



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

**Civil Case 812 of 2003**

1. Land and Environmental Law Division
2. Subject of main suit – Land ownership declaration first
3. Application No.1 dated 21 February 2007

Seeking to dismiss suit for want of prosecution

ii) Court rejects applications after hearing directs parties to pre-trials under parties own supervision. Dates be taken in the registry.

4. New application No. 2

iii) Advocates for defendant files new application dated 5.3.07 seeking of the striking out of the plaint on grounds that previous proceeding not disclosed

iv) That the verifying affidavit failed to disclose the address

5. Application opposed.

v) Though there is an omission the defect can be rectified

vi) Affidavit not fatally defective

6. Held:

1. Application dismissed

2. Parties to proceed to main suit

7. Case law: Microsoft Corporation v Mitsumi Computer Garage Ltd & Another

Milimani Hccc810/01 Ringera,J.

8. Advocates:

K. Mbuvi for K. Mbuvi & Co. Advocates for the plaintiff

M.T. Adala for M.T. Adala & Co. Advocates for the defendant

**APOLINA MUTHON WAITHUNGURI & OTHERS.....PLAINTIFF**

**VERSUS**

**SAMUEL MWANGI KINUTHIA.....DEFENDANT**

**RULING**

1: Back ground to application of 5 March 2007

1: The main suit herein concerns trust. The plaintiff filed suit claiming that the defendants hold land in trust of them.

2. The defendant is alleged to have taken the whole land of Chania/Mataara/03 comprising of 10 acres.

3. It is clear that there are other related suit to this one but the same presumably having abated being Hccc 494/80.

4. On the 26 January 2007 the defendant filed an application seeking the dismissal of this suit. I heard the parties on the 20 February 2007 and gave them a ruling on the 21 February 2007. I declined to dismiss this suit on the grounds that the plaintiff attempted several times to set this matter for hearing but was never heard. I directed that the parties proceed to pre- trials and take dates in the registry for hearing.

5. Instead, the defendant applicant returned to court on 5 March 2007 with an application of 5 March 2007 and fixed a new application for hearing during the court vacation.

II Application 5 March 2007

6. By an application of 5 March 2007 defendant sought court orders that the whole suit be struck out on technicalities. The first, on none disclosure of existence of a former suit, the other on the verifying affidavit.

7. In reply the plaintiff/respondent claim the matter may be curable. The plaintiff/respondent asked that he be not punished for omissions made.

III: Finding

1. I refer to the case law of:

Microsoft Corporation V Mitsumi Computer Garage Ltd & Another

Milimani Hccc810/01, Ringera J.

On verifying affidavit and would note that a minor omission is not fatal to the application.

I accordingly find the application is frivolous. I had requested parties to proceed to prepare for trial under their own supervision.

9. This was not done I would find the application before me is to circumvent this suit from proceeding to trial.

10. The application of 5 March 2007 be and is hereby dismissed with costs to the plaintiff/respondent.

Dated this 18<sup>th</sup> Day of June 2007 at Nairobi.

**M.A. ANG'AWA**

**JUDGE**

K. Mbuvi for K. Mbuvi & Co. Advocates for the plaintiff

M.T. Adala for M.T. Adala & Co. Advocates for the defendant