



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 193 of 2002

CHARLES MUGO.....1ST PLAINTIFF

JOHNSON KABUTU.....2ND PLAINTIFF

JOHN GITAU.....3RD PLAINTIFF

KIBAARA KINYA.....4TH PLAINTIFF

VERSUS

PETER GACHOKI MBURIA.....1ST DEFENDANT

PETER MBOGO NYUMU.....2ND DEFENDANT

DAVID KARIMI NYUMU.....3RD DEFENDANT

PAUL MURIITHI NYUMU.....4TH DEFENDANT

ESTHER MICERE NYUMU.....5TH DEFENDANT

HANNAH WAMBURA KANGURU.....6TH DEFENDANT

MARGARET WAMBETI KARIITHI.....7TH DEFENDANT

GRACE WANGITHI MACHAI.....8TH DEFENDANT

CRISPON KIHARA MACHAI.....9TH DEFENDANT

SOSPETER KABUCHWA MACHAI.....10TH DEFENDANT

JOSEPHAT KARIUKI MAHCAI.....11TH DEFENDANT

ELIUD RUGAITA MURANE.....12TH DEFENDANT

JAMES NDEGE NJUGUNA.....13TH DEFENDANT

JOSEPHAT MURAGE MARARO.....14TH DEFENDANT

JOSEPH NJENGA GIOKO.....15TH DEFENDANT

GICHUBI PETER AMOS.....16TH DEFENDANT

STEPHEN MUNYI.....17TH DEFENDANT

RULING

By a notice of motion dated 20th September 2006 brought under Order XVI rule 5 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, the Defendant/Applicant seeks to have the Plaintiff's suit dismissed for want of prosecution.

It is contended that the Plaintiff/Respondent are no longer interested in the suit and that is why they have taken no action to have the suit set down for hearing since 4th August 2001 when the suit was filed.

In an affidavit sworn by the applicant's advocate Francis Kalwa, it is deponed that the Respondent filed a Chamber Summons on 12th November 2002 and obtained an order of injunction which orders have remained in force to date, but that notwithstanding the applicant's protestations the Respondent has taken no action to have their suit listed down for hearing since 4th October 2001 when the suit was filed.

In a replying affidavit David Njue Kabungo who is one of the Respondents sets out the chronology of events showing that since the filing of the suit on 4th October 2001 a lot of activities have taken place including the transfer of the suit from Nairobi High Court to Nyeri, the hearing of an application for an injunction and an application seeking to set aside the injunctive orders which were granted, contempt proceedings and an application by the Defendant/Applicant for striking out the Plaintiff's suit, the last two applications being still pending.

It is contended that the delay in having the main suit listed for hearing has been caused by the numerous applications and also by the death of one of the Plaintiffs.

I have carefully considered the application, the affidavit in support and in reply together with all the annexures thereto as well as the entire court record.

It is evident that the hearing of this suit has been hampered by the parties concentrating on the hearing of the applications rather than the hearing of the main suit. It is also evident that the Plaintiff/Respondent has not acted diligently in ensuring that their suit is disposed off expeditiously as no efforts have been made by the Plaintiffs to list the main suit for hearing. The fact that one of the Plaintiffs is now deceased cannot be a bar to the suit proceeding. The court has not been shown what efforts have been made to have any person appointed an administrator of the deceased Plaintiff for purposes of proceeding with this suit. I would concur with the submissions of the applicant's advocate that the Plaintiffs/Respondents appear to be comfortable with the interlocutory injunctive orders and are therefore not anxious to have this matter disposed off. While I recognise the fact that this suit involves the emotive issue of land ownership, and that it would not be desirable to dismiss the suit for want of prosecution without hearing the suit on merit, it is evident that the Plaintiff/Respondent requires to be jump started in order to make them move forward with their suit.

For this reason I will order that the Plaintiffs shall take action to have their suit listed for hearing and to have the suit heard within 6 months from the date hereof, failing which the Plaintiffs' suit shall stand dismissed.

The Defendants shall have costs of this application.

Those shall be the orders of this court.

Dated, signed and delivered this 8th day of February 2007.

H. M. OKWENGU

JUDGE