



**REPUBLIC OF KENYA**  
**N THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 1709 of 1994**

**JOHNSON MBURU KINYANJUI .....PLAINTIFF**

**V E R S U S**

**1. PYRETHRUM BOARD OF KENYA**

**2. THE HON. ATTORNEY GENERAL .....DEFENDANTS**

**R U L I N G**

The suit herein for damages for malicious prosecution was filed on 11<sup>th</sup> May, 1994. The Defendants filed defence denying liability. The suit was subsequently dismissed for want of prosecution **under Order 16, rule 6 of the Civil Procedure Rules** (the Rules).

The Plaintiff has applied by chamber summons dated 8<sup>th</sup> October, 2008 to set aside the order of dismissal and for reinstatement of the suit. The application is said to be made under Order 9B, rule 8 of the Rules. Section 3A of the Civil Procedure Act, Cap 21 (the Act) is also cited.

As already pointed out, the suit was dismissed under Order 16, rule 6 of the Rules. That rule provides:-

“6. In any case not otherwise provided for in which no application is made or step taken for a period of three years by either party with a view to proceeding with the suit, the court may order the suit to be dismissed; and in such case the plaintiff may, subject to the law of limitation, bring a fresh suit.”

The suit was not dismissed under Order 9B of the Rules. Only in that event would an application under rule 8 of that Order be competent. As it is, the application is incompetent. An order for dismissal under Order 16, rule 6 of the Rules is not amenable to being set aside under Order 9B, rule 8 of the Rules.

Even on merit I would dismiss the application. The Plaintiff has given an unlikely story for not taking any action towards prosecution of the suit from the year 1998 to October 2008, a period of 10 years. That story is contained in the two supporting affidavits annexed to the application. One affidavit is sworn by the Plaintiff, the other one by his advocate. The explanation given is that about the year 1998 the Plaintiff's file was misplaced in the course of the advocates moving offices and could not be traced.

Ten years is too long a period of time for a file to disappear without taking any action to reconstruct the file. Such reconstruction could easily have been done using documents copied from the court record, or the records of the opposite counsels. It is alleged that because of the misplacement of the Plaintiff's file at his advocates' offices even the court case number could not be known. But surely, such information would have been available from the court register of suits? At least the Plaintiff himself would have known the year when his suit was filed if he was interested in the suit and was following it up!

Having considered the written submissions filed on behalf of the parties, including the case cited, I find no merit in the application by chamber summons dated 8<sup>th</sup> October, 2008. The same is hereby dismissed with costs to the Defendants. It is so ordered.

DATED AT NAIROBI THIS 1<sup>ST</sup> DAY OF JULY, 2009

**H. P. G. WAWERU**

**J U D G E**

**DELIVERED THIS 3<sup>RD</sup> DAY OF JULY, 2009**