

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
HIGH COURT CIVIL CASE NO. 21 OF 1989

STEPHEN J. MBURU NJOROGE PLAINTIFF/RESPONDENT
VERSUS
NANCY WAMBUI MBAU DEFENDANT/APPLICANT

R U L I N G

Nancy Wambui Mbau (hereinafter referred to as the Defendant/ Applicant) is seeking through her notice of motion dated 15th April 2004 to have the Plaintiff's suit dismissed under order XVI rule 5 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for want of prosecution. It is the applicant's contention that the Plaintiff has taken no action since 20th January 2003 to have the suit prosecuted. A perusal of the court file indicates that the Plaintiff/Respondent commenced this suit on 8th February 1989 when he filed his plaint and that a defence and a counterclaim was filed by the Defendant/Applicant on 16th May 1989.

The parties filed a joint statement of issues on 18th December 1989. It is evident from the file that between 1989 and January 2003, the parties have come to court on several occasions. The matter was even referred to arbitration by consent of the parties, but the arbitration award was later set aside and arbitration superceded. That was way back on 22nd March 1993. Since then the matter has again been fixed for hearing on numerous occasions but has never taken off. I do not think that this is a case in which the court can conclude that the Plaintiff is not interested in his suit. There appears to have been a lot of intervening factors which have contributed to the delay in the prosecution. The plaintiff has otherwise exhibited his interest by having the suit fixed for hearing many times. In any case as pointed out by the advocate for the Plaintiff the Defendant/Applicant has also not taken any action to prosecute his counterclaim and cannot therefore lay the blame squarely on the Plaintiff. Each had a duty to take action to have the suit heard.

I find that this is not an appropriate case for action under Order XVI rule 5 of the Civil Procedure Rules. I dismiss the application and Order that the suit be fixed for hearing within the next 3 months and that the case be given priority given the time it has already taken.

Dated signed and delivered this 18th day of March 2005.

H. M. OKWENGU

JUDGE