

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Case 57 of 1997

WAIRIMU NGATIA

PETERSON WABUCHA NGATIA

GEORGE GITHINJI NGATIAPLAINTIFFS/RESPONDENTS

Versus

NDIRANGU KARUU

ELIZABETH WAIRIMU KARUU.....DEFENDANTS/APPLICANTS

RULING

An application is filed herein on behalf of the defendants who seek the court's order for the dismissal of this suit for want of prosecution. The application is brought by way of Notice of Motion brought under *Order XV1 Rule 5* and 6 of the Civil Procedure Rules and *Section 3A* of the Civil Procedure Act. The Applicants state that the Plaintiffs have been indolent in prosecuting this suit. That an application was made by the Defendants dated 29th July 2003 which application also sought the dismissal of the Plaintiff's suit for want of prosecution. The court after hearing that application delivered a ruling dated 12th November 2004. In that ruling the Learned Judge found that the Plaintiff had been indolent in prosecuting this suit. The judge however stated in the ruling that she would give the Plaintiffs a final opportunity to prosecute the suit and ordered that the Plaintiffs would take action to prosecute the suit within the next three months from the date of the ruling. The applicant was granted liberty to reapply for the same orders, hence the present application.

The application is opposed by a Replying Affidavit, which although drawn in person by the Plaintiffs at the hearing of the application were represented by counsel. In their Replying Affidavit the Plaintiff stated that a letter was written seeking the fixing of a hearing date in this matter. The Plaintiffs stated that a date was not however given. Defendants' present application was served upon the Plaintiffs in the month of June 2006. This was after the Plaintiffs had searched for the file that is the court filed severally. That they were informed the court file could not be found. That although three months given to the Plaintiffs by the judge in her ruling that it was not the wish of the Plaintiffs not to fix this case for hearing. The Plaintiffs in their Replying Affidavit prayed for the last indulgence of the court.

I have considered the application and the arguments presented before court. *Order 16 Rule 5* provides that if within three months after the close of pleadings or after the removal of the suit from hearing list or after the adjournment of the suit generally, the Plaintiff does not fix the case for hearing, the defendant may either set the suit down for hearing or apply for dismissal. It is admitted even by the Plaintiffs that they have failed to take a hearing date in this matter. What however is of some concern is that even though the Plaintiffs give certain reasons why they were unable to get a hearing date they fail to annex any evidence of those reasons to their Replying Affidavit. Such failing can only be detrimental to the Plaintiffs, particularly considering the order of the Learned Judge made on the 12th November 2004 when the Judge ordered the Plaintiffs to fix this suit for hearing within three months. Plaintiffs did not abide with that order and have failed to produce before this court sufficient material for which the court would

overlook their failure to so do. The court cannot act in vacuum and even in exercising its discretion the court needs to be given material for so acting. The Plaintiffs have failed to so provide and the end result therefore is that this suit will be dismissed for want of prosecution. Even though the Plaintiffs have sought that they be given the last opportunity, that last opportunity was given to them by the Learned Judge when they were given three months to fix his suit. It makes no sense whatsoever for the courts to continually give a party the last opportunity only for that party to squander that opportunity. Accordingly the Defendants' application by Notice of Motion dated 17th December 2005 does succeed and their application is granted in that the Plaintiffs' suit is hereby dismissed for want of prosecution. The costs of the suit and the costs of the Notice of Motion dated 17th December 2005 are awarded to the Defendant. Orders accordingly.

Dated and delivered at Nyeri this 8th day of June 2007.

MARY KASANGO

JUDGE