

VICTOR NJUGUNA WAMAGATA.....PLAINTIFF

VERSUS

MARY WAIRIMU WAGARA.....1ST DEFENDANT

NAKURU MUNICIPAL COUNCIL.....2ND DEFENDANT

RULING

The plaintiff instituted this suit in October 2001 against the 1st and 2nd defendants. The 1st defendant filed a defence and counterclaim. It is apparent from the records that pleadings closed in June 2002. The suit was fixed for hearing on 19th April 2005, on the day of the hearing, Mr. Muhia Counsel for the plaintiff applied for an adjournment on the grounds that his client was unwell. The adjournment was granted and the matter was fixed for hearing on 13th June 2005. On that day, Mr. Muhia applied for an adjournment on the grounds that he needed the surveyor to conclude the survey work because the outcome of the survey was needed in the case. The matter was stood over generally.

The matter was fixed again for hearing by consent on 27th March 2006. Mr. Muhia once more applied for an adjournment on the grounds that he had not seen his clients. This application was opposed by counsel for the 1st defendant. The court granted the adjournment on condition that it was the last adjournment. The plaintiff was ordered to pay defendant's counsel costs for the day assessed at kshs 1,200/= as well as the court adjournment fees.

On 23rd September 2008 the 1st defendant filed a notice of motion under **Order 16 rule 5(d)** of the **Civil Procedure Rules** seeking for orders that the suit be dismissed for want of prosecution. The application is premised on the grounds stated on its body and the supporting affidavit of the 1st defendant. The plaintiff adjourned the matter so that he can prepare his evidence. Although the plaintiff was granted an adjournment and ordered to pay costs and court adjournment fees to-date the plaintiff has not complied with that order. Apart from failing to comply with the court order the plaintiff has taken no steps to fix the matter for hearing since March 2006. This delay has prejudiced the 1st defendant in the preparation of her own defence.

This application was opposed by counsel for the respondent. He relied on the affidavit of Mr. S. M. Muhia who deposed that the matter was adjourned to enable a surveyor complete the survey work. Counsel has been following the surveyor and has been informed that the survey work has not been completed because the surveyor has not traced some maps. Thus counsel urged the court not to dismiss the suit and allow the surveyor time to complete his work.

The provisions of **Order 15 rule 5** of the **Civil Procedure Rules** provide that:

'If within three months after the close of pleadings or the matter has been removed from the hearing list the plaintiff or the court on its own notion does not set the suit for hearing the defendant may either set the suit for hearing or apply for its dismissal.'

No steps have been taken to fix this case for hearing from 27th March 2006 therefore the applicant took steps to dismiss this matter. The applicant cannot be faulted for taking this step to dismiss this suit for want of prosecution. I have considered the grounds advanced by the plaintiff that the evidence required by the plaintiff to prosecute this matter is a report from the survey which is yet to be completed. This is not a satisfactory reason to keep the suit waiting for the plaintiff to gather the evidence.

This suit was filed more than eight years ago. Failure by the plaintiff to prosecute the matter indicates lack of interest. On the other hand the suit, the allegations and the preparation of the defence hangs on

the shoulder of the 1st defendant like a sword of demagoues. There is no doubt that the continuous pendency of this case is prejudicial to the 1st defendant who would like to get over the matter.

For the above reasons I find no justifiable reason for keeping this matter pending until the plaintiff gathers her evidence. The suit is hereby dismissed for want of prosecution with costs to the 1st defendant.

Ruling read and signed on 27th day of March 2009

M. KOOME

JUDGE