



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CASE NO. 22 OF 2017**

MBUKONI HOLDINGS LTD.....1<sup>ST</sup> PLAINTIFF  
JARED OTIENO NGOJE.....2<sup>ND</sup> PLAINTIFF  
ROBERT NYAMBANDO NDUKO.....3<sup>RD</sup> PLAINTIFF  
JOHN MUSEMBI MUTALA.....4<sup>TH</sup> PLAINTIFF  
GEORGE MORARA MOMANYI.....5<sup>TH</sup> PLAINTIFF  
MICHAEL NJAMA KAMAU.....6<sup>TH</sup> PLAINTIFF  
SELINA NDUNGWA ISEVA.....7<sup>TH</sup> PLAINTIFF  
ERICK MURITHI GATHUMBI.....8<sup>TH</sup> PLAINTIFF  
JENIPHER WAMBUI.....9<sup>TH</sup> PLAINTIFF  
SAMUEL MUNYIRI MUKWA.....10<sup>TH</sup> PLAINTIFF  
DAVIS NYAGAKA NYAMWANGE.....11<sup>TH</sup> PLAINTIFF  
HIRAM MAINA CHEGE.....12<sup>TH</sup> PLAINTIFF  
DENNIS WANYONYI MASINDE.....13<sup>TH</sup> PLAINTIFF  
REUBEN LAISA MURUNGA.....14<sup>TH</sup> PLAINTIFF  
ERNEST ACHUTI GAMBI.....15<sup>TH</sup> PLAINTIFF  
PRISCILLA WAMAITHA MITHAMBO.....16<sup>TH</sup> PLAINTIFF  
ERASTUS MUCHEMI EUSTACE.....17<sup>TH</sup> PLAINTIFF

VERSUS

RACHEAL NTHENYA LUVITA.....1<sup>ST</sup> DEFENDANT  
JOHN MUNYAO MUINDI.....2<sup>ND</sup> DEFENDANT  
MULIKA MUINDI.....3<sup>RD</sup> DEFENDANT

RULING

1. In the Notice of Motion dated 23<sup>rd</sup> April, 2019, the Plaintiffs are seeking for the following orders:

- a. **This Honourable Court be pleased to review its orders made on 9<sup>th</sup> April, 2019 dismissing this suit for want of prosecution and reinstate it.**
- b. **This Honourable Court be pleased to reinstate the conservatory orders issued by this Honourable Court on 8<sup>th</sup> July, 2014.**
- c. **The costs of this Application be provided for.**

2. The Application is premised on the grounds that the Plaintiffs' suit was dismissed on 9<sup>th</sup> April, 2019; that the delay in prosecuting the suit was caused by the prolonged procedures of substituting the 1<sup>st</sup> Defendant and that the Plaintiffs accommodated the 1<sup>st</sup> Defendant's (*deceased*) advocate to take out Letters of Administration, thus occasioning delay in prosecuting the suit.

3. The 1<sup>st</sup> Plaintiff's Director deponed that the 1<sup>st</sup> Defendant was substituted on 30<sup>th</sup> January, 2019; that the date of 9<sup>th</sup> April, 2019 was fixed unilaterally by the Defendants' advocate and that the fixing of the suit for hearing was pre-mature because both parties had not complied with pre-trial requirements.

4. The 1<sup>st</sup> Plaintiff's Director finally deponed that the subject matter concerns land which is occupied by the Plaintiffs; that the dismissal of the suit without hearing it on merit has left a very unhappy and explosive situation on the ground and that the circumstances of this case enjoin the court to give effect to Article 159 (2) (d) of the Constitution in order to do substantive justice as opposed to express dismissal of the suit on technical grounds

5. In reply, the Defendants' advocate deponed that the Plaintiffs' suit was dismissed for non-attendance and want of prosecution; that on 8<sup>th</sup> July, 2014, the Plaintiffs were given forty five (45) days by the court to comply with Order 11 of the Civil Procedure Rules and that the Plaintiffs have the habit of filing incompetent suits and abandoning them.

