



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

Civil Suit 33 of 1998

DICK KAMAU NJUGUNA.....1ST PLAINTIFF
DAVASON GICHUKI.....2ND PLAINTIFF
DANIEL BARAGU.....3RD PLAINTIFF
JOHN MWANGI NJOROGE.....4TH PLAINTIFF
PASCAL KAMAU.....5TH PLAINTIFF
CHARLES MAINGA MACHARIA.....6TH PLAINTIFF

VERSUS

NAKURU KIAMUNYEKI CO. LIMITED.....1ST DEFENDANT
STEPHEN MBOTE.....2ND DEFENDANT
EVANS KIRIUNGI.....3RD DEFENDANT
PAUL CHIERA.....4TH DEFENDANT
MOSES KARANJA.....5TH DEFENDANT
MATHEW GITAHU.....6TH DEFENDANT
DAVID KARUGA.....7TH DEFENDANT

RULING

On the 10th June 2008 I dismissed this suit for want of prosecution, pursuant to a notice of motion dated 5th September 2006, filed by the defendants/respondents and which was allowed. The application was heard in the absence of the plaintiffs/applicants who did not attend for the hearing despite service. The plaintiffs/applicants had not taken any steps to have the suit prosecuted since the same was stood over generally on 31st May 2005.

Subsequent to the dismissal the defendants/respondents filed their Bill of Costs for taxation. The same was listed for hearing on 23rd July 2008. Mr. Muhia, then acting for the applicants herein, attended

before the taxing officer and applied to put in written objections to the bill. With the consent of counsel for the respondents the court allowed the application. The defendants/applicants' objections were filed on 29th September 2008 and a rebuttal to the objection was filed on 11th November 2008. Based on the written objections and rebuttals, a ruling on the taxation was written and delivered on 24th February 2009. The respondents then moved to execute for their taxed costs of Kshs 268,905/=.

Reacting to the proclamation made against their assets on 16th March 2009, the applicants quickly instructed their present advocate, the learned counsel Mr. Ogolla, to come on record in place of M/s S. L. M. Muhia & Company and to file the present application, which is brought under **Order XLIV Rules 1(1)(a) and (b)**, and **Rule 2** of the **Civil Procedure Rules** and **Sections 3A, 63(e) and 80** of the **Civil Procedure Act**. Mainly, the application seeks to have the dismissal order reviewed and the suit reinstated. It is premised on the grounds that there are errors of law and facts (*approval?*) on the record and that there exists some evidence which ought to have been brought to the attention of the court.

The purported error (*on the face of the record*) is that some of the plaintiffs and two defendants were deceased when the application for dismissal was heard and allowed. While arguing the application learned counsel for the applicants submitted that the issue of the demise of the several litigants was the only error the court was being asked to address. Another reason given for seeking a review was that the applicants' previous advocate did not advise them of the application dated 5th September 2006 seeking the dismissal of the suit.

Although the court may consider a review of its decrees or orders for any sufficient reason, other than the grounds set out in the application, I am not inclined to accept as being true, that the applicants were not aware of the goings-on. It is highly doubtful that the counsel previously on record would have proceeded to defend the respondents' bill of costs in the manner he did without instructions from the applicants. The court deems them to have been aware of the dismissal order (*and, by implication, the application*) as at the time they instructed counsel to challenge the Bill of Costs. If as at that time they had issues with the notice of motion dated 5th September 2006, then the present application for review and not an objection to the taxation would have been the appropriate course for them to take. The applicants do not appear to be sincere. They were served with a replying affidavit sworn on 14th May 2009 clearly spelling out the particulars of their indolence throughout the 10 years their suit remained unheard and have filed nothing in rebuttal.

As rightly submitted by learned counsel **Mr. Karanja** for the respondents herein, the death of parties to the suit only resulted in the suit abating as against those parties after 1 year and it is the responsibility of a party claiming a survival of the action to apply for substitution. That being the case, the situation as of now, is that the decree herein can only be enforced for or against the respective surviving parties and no prejudice as is likely to be occasioned by its enforcement has been shown.

The applicants have not established any grounds for the stay of execution sought. Litigation belongs to the parties and the applicants herein cannot blame their previous advocate for their glaring indolence. I find no sufficient ground for review of my orders of 10th June 2008 and have no hesitation in dismissing this notice of motion under **Order XLIV Rule 3**, being of the considered view that the same is devoid of merits and was not timeously brought. I award costs of the same to the respondents.

Dated signed and delivered at Nakuru this 13th day of November 2009

M. G. MUGO

JUDGE