



1. Land and Environmental Law Division
2. Subject of main suit land.
  - a) Limited liability arrived 1,688 access of land LR 11154/2
  - b) Coffee Farmers company
  - c) Management/directors agreed to sub-divide land to pay debt Ksh.60 m.
  - d) 3<sup>rd</sup> defendant chair allegedly and fraudulently transferred properties to himself his wife and son defendant 1 and 2 respectively
  - e) 3<sup>rd</sup> defendant dies. Advocate seeks time to substitute 3<sup>rd</sup> defendant 13.6.02 Hayanga J) and court adjourns.
  - f) No action taken from 3.6.02 to 2007.
3. Application 16 April 2007.
  - a) Advocate for 1 and 2 defendant seeks dismissal of suit for want of prosecution
  - b) 3<sup>rd</sup> defendants – suit abated
  - c) No replying affidavit advocate for plaintiff's intention to cease acting.
4. Held
5. Case law
6. Advocates:

Ochieng for Ochieng Onyango Kibet & Ohaga & Co. Advocates for the plaintiff/applicant - present  
Ogicho for A.H. Malik & Co. Advocates for the defendant/respondent- present

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**(MILIMANI LAW COURTS)**

**CIVIL CASE 995 OF 1994**

**MAVOLONI COMPANY LIMITED.....PLAINTIFF**

**VERSUS**

**TERESIAH NDUKU.....1<sup>ST</sup> DEFENDANT**

**RAPHAEL NZIOKA.....2<sup>ND</sup> DEFENDANT**

**JOHN BENEDICK KILONZO.....3<sup>RD</sup> DEFENDANT**

**RULING**

I: Application dated 16 April 2007 to dismiss suit for lack of prosecution

a) Background of application.

1. The plaintiff herein /Mavoloni Company Ltd own about three pieces of coffee farm land being;

Kathini Estate LR 11154/2 Western part

Soya Estate LR 11154/2 Eastern part

Ngoiba estate LR11488/2

2. The company was in the business of growing Coffee Sibal. Their Managers were the Standard Chartered Bank. Due to the prevailing economic situation in Kenya – being poor returns on coffee and high interest rates they were indebted to the tune of Ksh. 60 million. It was advised by their bank managers to sub- divide the properties and sell to reduce the indebtedness.

3. The company did so. It was whilst dealing with the Kathini estate LR 11154/2 that it transpired the 3<sup>rd</sup> defendant John Benedict Kilonzo, a former chairman of the company fraudulently and or illegally sold two properties of sub-division to his wife Teresia Nduku (defendant No.1) and his son Raphael Njoka (defendant No.2) that amounted to about Ks.5 million.

4. The company sued all three defendants seeking the setting aside of the sale agreement; seeking a refund of Ksh 9 million received as a result of the sale of the further 141 acres and orders for the 3<sup>rd</sup> defendant to return the company books.

4. An injunction had been applied for by the plaintiff. This was opposed Lakha (as he then was) leading the arguments. The injunction was rejected Owuor J (20 April 94).

5. Between 1998 to 2002 hearing dates were not reached by the High Court. No action to this matter was taken in fact between 1994 to 1998. On the 3<sup>rd</sup> June 2002 the matter came up for hearing before Hayanga J, when the advocate for defendants notified the court that the 3<sup>rd</sup> defendant had passed away. That there required to be an application made by the defendant advocate to substitute the estate. The advocate for 3<sup>rd</sup> defendant took no action for four years.

II: Application 16 April 2007

6. By an application of 16 April 2007 brought on behalf of defendant 1 and 2 the advocate sought for the dismissal of the suit for lack of prosecution. That for four years no action had been taken in his matter by the plaintiff.

7. The suit against the 3<sup>rd</sup> defendant has since abated and there is therefore nothing left against him. The plaintiff filed no reply to this application.

III: Finding

8. The suit before me appears to be of public interest more so to the plaintiff. The issue herein is of accountability by the defendants to the plaintiff.

9. The adjournment sought by the 3<sup>rd</sup> defendant on this case was on the basis that he is to be substituted. This indeed is an untrue claim as the defendants failed to substitute the 3<sup>rd</sup> defendant. The suit against him has abated unless the plaintiff seeks and or the defendants seeks leave to remove the suit being in the estate.

10. The suit against the 1<sup>st</sup> and 2<sup>nd</sup> defendant is still alive. Should this suit be dismissed. As stated there is no reply to this application save an indication from the bar that there were new advocates to take over. None therefore has been made.

10. The law requires that after 3 years the court may suo moto dismiss a suit without notice.

11. I hereby find the application by defendant 1 and 2 concerns important issues raised in the plaint.

12. I decline to dismiss this suit. The same be set down for hearing. No orders to costs.

Dated this 20<sup>th</sup> day of September 2007 at Nairobi.

**M.A. ANG'AWA**

**JUDGE**

Ochieng for Ochieng Ongango Kibet & Ohaga & Co. Advocates for the plaintiff/applicant- present

Ogicho for A.H. Malik & Co. Advocates for the defendant/respondent-present