



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CIVIL CASE NO. 223 OF 2008**

**JACINTA NJOKI WAKABA(suing as legal representative of  
DANIEL WAKABA GACHOKA).....PLAINTIFF/RESPONDENT**

**VERSUS**

**ABERDARE FARMERS SACCO LTD.....1<sup>ST</sup> DEFENDANT**  
**JAMES M. GITAU T/A GALIANT AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**  
**MILTON GITAU GICHURU .....3<sup>RD</sup> DEFENDANT/ APPLICANT**  
**JANE NJERI.....4<sup>TH</sup> DEFENDANT/APPLICANT**

**RULING**

1. This is the 3<sup>rd</sup> and 4<sup>th</sup> defendants Notice of Motion dated **9<sup>th</sup> February , 2011** seeking;

- (i) That the suit be dismissed for want of prosecution**
- (ii) That costs of this suit and application be provided for.**

2. The Application is expressed to be brought under **Order 17 Rule 2 (1)(3) and Order 51 Rule 1** of the Civil Procedure Rules 2010.

3. The application is anchored on a supporting affidavit deponed by **Milton Gitau Gichuru**, the 3<sup>rd</sup> defendant herein with authority to swear the affidavit on behalf of the 4<sup>th</sup> defendant and on the grounds on the face of the application.

4. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants set out their case as follows; that since this matter was last in court on **8<sup>th</sup> February, 2010** the plaintiff has not taken any step to have this matter listed for hearing or prosecuted in any manner; that the unreasonable delay in prosecution of this suit shows the plaintiff is not interested in the same; that it will only be fair if this suit is dismissed with costs to the 3<sup>rd</sup> and 4<sup>th</sup> defendants

5. The application is opposed. **Jacinta Njoki Wakaba** filed a replying affidavit dated **9<sup>th</sup> June, 2011** where she deposes that the application is misleading as she has always done her best to have the suit fixed for hearing as evidenced by **(JNW1)** ; that the matter could not be fixed for hearing for various

reasons including unavailability of dates in court: that it is not true that the matter was last in court on **24<sup>th</sup> November, 2008** and that a period of three years had lapsed since the last time the matter was last in court; that the applicant had not served the plaintiff with their defence hence they had contributed to the delay; that she was interested in the suit as the subject matter was land where she resides with her children but was fraudulently sold by the defendants.

6. In a further affidavit deposed by the 3<sup>rd</sup> defendant on **20<sup>th</sup> June, 2011** he deposes that upon perusal of the court file, he had noted that this matter was last listed for hearing prior to filing this application on **17<sup>th</sup> June, 2009**; that the applicant was indolent in prosecuting this matter and had only attempted to fix it for hearing after the current application was served upon the plaintiff; that the assertion that the respondent had not been served with the defence by the applicant does not exonerate the plaintiff from taking appropriate steps in prosecuting the suit.

7. There was no response by the 1<sup>st</sup> and 2<sup>nd</sup> respondents although they were served with the application on **22<sup>nd</sup> February, 2011** by a process server, **Arasa Kinara** and on **4<sup>th</sup> February, 2014** through registered mail by **George Gisore Mboga**

8. I have perused the court record and heard oral submissions by counsel for the 3<sup>rd</sup> and 4<sup>th</sup> defendants. I take the following views on the matter.

9. This is an old application filed in 2011. Although the plaintiff filed a replying affidavit on **9<sup>th</sup> June, 2011** in which she has tried to persuade the court that she is still interested in prosecuting the suit, she has not taken any steps to either fix this matter for hearing or even comply with order 11 since she filed the suit or even after being served with this application. If the plaintiff was interested in prosecuting this suit, she would have demonstrated to court steps taken since 2011 to bring this suit to an end. Further, although her counsel was served with the hearing notice of the application on **25<sup>th</sup> March, 2014** by a process server **George Rasugu** and they acknowledged receipt, they did not attend court on the hearing date.

10. The decision whether or not to dismiss a suit is purely discretionary. However, like any other discretion the same must be based on reason and should neither be based on sympathy nor exercised capriciously .

In *Sheikh Vrs Gupta and others Nairobi HCCC No. 916 of 1960 (1969) E.A Trevelyan, J stated as follows:*

**“.....in deciding whether or not to dismiss a suit under order 6, a court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay that the defendant will suffer no hardship or that there has been flagrant and culpable inactivity on the part of the plaintiff”**

11. In this case, I find that there has been flagrant and culpable inactivity on the part of the plaintiff who has not demonstrated the steps she has taken to set down this matter for hearing as an indicator that she is still interested in pursuing her claim.

12. The upshot of the foregoing is that I find the Notice of Motion dated **9<sup>th</sup> February, 2011** merited and dismiss the plaintiff's suit for want of prosecution with costs of the suit and application to the Defendants.

**Dated, signed and delivered this 17<sup>th</sup> Day of October 2014**

**L N WAITHAKA**

**JUDGE**

**PRESENT**

Ms Njoroge holding brief for Mr Mboga for the plaintiff

N/A for defendant

Emmanuel Maelo : Court Assistant

**L N WAITHAKA**

**JUDGE**