



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 4462 OF 1986**

**JAMES KAREGI KIRATHE.....PLAINTIFF**

**VERSUS**

**GEORGE KANGETHE NYORO & ANOR.....DEFENDANT**

**RULING**

This is the plaintiffs application made under Order IXB Rule 8 Civil Procedure Rules for two main orders namely:

1. That the exparte order made on 4.12.98 (dismissing plaintiffs suit for want of prosecution be set aside and the suit be reinstated to hearing
2. The suit be transferred to Milimani Commercial Court for hearing. On 9.7.97 end defendant filed an application dated 12.5.97 for dismissal of the plaintiffs suit for want of prosecution under Order XVI Rule 6 CP Rules.
3. The application was allowed on 4.12.98 and the suit against both defendants was dismissed for want of prosecution under Order XVI Rule 6 Civil Procedure Rules.

As Order XVI Rule 6 Civil Procedure Rules provides if the suit is dismissed for want of prosecution under that Rule, plaintiff may, subject to the law of limitation, bring a fresh suit. Order IXB Rule 8 CP Rules provides

**“Where under this order Judgment has been entered or the suit dismissed, the court, on application by summons may set aside or vary the judgment or order upon such terms as just”**

I have under the words “where under this order” under IXB deals with hearing of suits and consequences of non – attendance on the hearing date. Under Rules 2 and 4 of that order the court can dismiss the suit under the circumstances described in those Rules. Order IXB Rules 8 Civil Procedure Rules gives court jurisdiction to set aside the order of dismissal made pursuant to order IXB when suit is called for hearing on the hearing date. Order IXB Rule 8 does not deal with an order of dismissal of a suit for want of prosecution made under Order XVI Rule 6 Civil Procedure Rules does not give court jurisdiction to set aside an order dismissing suit for want of prosecution under Order XVI Rule 6 Civil Procedure Rules.To that the application is incompetent.

On the merits of the application my Ruling of 4.12.98 explains the record plaintiff blames Mr. John Kamau Stompie who filed documents on his behalf on 27.10.98. But even before then plaintiff had not taken steps to prosecute this old suit filed in 1986 and where the cause of action arose in 1982. After the suit was dismissed on 4.12.98 plaintiff engaged M/S Thuki & Company Advocates who filed a Notice of Appointment on 24.3.99. But she did not file an application for setting aside the dismissal order at all. The present application was filed by another firm of Advocates on 6.4.2001. It is clear therefore that the present application was not filed expeditious in the circumstances of this case as explained in my ruling of 4.12.98, plaintiff does not deserve any indulgence of the court and setting aside the dismissal order will cause great prejudice to the defendants as it is not justly possible to conduct a fair hearing after the lapse of over 15 years since the suit was filed.

In the circumstances I dismiss the application with costs to 2nd defendant.

**E. M. Githinji**

**Judge**

**13.11.2001**

**Mr. Ohaga holding brief for Miss Njoroge present**

**Mr. Gichuji for 2nd defendant present**