



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 1659 of 1999

PETER GATHUITA.....PLAINTIFF

VERSUS

RUARAKA HOUSING CO. LTD.....1ST DEFENDANT

FRANCIS MBURU CHOMBA.....2ND DEFENDANT

MADRINA NJOKI.....3RD DEFENDANT

R U L I N G

This is the defendants' application for the dismissal of the suit, for want of prosecution.

When canvassing the application, the defendants pointed out that the pleadings herein were closed in 1998, and that since then, the plaintiff had not taken steps to prosecute the suit.

The defendants drew the court's attention to the fact that on 22nd September 2003 and 19th October 2004, they had withdrawn their earlier applications, through which they had sought orders for the dismissal of the suit, for want of prosecution.

In response to the application, counsel for the plaintiff notified the court that his client had passed away on 15th February 2006. A funeral and death announcement was extracted from the "**Daily Nation**" newspaper of 22nd February 2006, to show that the plaintiff had passed away.

Following the demise of the plaintiff, his advocate requests the court to give an opportunity to the administrators to his Estate to arrange for the substitution of the plaintiff, with a view to proceeding with the case.

The court records show that on 6th December 2001, this court dealt with a Notice To Show Cause why the suit should not be dismissed. The court had issued that notice to the plaintiff, pursuant to the provisions of Order 16 rule 2 (1) of the Civil Procedure Rules. In effect, the Plaintiff had failed to prosecute the suit for over a year, by the time the court served him with the Notice to show cause.

When his advocate, Miss Mugo attended court, she informed the court that the plaintiff had been sick for a long period of time. She also told the court that the plaintiff had since recovered, and was ready to proceed with the case. As a result of that assurance, the court did not dismiss the suit.

Almost one year later, on 2nd December 2002, the defendants filed an application to dismiss the suit

for want of prosecution. That application came up for hearing on 29th January 2003. On that day, the plaintiff's advocate persuaded the defendants to have the application adjourned indefinitely. In the meantime, the plaintiff's advocate was allowed, by the court, to file an application to cease acting.

It later transpired that the plaintiff's advocates, M/s Mwangi Chege & Company, did not apply to cease acting for the plaintiff. It would appear that the plaintiff persuaded the advocates to continue acting for him. They therefore filed the plaintiff's Replying Affidavit on 18th September 2003, through which it was explained that although he had been ailing from 1998 when thugs had attacked him, the plaintiff had since recovered. His plea was to be given an opportunity to prosecute the claim.

When the application dated 21st November 2002 came up for hearing, on 22nd September 2003, the defendants withdrew it, on condition that the plaintiff paid costs, amounting to Kshs. 5,000/=, within fourteen days.

Thereafter, the Plaintiff filed an application dated 17th February 2004, through which he sought leave to serve the 2nd defendant by way of substituted service. When that application came up for hearing on 23rd March 2004, the plaintiff was granted leave to serve the 2nd defendant through an advertisement.

Although the court did grant leave for substituted service, the plaintiff did not effect service anytime soon thereafter. That failure to take further action prompted the 1st defendant to file another application for the dismissal of the suit, for want of prosecution. The said application was finally withdrawn on 19th October 2004.

It is noteworthy that the parties consented to the following order:

“The application dated 14.7.04 is withdrawn subject to payment of costs by the plaintiff, agreed at Kshs. 5,000/=, payable within the next 30 days: failing which the suit stands dismissed.”

It would appear that the plaintiff managed to pay costs to the 1st Defendant, as the said defendant would otherwise have only needed to notify the court of the failure, and the suit would have stood dismissed.

The 1st defendant waited until 17th January 2006 before filing another application for the dismissal of the suit, for want of prosecution. In response, the applicant has been told that the plaintiff passed away on 15th February 2006.

Given the history of this case, I was inclined to grant the prayers sought. However, following the very recent demise of the plaintiff, it strikes me as being callous to cause the claim to suffer a fate similar to that of the plaintiff.

Yet again, a look at the Plaintiff reveals that the claim's origin is traced back to the year 1974, when the plaintiff was allegedly allocated plot number 85. That plot is said to have been later subdivided into two parcels, which were then transferred to the 2nd and 3rd defendants respectively.

On 12th November 1998 this court ordered that construction should stop on the two parcels of land. The said status quo appears to have been maintained.

In these circumstances, it is only fair and just that the litigation come to an end sooner rather than later. In that regard I hold the view that even if the Estate of the plaintiff is to be given an opportunity to prosecute the suit, it must be on stringent terms, as justice must be fair to all parties. Therefore, I now direct that the application dated 13th January 2005 be dismissed. However, the 1st defendant shall be paid the costs thereof, by the plaintiff.

The Estate of the plaintiff is to take steps within the next THREE (3) MONTHS to ensure that:

- (a) the plaintiff is duly substituted.
- (b) The 2nd defendant is served with the summons to enter appearance, together with the Plaintiff.
- (c) The 1st defendant's costs, which are assessed at KShs. 2,000/= are paid.

In the event that the foregoing conditions are not met, within the prescribed period of time, the plaintiff's suit herein shall stand dismissed.

Dated and Delivered at Nairobi this 30th day of May 2006.

FRED A. OCHIENG

JUDGE