

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU**

Civil Case 111 of 1997

CATHOLIC DIOCESE OF MURANG'APLAINTIFF

VERSUS

MANASSES DUNCAN WACHIRA.....1ST DEFENDANT

JACINTA WAIRIMU MUBARI..... 2ND DEFENDANT

KIRINYAGA COUNTY COUNCIL.....3RD DEFENDANT

R U L I N G

This suit was filed on 14/11/97 by the Catholic Diocese of Murang'a by way of originating summons. The same was served on the respondents and 1st and 2nd respondents filed their replying affidavits. 3rd Respondent filed grounds of opposition dated 23/9/98. Thereafter the case against the 3rd Respondent was struck out. The suit was to proceed with the rest of the parties but apparently the applicant did not move the court from July 2000. This prompted the Respondents to file the motion for dismissal of the suit under Order XVI Rule 5 of the Civil Procedure Rules.

The said application was in my considered view properly served on the Plaintiff/Respondent on 26/9/2005 as clearly indicated at the back of the supporting affidavit of the 1st Defendant/Applicant.

The affidavit of service dated 26/9/2005 shows clearly that the application was served on one Joseph Karanja Maina. I am actually perturbed that the Plaintiff/Respondent can actually turn round and deny service. I am satisfied that the said motion was properly served. It was not responded to and so my sister **Judge Khaminwa** allowed the same and dismissed the suit for want of prosecution on 25/11/2005. Almost 7 years later, the plaintiff filed the instant application asking the court to set aside that order. I would like to point out from the outset that Order 1X B Rule 8 cited by the Plaintiff/Applicant does not apply in this case as the suit was dismissed for want of prosecution under Order XVI Rule 5 and not for non-attendance under Order 1 X B. I nonetheless note that the applicant has invoked Section 3 A of the Civil Procedure Act and that cushions it against striking out for being defective. The reasons given for non prosecution of the suit was basically that their advocate on record died and they did not know how to prosecute the matter. (see paragraph 9 of supporting affidavit dated 3/10/2006).

As stated earlier, I like my predecessor believe that the application was properly served on the plaintiff but they chose to ignore the same. Non-service is therefore not an issue here.

Basically therefore other than general lethargy, there is no reason whatsoever as to why the plaintiff did not either prosecute the suit or respond to the application for dismissal. I have nonetheless perused the annexures to the Replying Affidavit including the valuation report. No doubt the plaintiff has substantially developed the plot in question. It is also not disputed that the Respondents have never been in physical occupation of the land and are not likely to suffer any loss that cannot be compensated by way of damages if the suit is reinstated. It is in the interest of justice that the matter be heard and decided on merit. I will therefore allow the application dated 3/10/2006 and reinstate the said suit but order that the Plaintiff/Applicant pays the Respondents thrown away costs of 20,000/= within 45 days from the date hereof failing which the order reinstating the suit will automatically lapse and the suit will stand dismissed.

Orders accordingly.

W. KARANJA

JUDGE

Delivered, signed and dated at Embu this 5th day of Nov. 2009.

In presence of:- Ms Wairimu & Mr. Mogusu for Wangari