



**REPUBLIC OF KENYA**

**High Court at Nakuru**

**Civil Case 32 of 2004**

**FRASIA WANJIRU MAINA.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**LEAH GATHONI.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**JOYCE WOTHAYA NJOKA.....3<sup>RD</sup> PLAINTIFF/RESPONDENT**

**PETERSON MAINA KIMITI.....4<sup>TH</sup> PLAINTIFF/RESPONDENT**

*(Suing in their capacity as the legal representatives of the estate of WAMAHIGA NJOROGE MUTITU (deceased))*

**VERSUS**

**ESTHER WACHUKA NJOROGE.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**HANNAH MUGURE NJOROGE.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**JOHN NDUNGU WAMBUGU.....3<sup>RD</sup> DEFENDANT/APPLICANT**

**HELLEN WANJIKKU BABU.....4<sup>TH</sup> DEFENDANT/APPLICANT**

**JOHN KAMAU MWANGI.....5<sup>TH</sup> DEFENDANT/APPLICANT**

**NANCY NGUNYU KIMANI.....6<sup>TH</sup> DEFENDANT/APPLICANT**

**PAULINE WANJIRA MIANO.....7<sup>TH</sup> DEFENDANT/APPLICANT**

**GRACE WANJIKU MIANO.....8<sup>TH</sup> DEFENDANT/APPLICANT**

**LUCY GATHONI MAINA.....9<sup>TH</sup> DEFENDANT/APPLICANT**

**JAMES WANJOHI NJOROGE.....10<sup>TH</sup> DEFENDANT/APPLICANT**

**SAMUEL GICHIRI NJOROGE.....11<sup>TH</sup> DEFENDANT/APPLICANT**

**EDWARD THUO NJOROGE.....12<sup>TH</sup> DEFENDANT/APPLICANT**

### **RULING**

This is the defendants Notice of Motion dated 24<sup>th</sup> March 2011 seeking an order of this court to dismiss the suit subject thereto for want of prosecution, that the injunctive orders given on 19<sup>th</sup> February 2004 and registered against TITLE NOS. LAIKIPIA/MARAKWET/2222-2236 (*both inclusive*) be discharged, lifted and/or set aside and costs thereof. The Application is expressed to be brought under order 40 Rule 7 and order 51 Rule 1 of the Civil Procedure Rules 2010 and under section 1(A), (B) (1)(d) of the Civil Procedure Act.

The application is anchored on a Supporting Affidavit deponed to by the 1st Defendant Esther Wachuka Njoroge sworn on 24<sup>th</sup> March 2011 on the grounds that the suit was instituted on 4<sup>th</sup> February 2004 against her and her co-defendants. She avers that the plaintiffs contemporaneously with the suit, filed an application for injunction dated 3<sup>rd</sup> February 2004 seeking for orders of injunction against them as well as a prohibitory order restricting and/or restraining any transaction that would affect Title Nos LAIKIPIA/MARMANET/2222-2236 (*both inclusive*). The honourable court on 19<sup>th</sup> February 2004 issued interim orders to the plaintiffs and the same were duly registered against the suit properties by the plaintiffs.

The Defendants set out their case as follows; (*seven*) 7 years after the issuance of the orders the plaintiffs have not taken any steps nor made any attempt to fix the case for hearing giving no indication that they are keen to prosecute their case. Further the orders registered against the suit properties have adversely affected the Defendants enjoyment of the rights and privileges conferred by registration as proprietors thereof. She further states that in the interest of justice and fair play the suit should be dismissed for want of prosecution and the said orders discharged and/or set aside because if they are not, the lands office will continue inhibiting their title notwithstanding dismissal of the suit.

The application is contested. In his replying affidavit the Fourth (4<sup>th</sup>) Plaintiff Peterson Maina Kamiti states that he is a bonafide purchaser. He purchased the land in question from Wamahiga Njoroge Mutitu (deceased). He further states that the 1st Defendant fraudulently took out a title deed to the said parcel of land in her names and sold it to the other Defendants.

The Fourth (4<sup>th</sup>) plaintiff then engaged the services of NJIHIA NJOROGE & CO. ADVOCATES to institute this suit. However the advocate was appointed a Magistrate without their knowledge but he kept his law office open which kept indicating to the Defendants that their matter was being dealt with. The plaintiff stated it would be unfair to allow the mistake of the Advocates to be borne by the Defendants and if the present application is dismissed his entire family who reside on the land would be rendered homeless.

I have heard the rival submissions. I take the following views on the matter. Before this application, this matter was last in court on 19<sup>th</sup> February 2004 when the Plaintiffs obtained their interim orders which they proceeded to register against the suit properties. Since then they have not taken any action to have the suit set down for hearing. The explanation given by the plaintiffs for not taking any step for the facilitation of the hearing of this suit are not satisfactory. The Plaintiffs did not write even a letter to court during the (7) seven years to state their frustrations with their advocate. The same way they have managed to change their Advocate once threatened with an application for dismissal is the same way they would have engaged another counsel were they interested in prosecuting this matter.

It is true to say that the court should be slow to dismiss a suit for want of prosecution if the suit can be heard without any further delay, if the defendant will not suffer any hardship and if there has been no flagrant and culpable inactivity **Victory Construction Company vs. A. N. Duggan (1962) E.A. 697**. But in this case where the Plaintiff has taken no action to move the court except to change counsel after being served with an application for the dismissal of their suit, I am persuaded that in this case the plaintiffs has lost interest in the suit.

The continued presence of the injunction orders obtained on 19th February 2004 and registration of the same against the suit properties is highly prejudicial to the defendants/applicants who are unable to deal with the suit properties in their best interests.

I find the Notice of Motion dated 24<sup>th</sup> March 2011 is merited.

The orders of this court are:

- (1) That the plaintiffs suit is dismissed for want of prosecution.
- (2) That the injunctive orders given against TITLE NOS. LAIKIPIA/MARMANET/2222-2236 (*both inclusive*) are lifted.
- (3) The costs for the suit and are awarded to the Defendants.
- (4) The applicant to bear the costs of this application.

**Dated, signed and delivered at Nakuru this 30<sup>th</sup> day of November 2012**

**L.N. WAITHAKA**

**JUDGE**

**PRESENT**

Hon. Lady Justice L Waithaka  
Mr Olonyi holding brief for the applicant  
Mr Simiyu for the respondent  
CC: Ray