



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**ELC Civil Case 1044 of 2007**

**ESTHER WANDIA NJUGUNA ..... 1<sup>ST</sup> PLAINTIFF**

**TABITHA NEJRI NJUGUNA ..... 2<sup>ND</sup> PLAINTIFF**

**HARRISON MWANGI MUCHIRI ..... 3<sup>RD</sup>  
PLAINTIFF**

**VERSUS**

**JAMES NGANDU MUTHIGANI ..... 1<sup>ST</sup> DEFENDANT**

**JOSEPH NJOROGE MUTHIGANI ..... 2<sup>ND</sup> DEFENDANT**

**SAMUEL THUKU MUTHIGANI ..... 3<sup>RD</sup> DEFENDANT**

**CHARLES GITAU MUTHIGANI ..... 4<sup>TH</sup> DEFENDANT**

**STEPHEN MWAURA MUTHIGANI ..... 5<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 6<sup>TH</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 7<sup>TH</sup> DEFENDANT**

**RULING**

**APPLICATION TO DISMISS SUIT FOR LACK OF  
PROSECUTION NOTICE OF MOTION 18 JANUARY 2007**

**I: BACKGROUND**

1. I have before me an application Notice of Motion

18 January 2007 seeking orders that I dismiss the entire suit before this court for lack of prosecution. This application was filed on

18 January 2007. The grounds being that for 3 months the plaintiff 1, 2 and 3 have failed to set the suit down for hearing.

2. The plaintiff 1, 2 and 3 are Esther Wandia Njuguna and Tabitha Njeri Njuguna – the administratrix of the estate of Njuguna Kamande now deceased on 15 October 1990. The 3<sup>rd</sup> plaintiff is a buyer who bought 0.5 acres from the said deceased. They sued the eight defendants including the Attorney General for fraud and illegal sub-division of the land. This sub-division of the main suit land being Chania/Mataara/839.

3. The land was sub-divided several times.

4. The plaintiff prayed that the land be restored to its original state to them. They filed suit on 27 May 2003 when the Narc Government was in power.

5. After close of pleading the parties took dates in the registry on 27 April 2004. The dates of 16 and 17 November 2004 was not indicated in the file. There was preserved no hearing.

6. On 20 March 2007 the Land and Environmental Division was operational. The parties appeared only by the defendant. Fresh dates was sought before Rawal J.

7. The parties took no action. On 25 January 2008 the dates for an application 18 January 2008 was taken. This in effect is the reasons whereby the respondent alleged that the suit requires to be dismissed for non prosecution.

8. The plaintiff respondent filed their reply out of time and the same was rejected.

9. In the matter before court the defendant applicant relied on the cause law of:-

9.i Mobile Kitale Service Station V Mobile Oil Kenya Ltd & Another (2004) I KLR 1 Warsame J

Where it held that dismissal of suit for want of prosecution is meant to prevent injustice and or abuse of the process of court. It is at the discretions of the court.

While in the case of:

9.ii) Agip (Kenya) Ltd V Highlands Tyres Ltd (2001) KLR 630 Visram J.

Where the judge outlined 3 principal governing dismissal for want of prosecution.

Namely,

(i) Delay is inordinate

(ii) The inordinate delay is excusable

And (iii) The defendant is likely to be prejudiced by the delay.

10. The applicant prayed that I dismiss this suit for lack of prosecution.

## **II: Opinion**

11. In this matter I require to consider whether the application herein was delayed inordinately. There was a mention of another suit being Hccc759/91 that already determined the issue in question. Is

this a claim for Res Judicata? If it is, it is misplaced in the application before court.

12. I find that there should be at least one year in land matters before dismissal is issued but this is at a discretion of court and circumstances of each case. The applicants are not to abuse the process of court and neither should the respondent.

13. I am of the view that the parties be given time in which to sufficiently bring this suit to its conclusion.

14. The application is rejected and dismissed with no orders as to costs.

DATED THIS 8<sup>TH</sup> DAY OF MAY 2008 AT NAIROBI.

**M.A. ANG'AWA**

**JUDGE**

B. Mureithi instructed by B. Mureithi & Co. Advocates for the defendant/applicant

R.N. Kamiro instructed by Kamiro & Co. Advocates for the plaintiff/respondent