REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL SUIT 321 OF 2009

BENJAMIN KIMUYA IVULILA.....PLAINTIFF/RESPONDENT

VERSUS

1. SAMSON KIMULA MUSYOKI

2. DANIEL NGUMBI NDETEI
3. MWENDWA KITHUKU

4. NDUNGUU NDAVI.....DEFENDANTS/ RESPONDENTS

RULING

1. On **28/10/09, Benjamin Kimuya Ivulila** (hereinafter, the "*Respondent")*, filed a Plaint initiating a suit against **Samson Kamula Musyoki, Daniel Ngumbi Ndetei, Mwendwa Kithuku, and Ndunguu Ndavi** (hereinafter, *"Applicants").* The suit asks for a finding and declaration that certain parcels of land now registered in the names of the Applicants were so registered in trust for the Respondent.

2. The Applicants entered appearance on 05/11/2009 through their advocate, **King'oo Njagi & Co. Advocates** who then filed a Statement of Defence on behalf of the Applicants on 17/11/2009. In the main, the Defence denies any trust relationship and avers that there have been previous proceedings over this matter at Makindu Law Courts and that this suit, therefore, represents an abuse of the process of the court.

3. On **23/11/2009**, the Respondents advocate invited the Applicants' advocates to send a representative to meet theirs at the Machakos High Court registry with a view to fixing a suitable hearing date for the matter. The record does not indicate what, if anything, happened on the appointed date to wit **25/11/2009.**

4. Nothing further happened in the matter until **06/08/2010** when the current advocates for the Applicants, **Kang'oli & Co. Advocates**, filed a Notice of Change of Advocates. On **25/01/2011**, they filed a Notice of Motion ("*Application*") seeking that the suit be dismissed for want of prosecution. The Applicants aver that by the time they filed their application, it had been more than a year since the suit was filed and the Respondent had not taken any steps to set it down for hearing or take any pre-trial steps. The Applicants say that this amounts to inordinate delay and shows that the Applicant is not interested in prosecuting the suit and that, therefore the same should be dismissed with costs for want of prosecution.

5. The Application and the Supporting Affidavit were served on the Applicant's advocates on **07/02/2011.** The Application was fixed for hearing for **11/10/2011** and a hearing notice duly served on the Respondent's advocate. It is not clear why the Application was not heard on that day but a new date was taken before the Deputy Registrar. The Application would now be heard on **24/11/2011**. A new hearing notice was served on the Respondent's advocates. Through all these, the Respondent's advocates did not file any papers in the response to the Applicant's Application. It was only in the morning of **24/11/2011** when the Respondent's advocate filed a Replying Affidavit sworn by **Mr. P.M. Mutuku**, the advocate handling this matter on behalf of the Respondent. That affidavit was only served on the Applicant's advocate a few minutes before the Application was to be heard on **24/11/2011.**

6. When the matter came up for hearing on **24/11/2011, Mr. Mutuku** was not present. He had, instead, sent another lawyer, **Mr. Tamata** to hold his brief with instructions to seek an adjournment to give him time to file an application seeking leave to withdraw from acting for the Respondent on the ground that Mr. Mutuku has been unable to get instructions from the Respondent. **Mr. Tamata** represented that **Mr. Mutuku** was away at Milimani Court attending to a matter which had been filed under a Certificate of Urgency there hence his absence.

7. **Mr. Kamau** who was holding brief for **Mr. Kang'oli** for the Applicants vehemently opposed the application for adjournment. I noted that the Application had been filed more than **eight** months before **24/11/2011** and there was no adequate explanation why Mr. Mutuku had not filed his application to withdraw or prepare to defend the Application. I declined to grant an adjournment. At **Mr. Tamata's** urging, I placed the file aside so that he could obtain further instructions from Mr. Mutuku. The matter resumed at 12:45 PM. This time, **Mr. Musyoki** was present for the Applicants.

8. **Mr. Musyoki** urged me, first, to expunge the Replying Affidavit because it offends the clear provisions of **Order 51, Rule 14.** That rule obligates a party to file and serve any replying papers to an application not less than three clear days of the date of the hearing of the application. It gives the court discretion to hear the application *ex parte* if a Respondent fails to comply with the rule. **Mr. Musyoki** urged me to treat the Application as unopposed.

9. In any event, argued **Mr. Musyoki,** the Application should be allowed on its merits. The resistance to the Application by the Respondent, argued Mr. Musyoki, is nothing more than a ploy to delay realization of justice for the Applicants. As he sees it, the Respondent is not really interested in prosecuting the suit but only to subject the Applicants to unnecessary anxiety.

10.**Mr. Tamata** urged me not to expunge the Replying Affidavit on the ground that it occasions the Applicants no injury at all. There are no material matters raised in the Replying Affidavit, argued Mr. Tamata, which would have required more time by the Applicants to respond to. The Court should, therefore, eschew technicalities and, in the spirit of the new Civil Procedure Act and Rules, decide the matter on its merits despite the non-compliance by the Respondent with the rule on filing and serving replying documents.

11.On the merits, **Mr. Tamata** argued that land is a sensitive and emotive issues and it is important that the parties ventilate their respective cases before a Court decides on the issues. **Mr. Tamata** secondly argued that the failure to set the case for hearing was actually caused by the Court registry because there were simply no dates available. It would, therefore, be very unfair to the Respondent to dismiss the matter on account of non-availability of dates in the Court registry.

12.I have anxiously considered the Application. Yet, at the end of the day, I have declined to accept the invitation by the Applicants to dismiss this suit for want of prosecution. I have come to that determination against the background that this is a land dispute. Given the special place land occupies in our national and community psyche, economy and culture, it is important, wherever possible, that disputes involving land be fully ventilated and a decision given on its merits. As the Court of Appeal remarked in the *Trust Bank v Amalo Co. Ltd* (Civil Appeal No. 215 of 2000 (Kisumu), indeed, in any dispute, the Court has an abiding objective of reaching the merits of the suit if at all possible. The Court said:

The principle which guides the court in the administration of justice when adjudicating on any dispute is that where possible suits should be heard on their own merits. This was succinctly put a while ago by George C.J. (Tanzania) in the case of Essanji & Another v Solanki [1968] EA 224:

The administration of justice should normally require that the substance of all disputes should be investigated and decided on merits and that errors should not necessarily deter a litigant from pursuing litigation.

13. In this case, I have taken into consideration that the Respondent's advocates did try at least once to fix the case for hearing. I have also taken judicial notice of the high number of pending cases at the **Machakos High Court registry** and the fact that until recently, it was very difficult to get hearing dates for cases. Indeed, and quite sadly, in the scheme of things, cases instituted in **2009** are considered fairly "*new*." This has simply been the unfortunate reality at Machakos High Court registry. At present, the new policy is for the Deputy Registrar to give dates through a call over system beginning with the oldest cases. **2009** cases do not, as yet, qualify for priority dates under this new system owing to the high numbers of older cases pending.

14. This does not excuse the conduct of the Respondent in this matter. Indeed, it is disturbing that no efforts to comply with any pre-trial procedures have been taken. I find it necessary to take some space in this ruling to register the Court's disappointment in the Respondent's counsel's handling of the matter so far. Their failure to professionally prosecute the Application, timeously file replying papers to the Application and show up for the hearing of the Application demonstrate a worrying pattern of the kind that all too often brings disrepute to our profession. However, I will not visit the sins of the advocate on his client in these circumstances.

15.In the circumstances, I will dismiss the Application with the order that the costs be in the cause.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this day **15TH** day of **FEBRUARY 2012**.

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J.M. NGUGI
JUDGE