



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Case 1351 of 1980**

**MIRIAM GACOKI KIARIE .....PLAINTIFF**

**V E R S U S**

**1. THE ATTORNEY GENERAL**

**2. WAWERU RANJA**

**3. WILLIAM WAITUIKA KIHURIA .....DEFENDANTS**

**R U L I N G**

This is an application by the 2<sup>nd</sup> Defendant (by amended notice of motion dated 29<sup>th</sup> April, 2008, the original application being dated 15<sup>th</sup> October, 2003) for dismissal of the Plaintiff's suit for want of prosecution. It is brought under Order 16, rule 5(d) of the Civil Procedure Rules (the Rules). Under that rule, if, within three months after the adjournment of the suit generally, the plaintiff, or the court of its own motion on notice to the parties, does not set down the suit for hearing, the defendant may either set it down for hearing or apply for its dismissal.

The 2<sup>nd</sup> Defendant's case in this application is that the suit was last before a judge on 20<sup>th</sup> February, 1998 when a ruling was delivered and the suit then removed from the hearing list. Since that date, and by the time this present application was filed on 16<sup>th</sup> October, 2003, the Plaintiff did not take any steps to fix the case for hearing. It is argued for the 2<sup>nd</sup> Defendant that this is inordinate delay which the Plaintiff has not explained at all. Because of this delay, it is the 2<sup>nd</sup> Defendant's further case, it can no longer be possible to have a fair trial of the action, especially because the original parties are now long dead.

In her replying affidavit the Plaintiff has acknowledged the delay. But she has blamed her previous advocates for it. She says they closed their chambers in 1998 and disappeared with her file. That notwithstanding, she kept making enquiries at the court registry about the status of her case. But she remained none the wiser because she was always told that the court file was missing. The registry did not even acknowledge her written enquiries because, she says she was told, the file was missing. She makes a passionate plea to be allowed to prosecute the suit. She further says the suit land was bought by her late husband (the original plaintiff) in 1968 from the mother of the 3<sup>rd</sup> Defendant, and further, that she has been in occupation of the land since 1971.

I have carefully considered the submissions of the learned counsels appearing, including the cases cited. This suit was filed in 1980, some 28 years ago. When the application for dismissal was filed, there had already been a delay of over five (5) years in prosecuting the case. The application for dismissal was heard *ex parte* and allowed on 12<sup>th</sup> March, 2004. That order was reviewed and set aside on 18<sup>th</sup> April, 2008 to enable the application for dismissal to be heard *inter partes*.

As already seen, the Plaintiff has blamed her previous advocates for the delay in prosecuting the suit. But what efforts did she herself make to ensure prosecution of the suit without undue delay? She says that over the years she had been "making queries on this file in the High Court Registry without

success". She further says that her "numerous requests for the file were never stamped by the court registry officials as the file was never traced ... since 1999 (to the) year 2005". But she has not exhibited a single letter of protest addressed to the court complaining about her missing file. All she has exhibited is a request dated 16<sup>th</sup> August, 2005 by her then advocates to peruse the court file. She says that her advocates on record, Njenga Muchiri & Company, closed their offices suddenly and without notice in or about 1998, and they disappeared with her file. She further says that she was at a loss as to what to do because she "had no papers to reconstruct the file". Why did she not at that point consult another lawyer (in 1998) to find out what may have happened to her suit? Why did she wait until August 2005 to instruct M/s Kagongona & Co., Advocates to peruse the court record?

I do not find at all any credible explanation for the inordinate delay in prosecuting the suit between 20<sup>th</sup> February, 1988 and 16<sup>th</sup> October, 2003 when the present application was filed, a period of five years. The delay is quite inordinate. This delay has been further exacerbated by the further delay that has occurred since the application was heard *ex parte* and allowed on 12<sup>th</sup> March, 2004.

As already noted, this suit was filed in 1980, 28 years ago. It is said that the original parties and witnesses are long dead. I am therefore satisfied that it will no longer be possible to have a fair trial of the action. It is thus not just that the suit should continue to hang over the heads of the Defendants.

Having considered all the matters urged, I will allow the amended notice of motion dated 29<sup>th</sup> April, 2008. The Plaintiff's suit as against all the Defendants is hereby dismissed with costs for want of prosecution. The 2<sup>nd</sup> Defendant shall have the costs of this application. Those will be the orders of the court.

**DATED AT NAIROBI THIS 2<sup>ND</sup> DAY OF OCTOBER, 2008**

**H. P. G. WAWERU**

**J U D G E**

**DELIVERED THIS 3<sup>RD</sup> DAY OF OCTOBER, 2008**