



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**Civil Case 122 of 1995**

**TERESIA KAGONDU ELASTO.....APPLICANT/PLAINTIFF**

**Versus**

**MWOBE GATHUTE.....1ST RESPONDENT/1ST DEFENDANT**

**LAND REGISTRAR - KIRINYAGA.....2ND RESPONDENT/2ND DEFENDANT**

**RULING**

The Applicant in her Notice of Motion dated 28th July, 2004 is praying for the dismissal of the Respondent's application dated 21st September, 2001 for want of prosecution. There is no dispute that the last time that application came up for hearing was on 8th December 2003. But since the Respondent has come to oppose this Notice of Motion with a new advocate, I would have been inclined to dismiss this Notice of Motion with hope that new blood on the side of the Respondent will not be same as the old blood. However the unfounded grounds the Respondent is relying upon take me aback. Even if the technical defects counsel for the Respondent is claiming to exist do exist, which is hotly contested, I would rather invoke Section 3A of the Civil Procedure Act to decide the Notice of Motion on its merits.

Firstly, by the time the Respondent's application dated 21st September, 2001 was filed in this court, there may have been one judge, though that is highly doubtful. But for sure, from the year 2000 this court has always had two judges. By 8th December, 2003 I myself was at this station having come together with my present colleague Hon. Lady Justice H. M. Okwengu in July 2003 and that strength has remained same to-date. There was therefore no question of the applicant having failed to get a hearing date at this court because there is only one judge at the station.

Further, during the second half of each year at this station, a schedule covering the whole of the coming year is issued showing when various types of cases handled at this station will be dealt with in the new year and once that programme is out, parties in cases are free to take hearing dates for their various cases. By the time the Respondent's application was adjourned on 8th December, 2003 therefore, dates for the year 2004 were available and the diary had not passed the quarter and remained with dates for a considerable part of the year 2004 in which the same process was repeated for this year 2005. It is therefore not correct to suggest that hearing dates at this station have not been available from 8th December, 2003 to the time the Respondent alleges to have come to fix his pending application for hearing only to be told that because of this Notice of Motion he could not be given a hearing date.

Then comes the allegation that the court case file was missing. I think gone should be the days when people would make wild allegations of files missing. If indeed a case file is missing, a concerned party in that case making serious and genuine inquiry would see court staff including the Executive Officer, the Deputy Registrar and even the judge in charge of station if need be, exchanging correspondence copies of which will provide evidence in an application like this Notice of Motion.

The Respondent has not been able to produce any such evidence. Moreover if a case file went missing, the other parties in the case would know. If effort was being taken to fix hearing dates the other parties would know as they would be receiving letters inviting them to fix consent hearing dates. In this matter the Applicant is not aware of any time case file went missing. She is not aware of any effort having been made to take hearing date. So what is the Respondent talking about?

If the applicant caused adjournment of the application dated 21st September, 2001 on 8th December, 2003, that cannot prevent him from questioning the delay in having that application heard thereafter. It is now a good 1½ years and a party who says that that is not delay is a party who does not want his case to

be heard. The Civil Procedure Rules do not allow all that long.

I think the above reasons are sufficient to conclude this ruling. I may, however, add that the law firm of M/S MACHARIA MURAGURI, ADVOCATES seems to be acting in this matter in contravention of Order III Rule 9A Civil Procedure Rules although they deny it.

On the whole therefore, the Notice of Motion dated 28th July, 2004 is hereby granted as prayed.

*Dated this 1st day of July, 2005.*

**J. M. KHAMONI**

**JUDGE.**