



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL SUIT NO.126 OF 2000**

ANNA NDUNGE KISIA ..... PLAINTIFF

VERSUS

1. MUNICIPAL COUNCIL OF MOMBASA

2. SADIQ OMAR SALIM ..... DEFENDANTS

**R U L I N G**

Application before me is a Notice of Motion dated 28th March 2003 filed by Mr. Khatib advocate, acting for the 2nd defendants, seeking the dismissal of this suit for want of prosecution under Order XVI Rule 5 of the Civil Procedure Rules.

This suit was initially instituted by ANNA NDUNGE KISIA (the plaintiff) through a plaint dated 13th March 2000 drawn by M/s KENZI AND KENZI ADVOCATES on her behalf against The Municipal Council of Mombasa (1st Defendant) only. The prayers sought were a declaration that Plot No.294 Mikindani (suit property) belongs to the Plaintiff and an order of injunction to issue against the 1st defendant restraining it from obstructing and threatening the plaintiff or in any way interfering with the suit property.

On the 21st March 2000 an amended plaint was filed, bringing in the second defendant. The pleadings however remained the same as per the original plaint dated 13th March 2000.

The law firm of M/s Khatib & Co. Advocates filed a Notice of Appointment on the 27th March 2000 to act for the 2nd Defendant, while Mr Karisa Iha advocate is acting for the 1st Defendant.

On the 14th September 2000 M/s J.M. Mburu & Co. advocates filed a Notice of Change of Advocates. They took over the defence of the first defendant from Mr. Karisa Iha Advocate.

On 2nd October 2001 Kenzi & Kenzi Advocates filed a Notice of Motion seeking leave of the court to cease acting for the plaintiff on ground that they had been acting for the plaintiff and her husband in numerous matters for the last eight years and accumulated substantial legal fees which remained unpaid. Leave was granted as prayed. Thereafter the plaintiff engaged the services of M/S Musinga & Co. advocates. Now Mr. Joseph Munyithya is prosecuting this case.

It is Mr. Munyithya's submission in opposing this application that the delay in prosecuting this case was due to change of advocates and that there was a delay in getting the plaintiff's file from M/s Kenzi & Kenzi advocates over pending legal fees which had to be paid.

I have also perused the pleadings filed and the record of the court. The substantive suit could not have been set down for hearing when application dated 27/6/2001 was still pending.

In that application the 2nd defendant was seeking the setting aside of an order made on 26.6.2001 dismissing an application dated 28.3.2001 for want of prosecution. The defendants have not therefore made out a case for the dismissal of this suit for want of prosecution.

There is no merit in the Notice of Motion dated 28th March 2003 and the same is dismissed with costs to the plaintiff.

It is so ordered.

**Dated and delivered at Mombasa this 30th July 2003.**

**A.G.A. ETYANG**

**JUDGE**