



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Environmental & Land Case 361 of 2008**

**HENRY WAINAINA KARIUKI..... 1<sup>ST</sup> PLAINTIFF**

**PATRICK MWANGI KARIUKI ..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**SOLOMON MBUTHIA KIMANI**

**JOSEPH Z. MWANGI**

**JAMES MWANGI WAINAINA (*sued for and on behalf of***

**GATANGA ENDANI GROUP) ..... 1<sup>ST</sup> DEFENDANT**

**THE HON. THE ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

The plaintiffs are sons of one Joseph Kariuki Karua said to be the registered proprietor of a parcel of land known as LOC.1/Gatanga/297. They bring this claim against both defendants based on the right of licence and user of the said parcel of land.

It is their case that on or about 16<sup>th</sup> march, 2001 the Land Registrar at Thika transferred the said parcel of land to the 1<sup>st</sup> defendant. It is also their case that the said transfer was irregular and unlawful. Upon service of the summons herein, the 1<sup>st</sup> defendant filed a Statement of Defence and Counterclaim. The 2<sup>nd</sup> defendant also filed a Defence which is on record denying the claims raised by the two plaintiffs. Upon closure of the pleadings, no action was taken by the two plaintiffs and as a result, there is now before me an application by way of Notice of Motion under Order XVI rule 5(a) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for orders:

- 1. That the plaintiff's suit herein be dismissed with costs for want of prosecution;**
  - 2. That the fate of the counterclaim herein abide by the outcome of this application;**
- and**

**3. That the costs of this application be provided for.**

The grounds upon which his orders are sought are that:

- (a) The plaintiffs have neglected, refused and/or otherwise failed to take any steps to prosecute the suit for over 8 months since pleadings closed;**
- (b) It is apparent therefore that the plaintiffs have lost interest in this matter;**
- (c) The continued existence of this suit dormant and unprosecuted by the plaintiffs is prejudicial to the defendant; and**
- (d) It is in the interest of justice that the plaintiffs' suit be dismissed for want of prosecution.**

In addition to the said grounds, there is an affidavit sworn by James Mwangi Wainaina in support of the said application.

Order XVI rule 5(a) provides that if within three (3) months after the close of pleadings the plaintiff does not set down the suit for hearing, the defendant may either set the suit down for hearing or apply for its dismissal.

The record reveals that it is over eight months from the time the pleadings were closed to the date this application was filed. The 1<sup>st</sup> defendant is therefore within the provisions of Order XVI aforesaid to apply for the orders sought.

This application was served upon the learned counsel on record for the plaintiffs on 9<sup>th</sup> December, 2009, but as at the time of hearing this application, there was no reply filed on their behalf and no reason has been advanced for the said default.

There is also evidence in writing which is annexed to the application that the 2<sup>nd</sup> plaintiff has withdrawn his suit against the defendants. The 2<sup>nd</sup> defendant supports the application brought by the 1<sup>st</sup> defendant. On my part, I must consider that the dismissal of a suit is a drastic measure but which must be taken if there is laxity and inordinate delay on the part of a litigant.

The delay in this case has not been explained by the plaintiffs despite service of an application of this nature upon their counsel. There is also lack of interest expressed by the 2<sup>nd</sup> plaintiff which of necessity extends to the 1<sup>st</sup> plaintiff, the two being brothers and litigating under the same title. There is also one observation which I must make and this is that, although the land belongs to the father of the plaintiffs, there is no reason advanced as to why their father has not moved the court instead of the plaintiffs. The locus of the two plaintiffs is also in issue.

I consider the delay in this case inordinate and therefore hold that the suit should be dismissed for want of prosecution. It is so ordered.

The 1<sup>st</sup> defendant has filed a counterclaim which is on record. A counterclaim is an independent pleading and from the record before me, there are matters which cannot be determined summarily. Having dismissed the plaintiffs' suit, the 1<sup>st</sup> defendant shall now move to prosecute its counterclaim. The defendants shall have the costs of the main suit and this application.

Orders accordingly.

*Dated, signed and delivered at Nairobi this 12<sup>th</sup> day of March, 2010.*

**A. MBOGHOLI MSAGHA**  
**JUDGE**