



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 117 of 2005**

STEPHEN KAMUNGE WAINAINA ..... 1<sup>ST</sup> PLAINTIFF

JOSEPH NJOROGE KIMANI ..... 2<sup>ND</sup> PLAINTIFF

PAULINA MWEMBA KIROMBO ..... 3<sup>RD</sup> PLAINTIFF

**VERSUS**

PATRICK MULILI ..... DEFENDANT

**RULING NO.2**

**APPLICATION TO REVIEW COURTS ORDER DATED 5.6.2008 DISMISSING SUIT UNDER ORDER XVI R**

**1: Background**

1. A dispute arose between the three plaintiffs who are alleged to be the registered owners of Land Parcel LR209/4882 situated in Embakasi Nairobi and the defendant herein a councilor presumably of the area as to the ownership of the said land.

2. Allegations was the land was originally set aside for community use whilst the three plaintiff's claim they were rightfully allocated the land.

3. The defendant is alleged to have demolished foundation stone that had been constructed and or in the process of being constructed. The plaintiff filed this suit to stop him interfering with their possession of the land. They filed an application for an injunction which was duly granted by this court (Mugo J) (10 March 2005).

4. Once the injunction was granted no action was taken by the plaintiffs on the suit for three years. The defendant filed an application dated 28 January 2008 and prayed for the suit to be dismissed for want of prosecution under order XVI r 5(d) Civil Procedure Rules and Section 3A Civil Procedure Act.

5. The advocate for the plaintiff having been duly served failed to appear to court on 7 May 2008. The hearing proceeded under Order IXB r 3a Civil Procedure Rules the court being satisfied that the plaintiff having been duly served through their advocates were absent.

6. By the ruling of 8 May 2008 the suit was dismissed under Order XVI Civil Procedure Rules.

7. The plaintiff/applicant changed advocates with leave of the court Visram J (26.5.08) and thereafter filed an application dated 5 June 2008 under a certificate of urgency seeking orders to vary/review the order made on 8 May 2008. That the suit be reinstated for hearing.

**II: Application 5 June 2008.**

8. The plaintiff/applicant gave the reasons for not being in court to prosecute the application was that instructions had been withdrawn from their advocate M/s Gichigi Burugu & Co. Advocate. They instead instructed the firm of Kinyanjui & Njau Advocates. The latter firm of advocates failed to file a notice of change, failed to file grounds of opposition and subsequently the main suit was dismissed. This was a mistake on the part of the plaintiffs /applicants' advocate and should not be visited upon the plaintiff /applicants.

9. No reply was filed by the defendant/respondent within the requisite time.

**III: Opinion**

10. There are two issues here. The first is that the main prayer brought to this court was to have the suit dismissed for want of prosecution. Secondly the hearing proceeded against the plaintiff respondent on grounds that having been served they were absent. It therefore meant that under order IXB r 8 Civil Procedure Rules and subject to rule 7, the application to set aside the courts orders should be made under IXB r 8 Civil Procedure Rules. This order deals with non attendance of parties to a suit.

11. The application before me seeks to review my orders and reinstate the suit under order XLIV rule 1, Order Lr 1 Civil Procedure Rules section 3 A, 63 (e) and 80 Civil Procedure Rules.

12. This rule does not deal with the reinstatement of the suit. It deals with only the dismissal of a suit. Therefore once a suit has been dismissed for want of prosecution the only option such a party has is to file a fresh suit subject to the Limitation of Actions Act namely, once a suit is dismissed for want of prosecution a new suit is brought and or filed

13. I decline to set aside my order and hereby dismiss this application with costs to the respondent/defendant.

DATED THIS 18<sup>TH</sup> DAY OF JUNE 2008 AT NAIROBI.

**M.A. ANG'AWA**

**JUDGE**

N.W. Mwanyale holding brief instructed by M. Kamande & Co. Advocates for the plaintiff/applicant – present.

E.K. Mutua instructed by E.K. Mutua & Co. Advocates for the defendant/Respondent - present