

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

Civil Case 562 of 1994

**SEBELINE GAMITILI THIRINGI & HELLEN GATAMBI JACOB (both suing
as the Legal Representative/Dependants of the estate of)**

JACOB M'ITIMITU (Deceased).....PLAINTIFF

VERSUS

FRANCIS KINANGA.....1ST DEFENDANT

MUCEE G. KAGUANGE.....2ND DEFENDANT

ESSO MOTOR SALES & STATION.....3RD DEFENDANT

RULING

This is an application by the Defendants under Order XVI Rule 5 (d) of the Civil Procedure Rules for an order that the Plaintiff's suit against them be dismissed for want of prosecution. The Defendants say there has been inordinate delay. In support of the application James Kironji Mwenja Advocate for the Defendants has sworn an affidavit giving grounds for the application. The facts as gathered from the affidavit evidence are that the claim arises out of a traffic road accident which occurred on 18th May 1991 involving a motor vehicle registration NO. KAA 904V in which the deceased Jacob M'Itimitu was traveling as a lawful passenger.

This suit was filed on 10th February 1994 by the Plaintiffs suing as legal representatives of the estate of the deceased. The plaint was amended on 25th February 1994 and further amended on 15th June 1999. The defence was filed on 18th April 1997 and amended on 29th June 1999.

From the court record, it is evident that the Plaintiff has not been keen to set the suit down for hearing. The last time and the only time it had been fixed down for hearing was on 31st August 2001 and when it was taken out and since then the Plaintiff has taken no step to set the suit down for hearing.

The Plaintiff was served with this application but he did not file any papers in opposition nor did he appear in court to oppose the application. The application is unopposed.

Order XVI Rule 5 (d) provides that if within 3 months after the adjournment of the suit generally the Plaintiff does not set down the suit for hearing, the Defendant may either set down the suit for hearing or apply for its dismissal. The suit has been in court for about 14 years and Mr. Kironji for the Defendants submits that it is a proper case in which the Plaintiff's action should be dismissed under Rule 5.

I agree with Mr. Kironji for the Defendants that there has been inordinate and inexcusable delay on the part of the Plaintiff.

Accordingly I dismiss this suit for want of prosecution with costs to the Defendant as well as the costs

for this application.

Dated and delivered at Nairobi this 17th day of July 2007.

J.L.A. OSIEMO

JUDGE