



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**Civil Suit 80 of 2001**

1. Civil practice and procedure

2. Application dated 16<sup>th</sup> September, 2009

- a. To dismiss suit for lack of prosecution
- b. Order XVI 59(d) cpr
- c. Subject of main suit

Land claim

Upon Kericho/Kapkatet/1439 (portion) 1.3 acres)

- d. Case last adjournment 15<sup>th</sup> June, 2009
- e. No action taken

**3. Respondent:-**

- i) Failed to pay Kshs. 2,000/= costs as ordered by G.B.M. KARIUKI j ON 9.10.08.
- ii) Failed to file replying affidavit of grounds of opposition.

**4. Held**

- a) Application granted
- b) Suit dismissed for lack of prosecution

**5. Case Law - Nil**

**6. Advocates**

N.O. Migiro advocate instructed by M/S Migiro & Co. advocates for the Defendants/Applicants - present

J.R. Kimeto advocate instructed by M/S Bett & Co. Advocates for the Plaintiffs/Respondents - present

**MATHEW CHERUIYOT .....1<sup>ST</sup> PLAINTIFF**

**JULIANA CHERUIYOT ..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**ANNAH BWOKENY ..... 1<sup>ST</sup> DEFENDANT**

**RECHO SIOROR .....2<sup>ND</sup> DEFENDANT**

**ANNAH SIOROR .....3<sup>RD</sup> DEFENDANT**

**RULING**

**Application to dismiss the Originating Summons for**

**Lack of Prosecution**

**order XVI r 5(d) CPR**

**I: Procedure**

1. *Order XVI r 5(d)* provides that “If within three months after-

a) ...

b) *Deleted by LN 36/00*

c) ...

d) *the adjournment of the suit generally, the plaintiffs or the court of its own motion or notice to the parties does not set down the suit for hearing, the defendant may either set the suit down for hearing or apply for its dismissal”*

**II: Background**

2. The originating summons was filed on 15<sup>th</sup> October, 2001 suing by the estate of the late Cheruiyot Arap Tele through Mathew Cheruiyot and Juliana Cheruiyot referred to the Plaintiff/respondents herein against the estate of Kimilgo Bwokeny and two others the defendant/applicant.

3. Unfortunately, Annah Bwokeny passed away and was substituted by the current two respondents/applicants.

4. She was able to enter appearance and file a reply in which she claimed that, land parcel Kericho/Kapkatet/1439 belonged to her and was never parcel of land Kericho/Kapkatet/ 995 belonging to the plaintiffs/respondents.

5. That 1.3 acres of portion of the land was never the plaintiffs/respondents.

6. There was an African court case on this matter being No. 30 of 1956. Decided prior to adjudication

and a registration of the portion of land. The registration occurred on 28<sup>th</sup> April, 1969.

7. The plaintiff's case was not heard. It was adjourned and on 9<sup>th</sup> October, 2008 when it came for hearing before G.B.M Kariuki J it was adjourned with orders that Kshs. 2,000/= costs be paid to the defendants. This was never done.

### **III: Application 15<sup>th</sup> June, 2009**

8. The defendants/applicants filed this present application to have the suit dismissed for lack of prosecution as no action had been taken on this matter.

9. No replying affidavit or grounds of opposition had been filed. The sum of Kshs. 2,000/= had never been paid since that last adjournment.

10. This application not being opposed is granted. The originating summons is hereby dismissed for lack of prosecution under **Order XVI r 5(d) cpr** with costs to the defendants/applicants.

**DATED** this 23<sup>rd</sup> day of October, 2009 at **KERICHO**

**M.A. ANG'AWA**

**JUDGE**

**Advocates**

N.O. Migiro advocate instructed by M/S Migiro & Co. advocates for the Defendants/Applicants

J.R. Kimeto advocate instructed by M/S Bett & Co. Advocates for the Plaintiffs/Respondents - present