



**REPUBLIC OF KENYA**

**High Court at Nakuru**

**Civil Case 439 of 1996**

**NGECHA NEW FARMERS CO-OPERATIVE SOCIETY LTD.....PLAINTIFF/APPLICANT**

**VERSUS**

**COUNTY COUNCIL OF NAKURU.....DEFENDANT/RESPONDENT**

**RULING**

This suit was filed way back in 1996. On 8/4/2008, one Oyuo acting for the defendant appeared before J. Maraga and indicated that the plaintiff was absent and asked the court to dismiss the suit with costs. The court went ahead to dismiss the case for reasons that there was nothing on record to show that the plaintiff had been serious in prosecuting the case and it was dismissed for want of prosecution.

The plaintiff/applicant has now filed the application dated 10/8/2011 seeking the setting aside of the dismissal order of 8/4/2008 for reasons that the said order was granted irregularly as the date was not fixed by either of the parties nor was any notice issued to the plaintiff/applicant to attend the court to show cause why the suit should not be dismissed. Mr. Ngure urged that the defendant/respondent did not file any affidavit of service for that date and it was not known why the matter came up on that date and that the applicant is keen on prosecuting the suit. The plaintiff only became aware of the dismissal order in July 2011.

The application was opposed. Joseph Ndunda, County Clerk of the defendant deponed that the suit was dismissed procedurally; that this application lacks merit because there had been inordinate delay in prosecuting the suit and that the plaintiff/applicant was not vigilant in prosecuting the suit.

I have thoroughly perused the court file. Before the dismissal order was made on 8/4/2008, the last order on record is dated 5/4/2002 when the application dated 18/1/2002 was allowed. By that application, Kagucia & Co. Advocates were allowed to cease acting for the plaintiff. Thereafter, there was nothing else on record. It is unclear how the file came to be before the judge on 8/4/08. There is no evidence that the defence counsel had taken a hearing or a mention date and invited the plaintiff for mention or that the court had issued a notice to show cause under **Order XVI Rule (2)** now **Order 17 of the Civil Procedure Rules** which provides that if no step has been taken in the case by either party for one year, the court may give notice in writing to the parties to show cause why it should not be dismissed. No such notice was issued by the court. The only conclusion this court can make is that the file was irregularly placed before the judge without notice to the plaintiff and through an oversight on the part of the court, the order for dismissal was made. It is true that the plaintiff has been indolent in the prosecution of this case in that until 2008, when it was dismissed, no steps had been taken in the case for about 6 years. Even after the dismissal in 2008, it seems the plaintiff had gone to slumber. If the plaintiff had been keen to prosecute this case, it should have enquired with the court on what was happening to its case.

Having said that, two wrongs cannot make a right. The dismissal order was irregular as the plaintiff had no notice of the date when it was dismissed and the same cannot be sustained. It is in the interest of justice that the order of 8.4.2008 be set aside and it is hereby set aside. I direct that the plaintiff do prepare the case for hearing to be set down for hearing within 90 days hereof. In default, the suit will stand dismissed. The applicant bear costs of this application.

**DATED and DELIVERED this 9<sup>th</sup> day of November, 2012.**

**R.P.V. WENDOH**  
**JUDGE**

**PRESENT:**

Mr. Ngure for the plaintiff/applicant

Mr. Orege for the defendant/respondent

Kennedy – Court Clerk