



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Case 60 of 2004

PAUL MUTUA MULUMBI 1ST PLAINTIFF/RESPONDENT

MBATHA MUTUA 2ND PLAINTIFF/RESPONDENT

VERSUS

MATHA MBULWA MULI 1ST DEFENDANT/APPLICANT

LAWRENCE MUASA 2ND DEFENDANT/APPLICANT

CHAIRMAN ATANGWA CLAN 3RD DEFENDANT/APPLICANT

RULING

1. The Application dated 30/1/2007 seeks orders that the suit herein be dismissed for want of prosecution under Order XVI Rule 5 (a) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. In the Supporting Affidavit sworn on 30/1/2007, the Applicant depones that the pleadings closed on 25/6/2004 and since then the Plaintiff/Respondent has refused, neglected and/or failed to set down the suit for hearing.
2. In the Replying Affidavit sworn on 13/3/2008, the Plaintiff's/Respondent's response to the Motion and the issues raised therein is that the suit was triggered by the Applicant's attempts at getting a share of title No. Mwala/Nyanyani/371 registered in the Applicant's name. While the suit was pending the dispute was placed before the Machakos District Land Disputes Tribunal and his attempt at stopping the proceedings of the Tribunal was overruled and the Defendants had in any event stated that the matter in the High Court had been withdrawn. He decided to await the hearing before the Tribunal to proceed and for the matter there to be determined before he could revisit the present suit.
3. That it was therefore the Applicants who **“diverted (his) attention from this case to the Tribunal which was over the same subject matter, otherwise the matter would have proceeded to hearing”**. Further that he is prepared to proceed with the suit and any consequences of delay should be visited on the Applicants.
4. Order XVI Rule 5 of the Civil Procedure Rules provides as follows:-

“5. If, within three months after –

- a. the close of pleadings; or
- b. (Deleted by L.N.36/00)
- c. the removal of the suit from the hearing list; or
- d. the adjournment of the suit generally, the plaintiff, or the court of its own motion on notice to the parties, does not set down the suit for hearing or apply for its dismissal.”

5. Further, in Mukisa Biscuit Co. vs West End Distributors (1969) E.A 696 it was held as follows:-

“It is the duty of the Plaintiff to bring his suit to an early trial, and he cannot absolve himself of this primary duty by saying that the defendant consented to the position.”

6. There is no doubt that whatever his motivation for coming to this court and whatever the trigger for filing this suit, it was the Plaintiff who came to court on 19/5/2004 and sought the simple prayer that the Defendants be enjoined, permanently, from trespassing onto his parcel of land aforesaid. After the Statement of Defence was filed on 29/6/2004 the Plaintiff went to sleep until woken up by the present Application. It is not a defence to say that the Defendants diverted his attention elsewhere. The suit belonged to him as the initiator thereof and he ought to have taken necessary steps to ensure its expeditious disposal.

7. The explanation given before me is not tenable and the Applicants have good reason to remove the burden of this suit from their backs and so I will accede to their request and shall order the present suit to be dismissed for want of prosecution.

8. Costs thereof to the Defendants.

9. Orders accordingly.

Dated and delivered at Machakos this 30th day of July 2009.

ISAAC LENAOLA

JUDGE

In presence of: Mr Kisongo for Plaintiff

N/A for Defendant

ISAAC LENAOLA

JUDGE