



**REPUBLIC OF KENYA**

**High Court at Embu**

**Civil Case 49 of 2003**

**ZABALIYO NYAGA DAMIANO.....PLAINTIFF**

**VERSUS**

**KIRINYAGA COUNTY COUNCIL ..... 1ST DEFENDANT**

**PETER MBUE MBURIA ..... 2ND DEFENDANT**

**KIRINYAGA DISTRICT LAND REGISTRAR ..... 3RD DEFENDANT**

**R U L I N G**

This is the Notice of Motion dated 9/4/2008 brought under Order XVI rule 5 (Old Civil Procedure Rules) for an order dismissing the Plaintiff/Respondent's suit for Want of Prosecution. Its supported by three grounds and the supporting affidavit of D.G. Ngari which I can't trace in the file.

The Plaintiff/Respondent filed a replying affidavit dated 28/10/2008 opposing the application. He states that he is still keen on proceeding with his case.

The 2<sup>nd</sup> Defendant equally filed a chamber summons seeking dismissal of the suit. Its dated 25/10/2010. Its supported by grounds and his supporting affidavit dated 25/10/2010. Counsels agreed to dispose of the Notice of Motion by written submissions. I have read the record herein together with the affidavits and submissions. As I have noted there are two applications on record seeking the dismissal of the Plaintiff's case. One is dated 9/4/2008 while the other is dated 25/10/2010. The main reason is that the Plaintiff/Respondent has lost interest in the matter, and is not fixing it for hearing. This suit was filed back in the year 2003. Besides some applications being filed and heard the suit has not progressed at all in the area of hearing. The Plaintiff/Respondent says his Counsel was withdrawing and he could do nothing in the circumstances. M/s Wairimu was granted leave to cease acting for the Plaintiff on 1/7/2008 so that cannot be an excuse for the Plaintiff not to proceed with the case.

It is agreed that the matter had been in Court three months prior to filing of the application dated 9/4/2008. But what has the Plaintiff/Respondent done since that application was filed? That did not stop him from prosecuting the case.

The Plaintiff states that the 2010 Civil Procedure Rules apply to this case and the same can't be said to be ripe for hearing before the said Rules are complied with. Is it the Defendant or the Court who should push him to comply with the Rules? This is the Plaintiff's case. It is him who brought all the Defendants to this Court. The excuse that there is pressure of work in the High Court is not a genuine excuse. This Court has given priority to hearing civil matters registered prior to 2006. This case falls under that category and yet the Plaintiff and his Counsel have not taken advantage of this to have this matter fixed for hearing. I therefore find the Applicants justified in filing the two applications dated 9/4/2008 and

25/10/2010. I am however not going to allow the applications for the reason that the claim involves land and it would only be fair that it be determined on merits.

I am therefore giving all the parties 30 days within which to comply with Order 11 Civil Procedure Rules. Thereafter the Plaintiff fixes the matter for mention for directions on how to proceed for hearing.

I have however noted that the land in issue falls within Kirinyaga County which now has a High Court. I therefore transfer the matter to Kerugoya High Court for hearing and determination. Otherwise the two (2) Applications are dismissed with costs to the Defendants.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 14<sup>TH</sup> DAY OF MAY 2013.**

**H.I. ONG'UDI  
J U D G E**

**In the presence of;  
Mr. Okwaro for Plaintiff/Respondent**

**M/s Nyaga for Wangechi Munene for Defendant**

**Njue – C/c**