6. The 1<sup>st</sup> Plaintiff's Director filed a Supplementary Affidavit in which he deponed that since the matter was coming up for hearing for the first time, the court should have accommodated the Plaintiffs' request and that it is in the interest of justice for the court to review and vary its orders by reinstating the suit. Neither the Plaintiffs' nor the Defendants' advocate filed submissions.

7. The record shows that the Plaintiffs filed this suit on 27<sup>th</sup> February, 2014. After ordering for the status quo obtaining to be maintained pending the hearing of the suit, on 8<sup>th</sup> July, 2014, the court gave the following directions:

**“The parties are directed to comply with Order 11 of the Civil Procedure Rules within the next forty five (45) days from the date hereof. The matter is fixed for a pre-trial conference on 13<sup>th</sup> October, 2014.”**

8. It would appear that the matter was never mentioned on 13<sup>th</sup> October, 2014 as directed. However, on 25<sup>th</sup> February, 2015, the court made the following orders:

**“Matter certified to be ready for trial. Parties at liberty to fix a hearing date at the court registry.”**

9. The order of the court certifying the matter ready for hearing was made after the Plaintiffs' advocate informed the court that the Plaintiffs had complied with the provisions of Order 11 of the Civil Procedure Rules.

10. It would appear that the Plaintiffs never fixed the matter for hearing in the registry as ordered by the court. However, on 30<sup>th</sup> January, 2019, the Defendants' Application dated 12<sup>th</sup> April, 2018 for the substitution of the 1<sup>st</sup> Defendant (*deceased*) with the Applicant, Racheal Nthenya Luvita, was allowed by the court. The court then fixed the matter for hearing on 9<sup>th</sup> April, 2019.

11. When the matter came up for hearing on 9<sup>th</sup> April, 2019, the Plaintiffs' counsel applied for the matter to be adjourned on the ground that “pre-trial directions have not been taken.” According to the Plaintiffs' counsel, the Plaintiffs had not filed their documents and required more time to do so. The Plaintiffs' advocate's oral Application for adjournment was opposed by the Defendants' counsel.

12. After hearing the Plaintiffs' advocate for adjournment, the court made a short Ruling as follows:

**“The pre-trial directions were given on 8<sup>th</sup> July, 2014 when parties were required to comply within forty five (45) days. The Plaintiffs now say that they are not ready. The Plaintiffs are not in court. The suit having been filed in 2014 and the pre-trial conference having been done on 8<sup>th</sup> July, 2014, I find that no good reason has been given to adjourn the matter. I therefore decline the Application for adjournment.”**

13. When the Plaintiffs' advocate informed the court that it cannot proceed with the matter after the above Ruling was delivered, the court

dismissed the suit for want of prosecution and non-attendance on the part of the Plaintiffs.

14. The Plaintiffs have not adduced any new evidence or sufficient reasons to enable the court review its orders of 9<sup>th</sup> April, 2019. Indeed, having informed the court on 25<sup>th</sup> February, 2015 that it had complied with the provisions of Order 11 of the Civil Procedure Rules, the Plaintiffs' Application for adjournment four (4) years down the line on the ground that it had not complied with Order 11 of the Civil Procedure Rules was not only mischievous, but also an abuse of the court process.

15. Indeed, the mere fact that the 1<sup>st</sup> Defendant died during the pendency of these proceedings and was subsequently substituted could not have been a reason for the Plaintiffs to adjourn the matter on 9<sup>th</sup> April, 2019. In any event, the only reason that the Plaintiffs' advocate gave on 9<sup>th</sup> April, 2019 for the adjournment was that it had not complied with Order 11 of the Civil Procedure Rules, and not that the deceased 1<sup>st</sup> Defendant had been substituted.

16. In view of my observations above, I find that the Plaintiffs have not given any sufficient reason, or any additional evidence, to enable me review the order of 9<sup>th</sup> April, 2019.

17. The Application dated 23<sup>rd</sup> April, 2019 is therefore dismissed with costs. For avoidance of doubt, this suit stands dismissed with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 4<sup>TH</sup> DAY OF OCTOBER, 2019.**

**O.A. ANGOTE**

**JUDGE**