

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 508 of 1989

**PAULINE WANGUI MWINGA (suing on her behalf and on behalf of the Estate of
GRACE NYAMBURA MWINGA) PLAINTIFF**

VERSUS

KAGAYU MURAGE DEFENDANT

RULING

(1) The Plaintiff, Pauline Wangui Mwinga, acting in person has in her Notice of Motion dated and filed on the 11th February 2005 sought an order to set aside my order of the 2nd December 2005 dismissing this suit with costs for want of prosecution. The application is supported by the Plaintiff's own affidavits respectively sworn on the 11th February 2005, the 18th May 2005 and the 19th July 2006. The gist of the averments made in these affidavits is that the Plaintiff was let down by the firm of Messrs. Gautama & Kibuchi, Advocates, whom she had engaged to act on her behalf. The Plaintiff says that her failure to prosecute the suit arose purely due to the mischief on the part of her Advocates who failed to advise her appropriately.

(2) The Defendant filed Grounds in Opposition to the application on the 3rd May 2005. In his submissions, Mr. John Wananda, learned counsel for the Defendant, expounded these grounds citing authorities. He contended, *inter alia*, that the application is incurably and fatally defective and should be struck out and further that it discloses no or no sufficient grounds to warrant the re-instatement of the suit.

(3) The parties also consented to the filing of the affidavit sworn on the 13th June 2005 by Josephat Namada, Esq., Advocate. He says that between April 1998 and the end of 1999, he was employed by Messrs. Gautama & Kibuchi and had the conduct of the Plaintiff's brief. The firm closed down towards the end of the year 2000 and although he invited the Plaintiff by letter dated the 15th January 2001 to collect her file, she did not do so until three months later by which time Mr. Namada had surrendered the file to a Mr. Micheu, a former partner in the firm of Messrs. Gautama & Kibuchi. Mr. Namada says that the Plaintiff could not therefore have known that a motion had subsequently been filed on the 8th September 2004 seeking orders to dismiss her suit for want of prosecution.

(4) I have considered the application in the light of this evidence and submissions. In the Amended Plaintiff filed on the 30th October 1989, the Plaintiff's address for service is given as care of Messrs. Gautama & Kibuchi, Advocates, Meru South House, Tom Mboya Street, P.O. Box 72881, Nairobi. The Defendant has not explained why the Notice of Motion filed on the 8th September 2004 was not served upon the Plaintiff's Advocates at their physical address on Tom Mboya Street which would have been the logical and by far the most expeditious mode of effecting service. I can only assume his Advocates knew that the firm of Messrs. Gautama & Kibuchi had ceased operations — hence their decision to serve by registered post. Had this fact been brought to my attention on the 2nd December 2004 when I granted the order dismissing the suit, I would have ordered that the application be served upon the Plaintiff personally to give her the opportunity of defending the same. In the result, the Plaintiff's suit was dismissed without hearing her and I do not, therefore, accept Mr. Wananda's submission that the Plaintiff has been indolent, inactive and unconcerned with her suit. It is clear from the evidence that she was abandoned by her

Advocates who closed shop without even the courtesy of informing their client. At the very least, Messrs. Gautama & Kibuchi ought to have applied for leave to withdraw from acting for the Plaintiff and notified her accordingly.

(5) The Defendant further contends that in light of Mr. Namada's said letter dated the 15th January 2001, re-instating the suit will be an exercise in futility. With respect, the burden of proving her case lies squarely with the Plaintiff and she cannot be denied the right to prosecute her suit merely on the ground that the Defendant is of the view that her cause of action cannot succeed. The Defendant's remedy lies in moving the court to strike out the Amended Plaintiff or, in the alternative, to apply for security for costs pending the hearing and determination of the suit.

(6) For the reasons I have given, the Notice of Motion dated and filed on the 11th February 2005 succeeds and in terms of prayer No. 3 thereof, I order that the order of dismissal made on 2nd December 2004 (and issued on the 5th January 2005) be and is hereby set aside thereby and hereby reinstating this suit for hearing on merit. In the somewhat peculiar circumstances of this application, there will be no order as to costs.

Orders accordingly.

Dated and delivered at Nairobi this nineteenth day of October, 2006.

P. Kihara Kariuki

Judge