



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

Civil Case 385 of 2006

1. Land and Environmental Law Division

2. Subject of main suit:

Land

LR KJD/Kitengela/2333

Original title KJD/Kitengela 1953

- a) Construction of dam – encroaching on plaintiffs land
- b) Injunction to restrain defendant in trespass
- c) Injunction granted Dulu J (13 April 06) court vacation
- d) No action taken
- e) Defendant application 5 March 2007 to dismiss suit for want of prosecution

3. Civil Practice and Procedure

- a) Application 5 March 2007 to dismiss suit

4. In reply

- a) Matter recently taken over from former advocate
- b) The pleading not yet closed

5. Held

6. Case law related filed Hccc385/06 Joseph Wachira Ngatia v Sigma Seed Ltd

7. Advocates

1. Mburubu for A. Mburubu & Co. Advocates for the plaintiff

2. O. Agina for Agina & Co. Advocates for the defendant

DAVID KINUTHIA KIMANIPLAINTIFF

VERSUS

SIGMA FEEDS LIMITED..... DEFENDANT

RULING

I: BACKGROUND

1. The subject of the main suit is land being

LR KJD/Kitengela/2333 from original title KJD/Kitengela/1953 sub division.

2. The defendant, a limited liability company are alleged to have begun constructing a dam some time in 2006 which dam is alleged to have encroached onto the plaintiffs land.

3. The plaintiffs filed a suit against the defendant together with an application for injunction during Easter court vacation. The plaintiff obtained ex parte orders from the court (Dulu J) that directed the application be served for inter-party hearing on 25 April 2006. Once the orders ere obtained on 13 April 2006 the plaintiff advocates M/s Lang' at & Madeline & co. Advocates took no further steps in the matter.

4. Almost a year later the defendant filed this application of

5 March 2007, the subject matter of this ruling, seeking the dismissal of the entire suit for want of prosecution.

II APPLICATION 5 MARCH 2007

5. Since obtaining then exparte orders on 13 April 2006, the plaintiff have taken no action. Their suit should therefore be dismissed under order XVI r 5 (a),(b) and (c) Civil Procedure Rules.

6. In reply the plaintiff stated that he has now changed advocates. He prays that the application be not allowed as pleadings are not yet closed.

III FINDING

7. The defendants are correct in moving this court to dismiss the suit for lack of prosecution. All they require is a lapse of 3 months of inactivity before making application.

8. The rules unfortunately at the High Court had been changed. Previously no suit was permitted to be dismissed until summons for Direction (really the pre trial conference) was first heard by the Deputy Registrar and or judge. The rule for summons for Directions was done away with and expurged from our rules. It therefore means a suit may be dismissed without having to confirm that the pleading are closed and summons for directions are done.

9. The former advocates were most certainly negligent in obtaining ex parte orders then taking no further action. They were bound to obey the courts orders by serving the defendants so that inter party hearing may be heard. What if per chance the plaintiff did not pay them their fees? The advocate is bond to complete the work then sue later for his fees.

10. Should this suit be dismissed?

III: FINDING

11. The suit is of public interest suit. It involves the environmental Act. The plaintiff is not only the litigant herein. There is a related case Hccc385/20 pending.

12. As this is a public interest case I would not dismiss the same. There is now a new advocate on record whom it is hoped would prosecute this suit ably.

13. The application is dismissed with costs to the defendants/applicant.

Dated this 19th day of June 2007 at Nairobi.

M.A. ANG'AWA

JUDGE

A. Mburubu for A. Mburubu & Co. Advocates for the plaintiff

O. Agina for Agina & Associates Advocates for the plaintiff