



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

**Civil Suit 814 of 2000**

**VERONICA NGATHA GICHURI.....1<sup>ST</sup> PLAINTIFF**

**JOHN NG'ANG'A GICHURI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**JOSEPH KURIA KIHANYA }**

**DOMINIC MBURU }**

**BENSON KIHANYA } .....DEFENDANTS**

**PAUL NG'ANG'A }**

**JAMES KAMAU }**

**AGNES MUGURE }**

**RULING**

By notice of motion dated 18.01.08 stated to be brought under Order XVI rule 5 and Order L of the Civil Procedure Rules as well as under section 3A of the Procedure Act, Cap. 21, the defendants applied for the following orders:—

- 1. THAT the plaintiffs' suit be dismissed for want of prosecution.**
- 2. THAT the costs of the application be provided for.**

The grounds upon which the application is based are:—

- a) THAT the suit herein was filed on 17.03.2000.**
- b) THAT since the last appearance in court on 04.12.06, the plaintiffs have not taken any steps towards having the said matter set down for hearing.**
- c) THAT it is well over 12 months since the last appearance in court and as such the suit should be dismissed.**

The application is supported by the affidavit of the 1<sup>st</sup> defendant, Joseph Kuria Kinyua sworn on 18.01.08.

At the hearing of the application on 13.05.08, the defendants/applicants were represented by learned counsel, Miss J.W. Kimiti while the plaintiffs/respondents were represented by learned counsel, Mr. J.L. Etemesi.

Defendants'/applicants' counsel reiterated that no steps had been taken by plaintiffs/respondents to get the matter heard since the last court attendance on 04.12.06. She relied on the supporting affidavit of 1<sup>st</sup> defendant, Joseph Kuria Kihanya sworn on 18.01.08. With regard to the replying affidavit of the 1<sup>st</sup> plaintiff sworn on 09.05.08, claiming that the plaintiffs had not set the suit for hearing because they were waiting for a Limited Grant, defendants'/applicants' counsel submitted that that was a lame excuse as the process of getting Limited Grant takes only 3 months. Defendants'/applicants' counsel noted that the Limited Grant was issued on 29.03.07; that while the Limited Grant may have contained defects, no steps were taken to rectify them until September, 2007, which in her (defendants'/respondents' counsel's) view showed no seriousness by the plaintiffs/respondents in prosecuting their case and that the case should be dismissed with costs.

On the other hand, plaintiffs'/respondents' counsel opposed the application, insisting that the plaintiffs/respondents are keen and diligent in prosecuting the suit. Counsel relied on the replying affidavit of the 2<sup>nd</sup> plaintiff sworn on 09.05.08. It was 2<sup>nd</sup> plaintiff's counsel's case that when the matter was last in court on 04.12.06, the court directed the plaintiffs to give evidence of ownership of the suit premises and that after those directions, the plaintiffs took out a Limited Grant issued on 29.03.07. However, the Grant had an error which was outside the plaintiffs' control and which had to be rectified and that the rectification was made on 10.12.07. Plaintiffs'/respondents' counsel submitted that there was no inordinate delay and urged that the plaintiffs/respondents be allowed to prosecute their suit.

In reply, defendants'/applicants' counsel said she had nothing to add to what she had submitted earlier.

I have given due consideration to the application and opposition thereto.

The court record shows that on 04.12.06 Aluoch, J directed the plaintiffs to serve a further affidavit and annex evidence of their ownership of the suit premises. The next significant event seems to have been the acquisition by the plaintiffs of limited grant of letters of administration *ad litem* dated 29.03.07:

***'... limited to the purposes only for substitution in HCCC No.814 of 2000 and until further representation is granted by this court to JOHN NG'ANG'A GICHURI AND VERONICAH NGATHA GICHURI ... and until further representation be granted and render a true and just account thereof whenever required by law to do.'***

In his submissions to this court, plaintiffs'/respondents' counsel said the above limited grant contained an error which required rectification and that such rectification was effected vide a subsequent grant dated 10.12.07 not just limited to substitution but a grant with a somewhat expanded mandate.

***'... limited to the purposes only to institute and/or prosecute any suit to recover any property forming part of the estate in HCCC No.814 of 2000 and until further representation is granted by this court to JOHN NG'ANG'A GICHURI AND VERONICAH NGATHA GICHURI ... and until further representation be granted and render a true and just account thereof whenever required by law to do.'***

The plaintiffs followed up their rectified limited grant dated 10.12.07 a month later with their notice of motion dated 18.01.08 now under consideration. It emerges that the plaintiffs'/respondents' pursuit of their case may not have been at top speed but it cannot validly be said that they have altogether been idling over the matter. I shall give the plaintiffs/respondents an opportunity to prosecute their case for it to be considered on merit.

The defendants'/applicants' notice of motion application dated 18.01.08 is dismissed and the parties are hereby directed to proceed to take a date for hearing of the suit on priority basis.

Costs shall be in the cause.

Orders accordingly.

**Delivered at Nairobi this 3<sup>rd</sup> day of June, 2008.**

**B.P. KUBO**

**JUDGE**