



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NYERI**

**CIVIL CASE NO. 625 OF 2014**

**SIMON NGUYO ..... 1ST PLAINTIFF/RESPONDENT**

**MICHAEL MAINA NGUYO..... 2ND PLAINTIFF/RESPONDENT**

**JOACHIM GITONGA NGUYO..... 3RD PLAINTIFF/ RESPONDENT**

**-VERSUS-**

**ATANASIUS GITARI NGUYO..... DEFENDANT/ APPLICANT**

**RULING**

1. This is the defendant's Notice of Motion dated 9<sup>th</sup> May, 2014 seeking an order of this court to dismiss the suit for want of prosecution and costs thereof. The Application is expressed to be brought under **Order 17 Rule 2(3), Order 51 Rule 1** of the Civil Procedure Rules and **Sections 1A, 1B and 3A** of the Civil Procedure Act and all enabling provisions of the Law.

2. The application is anchored on a supporting affidavit deposed by Athanasius Gitari Nguyo, the defendant herein sworn on **9<sup>th</sup> May, 2014** on the grounds that the suit was last in court on **10<sup>th</sup> October, 2012** when the matter was taken out of the hearing list for that day; that since then, the plaintiffs have never taken any steps to fix the matter for hearing or comply with Order 11 of the Civil Procedure Rules which action has resulted in the applicant incurring costs in legal fees and the pendency of the suit has continued to cause him unnecessary anxiety; That from the conduct of the plaintiff, it is clear that the plaintiffs have lost interest in the claim.

3. The application is opposed vide a replying affidavit sworn by Simon Nderi Nguyo, the 1<sup>st</sup> plaintiff herein on his behalf and on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs. He deposes that whereas it is true that the matter was last in court on 12<sup>th</sup> October 2012, the hearing did not proceed on that date because counsel for the defendants sought an adjournment. Further, that they had on several occasions tried to contact and visit their former advocate in his offices but had always found his offices closed and his phone was always out of reach; that it was only after a lot of time had passed that they learnt that their former advocate had been struck off the roll of advocates and therefore incompetent to conduct this matter which information their advocate did not reveal to them; that they have since engaged the services of another advocate to expedite the hearing of this matter. They urge the court to allow their case to be heard on merit and not to punish them for mistakes occasioned by their former advocate.

4. I have considered the affidavits of both parties and oral submissions by their respective counsels. From the court record it is true that before the filing of this application, this matter was last in court on 10<sup>th</sup> October 2012 when the matter was taken out because counsel holding brief for Ms. Njoroge for the plaintiff, stated that Ms. Njoroge could attend court and conduct the hearing as she had been served late with the hearing notice. Further, upon perusal of the court record I have noted that neither the plaintiffs nor the defendants have filed their witness statements, list of documents or drawn up the issues for determination by this court.

5. So, the question i must now pose is this; is this a suit that warrants dismissal?

After considering the reasons given by the plaintiffs about the actions and fate befalling their former advocate and taking into account that they have now engaged a new advocate to represent them, I will exercise my discretion and give the plaintiffs an opportunity to prosecute their claim.

6. The plaintiffs will however pay costs to the defendant for this application and comply with order 11 of the Civil procedure Rules within 14 days of delivery of this ruling. The defendant is also granted leave of 14 days to comply with order 11.

7. Pretrial on 27th January, 2016.

**Dated, signed and delivered at Nyeri this 12<sup>th</sup> day of November, 2015.**

**L N WAITHAKA**

**JUDGE**

**In the presence of:**

N/A for plaintiffs

N/A for the defendants

Court assistant - Lydia