



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

**Civil Case 119 of 2004**

**JAMES M. KANYARA.....1<sup>ST</sup> PLAINTIFF**

**PETER K. NJOROGE.....2<sup>ND</sup> PLAINTIFF**

**KAHIGA NDEGWA.....3<sup>RD</sup> PLAINTIFF**

**PETER T. MWAURA.....4<sup>TH</sup> PLAINTIFF**

**CYRUS K. WAITHAKA.....5<sup>TH</sup> PLAINTIFF**

**PETER N. NJUGUNA.....6<sup>TH</sup> PLAINTIFF**

**VERSUS**

**MUIRURI MWANIKI.....DEFENDANT**

**RULING**

By consent of the parties this suit was fixed for hearing on 20<sup>th</sup> September 2006. On that day when it was called out none of the six plaintiffs was in court. Mr. Karanja Mbugua Advocate holding brief for Mr. Wariuki, counsel for the plaintiffs applied for adjournment on the ground that Mr. Wariuki was unwell. The application was strongly opposed and as there was no prove that Mr. Wariuki was unwell Justice Musinga dismissed the application and dismissed the suit for want of prosecution.

On the same day the plaintiffs through the firm of Mirugi Kariuki and Company Advocates applied to set aside the dismissal order and reinstate the suit. That application was on 1<sup>st</sup> August 2007 struck out on the ground that M/S Mirugi Kariuki and Company Advocate had not been granted leave under Order 3 Rule 9A of the Civil Procedure Rules to come on record in place of the plaintiffs' hitherto advocates.

On 27<sup>th</sup> August 2007, M/S Mirugi Kariuki and Co. Advocates having been granted leave to come on record filed another application under **Order 9B Rule 8** of the **Civil Procedure Rules** and sought to set aside the dismissal order and reinstate the suit. The application is based on the ground that on the hearing date, 20<sup>th</sup> September 2006, though they had been informed of their advocate's indisposition and thought that the case was not going to be heard, the plaintiffs nevertheless came to court but arrived at about 10.00 a.m. when the suit had just been dismissed. It is supported by the affidavit of James Muchendu Kanyara, the first plaintiff to which he annexed his affidavit in support of the earlier application which had been

struck out.

The defendant does not think highly of the application. In his counsel's view the application is misconceived, incompetent and bad in law for the reason that it is based on the affidavit which had been struck out with the earlier application. On the merits of the application, Mr. Kagucia for the defendant submitted that the plaintiffs, and in particular Peter Ndegwa Njuguna and Peter Thuo Mwaura, cannot even be believed because they have each sworn two affidavits in which they have contradicted themselves. Each of them has in one affidavit stated that he arrived in court late while in the other he has stated that he did not come to court at all because he knew that their advocate was unwell and the case not going to go on.

I have considered these submissions and perused the affidavits in support of the application. On the first ground of opposition I find nothing wrong with exhibiting and relying on the earlier affidavit. It is just an exhibit annexed to the affidavit in support of the application. I therefore find that the application is competent and properly before court.

On the merits of the application, I agree with Mr. Kagucia that the two above named plaintiffs contradicted themselves on what they did on the material dates. However upon perusal of the first plaintiff's affidavit and having sworn it on the same date, I am satisfied that he came to court with the second plaintiff on that day but arrived after their suit had been dismissed. In the circumstances and given the fact that this is a suit involving land which is said to be quite valuable, I think the interest of justice demand that the matter be decided on merit. Consequently, I allow this application but order the plaintiffs to pay thrown away costs as well those of this application to the defendant.

**DATED and delivered this 16<sup>th</sup> day of October, 2008.**

**D. K. MARAGA**

**JUDGE**