

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

Civil Case 1770 of 1995

PETER MACHARIA MUKABI.....1ST PLAINTIFF

PETER MWANGI MUKABI.....2ND PLAINTIFF

VERSUS

STANLEY KIMANI MUKABI.....DEFENDANT

RULING

The defendant by way of this Notice of Motion dated 22nd February 2006 and expressed to be brought under O.XVI R.5 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeks orders that the plaintiff's suit be dismissed for want of prosecution. He also prays for costs of this application as well as the entire suit.

The application is based on the ground that the suit was filed on 8th June 1995 and the plaintiff has not taken any steps to set it down for hearing, that the suit was last in court on 11th February 2004 when the court ordered that the same be fixed for hearing at the registry and since then no steps have been taken to fix it for hearing.

The application is opposed by the plaintiffs who have filed Replying Affidavit in which it is averred that earlier the court had ordered by Githinji J (as he then was) that the proceedings relating to this case do proceed in Muranga court where Arbitration Cause No.96 of 1995 relating to the same dispute had been filed, that that matter was heard and judgment entered against the defendants which judgment was later set aside, that the plaintiffs thereafter filed an appeal at Nyeri High Court being Appeal No. 19 of 2005 which appeal had been admitted to hearing; that plaintiffs did not think it necessary to fix this suit for hearing and that they can fix this suit for hearing if this court insists.

Mr. Nduati for the defendants submitted that the plaintiffs filed this suit against the defendant on 8th June 1995 and that on 11th February 2004 when the same last came to court they were ordered to take a hearing date in the registry but to date they have not done so.

The plaintiffs admit that they were ordered to fix the suit down for hearing but submit that they had filed an appeal in High Court in Nyeri relating to the same dispute which appeal has been admitted to hearing and hence the reluctance to fix this one for hearing.

This suit has been in court for the last 12 years and in view of the fact that the plaintiffs has admitted that he had filed an appeal in the High Court at Nyeri relating to the same dispute and hence the reluctance to fix this one for hearing, it is only fair and just that one of the two suit should be discontinued.

The defendant having applied that this one be dismissed for want of prosecution and the plaintiff having shown unwillingness to take a hearing date, the defendant's application must be allowed and I order that the plaintiffs suit herein be and is hereby dismissed for want of prosecution with costs of this application as well as the main suit.

Dated and delivered at Nairobi this 12th day of October 2006.

J.L.A. OSIEMO

JUDGE