



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

Civil Case 1803 of 2001

1. Land and Environmental Law Division
2. Civil Practice and Procedure
- i) Application to notice of motion 28.8.06 to set aside dismissal of suit.

Section 3A

- ii) In reply by respondent

Inordinate delay – after 4 years.

3. Held: Application dismissed.

4. Case law

5. Advocates:

F.S. Mwaura of Mwaura Shairi & Co. Advocates for the plaintiff/ applicant - present

A.M. Kiaragu of Kiaragu & Co. Advocates for the defendant/respondent – present

DAVID IRUNGU GICHERUPLAINTIFF

VERSUS

KENYATTA UNIVERSITY DEFENDANT

RULING

1: Application to set aside orders of the court – G.B.M. Kariuki J 17 September 2003
dismissing suit for lack of persecution.

1. The parties were heard inter parties on 17 September 2003 by G.B.M. Kariuki J on application dated 21 May 2003 seeking this courts leave to dismiss the suit for want of prosecution. That no action had

been taken for two years.

2. The application was granted by the Hon. Judge on

17 September 2003.

3. The applicant comes to court under section 3A of the Civil Procedure Act and seeks this courts orders to set the orders of G.B.M. Kariuki J. The Hon. Judge has since left the station and I hear this matter under order 17 r 10 Civil Procedure Rules.

4. The reasons sought is that the plaintiff applicant was not aware nor informed that the suit had been dismissed and or transferred from the lower courts to the High Court.

5. The suit was originally filed in the Senior Principal Magistrates Court No.364/94 (civil case) on 14 February 1994. Four years later the plaintiff/applicant applied for transfer of the case to the High Court at Nairobi Miscellaneous civil application 948/97 and the same was granted. No action was taken by the plaintiff.

6. The plaintiff took no action thereafter. The cause of action arose in 2 January 1991. After 13 years, no trial had been held.

7. The Hon. Judge allowed it and dismissed the suit.

8. Thus four years later the plaintiff returns to seek prayers of setting aside this courts orders.

II: Findings

9. The application has been brought under section 3A Civil Procedure Act. The application to dismiss the suit was made under Order XVI r 5 Civil Procedure Rules under this rule a party cannot set aside a dismissal order but is required by law to file a new suit subject to the Limitation of Actions not having expired. If it has, parties are given an opportunity to seek for leave to file suit out of time. Section 3A Civil Procedure Act is not available to the applicant.

10. If per chance it was available to the applicant the suit itself would not sand. The reason being that it was transferred from the lower courts to the High Court. The reasons of lack of jurisdiction by the subordinate courts to hear the matter. The applicant transferred this suit to the High Court. The High court would consequently have no jurisdiction to hear the suit.

11. I hereby disallow this application and dismiss it with costs to the respondent.

Dated this 11th day of November 2007 at Nairobi.

M.A. ANG'AWA

JUDGE

F.S. Mwaura of Mwaura Shairi & Co. Advocates for the plaintiff/ applicant - present

A.M. Kiaragu of Kiaragu & Co. Advocates for the defendant/respondent - present