



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CIVIL SUIT 14 OF 2009**

**LUCY WAIRIMU WAINAINA.....PLAINTIFF**  
**VERSUS**  
**FRANCIS KUIRA WAINAINA.....DEFENDANT**

**RULING**

In his Notice of Motion dated 12<sup>th</sup> October 2009 and brought under Order 16 Rule 5(d) and Order 50 Rule 1 of the Civil Procedure Rules as well as Section 3A of the Civil Procedure Act and all other enabling provisions of the law, the defendant seeks the dismissal of this suit for want of prosecution or alternatively the striking out of the amended plaint as an abuse of the process of court. In his affidavit in support of the application the defendant averred that this suit was filed on 16<sup>th</sup> January 2009 and he filed a defence and counter claim on 3<sup>rd</sup> March 2009. On 9<sup>th</sup> March 2009 the plaintiff filed an amended plaint that he has to date not served it upon him. As the pleadings closed on or about 18<sup>th</sup> March 2009 and the plaintiff has not taken any action to have the case heard, he prays that the same should be struck out for want of prosecution. He also prayed that failure to serve him the amended plaint is an abuse of the process of court calling for its striking out.

Mr. Mutonyi for the plaintiff opposed the application. Relying on the replying affidavit of the plaintiff, he submitted that the reason for the failure to fix the case for hearing is because soon after the pleadings were closed the court diary for 2009 was full. Regarding service of the amended plaint he submitted that his office sent it to the defendant by registered post but used a wrong address. He apologized for the mistake which he did not discover until the time of the hearing of this application when counsel for the defendant brought it to his attention.

I know it as a fact that this court's diary for the year 2009 was closed quite early. There is therefore no way the plaintiff could have obtained a date for the hearing of her case even if she had attempted to fix it for hearing. On that ground I decline to grant the prayer for the dismissal of the suit for want of prosecution.

As regards the prayer for the striking out of the amended plaint, I accept Mr. Mutonyi's apology that his office inadvertently posted it to a wrong box number. I therefore direct that Mr. Mutonyi should serve the amended plaint upon counsel for the plaintiff within 15 days.

For these reasons I dismiss this application with no order as to costs.

**DATED and delivered this 11<sup>th</sup> day of February, 2010.**

**D. K. MARAGA**  
**JUDGE.**