

REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT NYERI

Civil Case 56 of 2001 (OS)

STEPHEN MACHARIA KARIUKI.....1ST PLAINTIFF/RESPONDENT

MWIHAKI KARIUKI.....2nd PLAINTIFF/APPLICANT

Versus

MWANGI GACHARA.....DEFENDANT/APPLICANT

RULING

The Defendant's Notice of Motion is dated 12th January 2006. The same is brought under *Order XVI Rule 5* of the Civil Procedure Rules. The Defendant seeks the dismissal of the Plaintiff's suit for want of prosecution. In the supporting affidavit, the Defendant deponed that the Plaintiff since the 25th November 2004 had failed to fix this matter for hearing. The Defendant deponed that he is anxious for this suit to be heard and determined. In opposition the Plaintiff filed a Replying Affidavit. In that Replying Affidavit it s deponed that on the 18th November 2004 a ruling was delivered on a preliminary objection. The essence of that objection was that the Plaintiff had failed to annex a copy of the title to the Originating Summons. During that time the Defendant was represented by the firm of S. M. Wahome & Co. Advocates. The Court in its ruling ordered the Plaintiff to file another affidavit annexing the title. That indeed was done by the Plaintiff. The Plaintiff further deponed that soon after the ruling was delivered Mr. Wahome, the proprietor of S. M. Wahome & Co. Advocates joined the Judiciary. The Plaintiff embarked on tracing the Defendant for purposes of service. The Plaintiff was not successful and therefore proceeded to invite the Defendant to the Registry for the purpose of fixing this case for hearing. The hearing was taken *exparte* for 26th January 2006 and the case did not proceed for hearing because the Defendant had not been served. The Plaintiff did request the court that they be allowed to serve the Defendant by substituted service and the Court directed that a formal application be made. It does seem that the Defendant had instructed the present advocate to act for him and the Notice of Appointment was filed in court on 13th February 2006. The present application was filed on 18th January 2006. The Plaintiff deponed that that application was not served until after the hearing date of this case had passed. The Plaintiff therefore sought that the application be dismissed.

In considering the application, it is important to note that the Defendant did not contradict the Plaintiff on deposition in the replying affidavit. The Defendant did not contradict the statement that his former lawyer joined the Judiciary and that the Plaintiff was unable to trace him nor did he contradict the statement that his present advocate did not serve the notice of appointment and the present application in time. Had the present advocate served the Plaintiff in time the date taken, that is, 26th January 2006 for the hearing of this suit, that hearing may well have proceeded. I am therefore of the view that the application by the Defendant cannot succeed in view of what is stated herein. The Notice of Motion dated 12th January 2006 is therefore hereby dismissed with costs to the Plaintiff.

Dated and delivered at Nyeri this 28th day of September 2007.

MARY KASANGO

JUDGE