



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 2658 OF 1998**

**THE ASSUMPTION SISTERS OF NAIROBI REGISTERED TRUSTEES ..... PLAINTIFF**

**VERSUS**

**BESNON MUKUWA WACHIRA ..... DEFENDANT**

**R U L I N G**

The Respondent to the substantive suit, hereinafter referred to as Benson Wachira has filed an application dated 25th April 2003, seeking orders for the dismissal of the suit for want of prosecution.

It is Benson Wachira's submission that when the case came up for Hearing on 29th February 2000, the Applicant to substantive suit (hereinafter referred to as Assumption Sisters), the case was adjourned, at the request of the Assumption Sisters. Benson Wachira further states that the reason for the adjournment was that the Assumption Sisters had indicated to the Court that they needed to file a supplementary affidavit. Following the adjournment of the case, Benson Wachira says, no steps have been taken by the Assumption Sisters to prosecute the case. After the case had remained dormant for a period of about 2 years, Benson Wachira was convinced that the Assumption Sisters were no longer interested in prosecuting the case, hence his decision to file the Chamber Summons dated 25/4/02.

Benson Wachira has pointed out the fact that an order for stay was issued in 1999, in favour of the Assumption Sisters. He contends that the said Assumption Sisters are therefore in the happy position, hence their lack of interest in the prosecution of the substantive suit. Meanwhile, he, Benson Wachira is said to be suffering substantial loss and prejudice, as he is unable to enjoy the fruits of the suit property of which he is the registered owner.

What is the response of the Assumption Sisters to all these serious issues?

The Assumption Sisters have filed a Replying Affidavit of one Sister Leah Wambui Kimani. The said Affidavit explains the reasons for the delay in prosecuting the case, as being the death of Sister Martin Wanjiru who had the conduct of the case for the Assumption Sisters, at the start of the case.

Sister George Mumbua replaced Sister Martin. However, she did not get round to attending to this case. It was not until Sister Leah Wambui Kimani took over the responsibility of the center built on the suit premises that the Assumption Sisters familiarized themselves with the case. They also appeal for one last opportunity to prosecute the case. It is their contention that the dismissal of the suit at this stage would occasion serious prejudice to the 2000 orphans housed by the Assumption Sisters.

I find that on the face of it, a delay of 2 years without any steps being taken to prosecute the suit would normally be deemed as inordinate. That is so, when the provisions of Order XVI rule 5 are borne in mind, as the said rule enables an application for dismissal for want of prosecution to be brought after the lapse of 3 months. However, every case must be looked at on its own merits. In this case, the Assumption Sisters have set out an explanation for the delay of 2 years. It is incumbent upon me to assess whether or

not the explanation given is reasonable and sufficient to enable me exercise my discretion in favour of the Assumption Sisters.

I have perused the court records, and noted that the adjournment of the trial on 29/2/00 was by consent of the parties. The record does not show that the said adjournment was prompted by the Assumption Sisters' request for time to file a supplementary affidavit. However, I hasten to add that the absence of the reason from the court record does not by itself add to or detract from the present application by Benson Wachira.

Having given due consideration to the submissions of the Counsel, and also after a careful perusal and consideration of the pleadings herein, I note that the suit property is land. This court takes judicial notice of the sensitivities of the Kenyan population in relation to the land matters. I also note that it is common ground between the parties, that the Assumption sisters had put up structures catering for numerous orphans and marginalized children.

This court is persuaded that if the case by Benson Wachira is as strong as his counsel had said it is, it would be only a matter of time before the Assumption Sisters reach the day of reckoning. However, I believe that the interests of justice for both parties can best be achieved by allowing the case to proceed to trial, rather than by dismissing it at this stage.

However, I fully appreciate that this is an old case. It must therefore be prosecuted diligently henceforth. I make the following orders:-

- (i) The Notice of Motion dated 25/4/02 is dismissed.
- (ii) Costs of the application are awarded to the Respondent (BensonWachira) in any event
- (iii) The Applicant (The Assumption Sisters of Nairobi Registered Trustees) must set down the case for Hearing within 4 months, failing which it will stand dismissed automatically.

Dated this 27th day of January 2004.

**F.A. OCHIENG**

**Ag. JUDGE**