



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

P & A CAUSE NO. 243 1999

IN THE MATTER OF THE ESTATE OF THE LATE KIPKOSGEI ARAP MAINA ALIAS KIPKOSGEI KETER(DECEASED)

SABINA JEBORE INGOTE & 2 OTHERS ... PLAINTIFF

VERSUS

CHERUIYOT ARAP KOSGEI.....DEFENDANT

RULING

1. The applicant filed this application under a notice of motion seeking for orders that;-
 - a. The Honourable court be pleased to dismiss the respondent application dated 22/11/2012 for want of prosecution with costs to the applicant.
 - b. The Honourable court be pleased to reinstate the eviction order issued on 27/9/2011.
2. The application is based on the grounds that the Court delivered its ruling on 4/7/2005 wherein the respondent was ordered to vacate the suit property and instead go and occupy his own portion as per the mode of distribution.
3. Since the delivery of the ruling the Respondent has been adamant in complying with the relocation order hence forcing the application herein.
4. Upon issuance of the eviction orders, the Respondent vide an application dated 22/11/2012 sought and obtained stay orders.
5. When the application came up for hearing on 7/11/2013, the Respondent's advocate sought and obtained leave to file and serve a supplementary affidavit.
6. The court made an order that he files and serves the supplementary affidavit within 7 days from 7th November, 2013, but to date the Respondent has not complied.
7. There has been inordinate delay in prosecuting the Respondent's application dated 22/11/2012 hence the same ought to be dismissed forthwith.
8. Lastly, that the Respondents did not lodge an appeal against the ruling dated 4/7/2005 therefore the orders contained therein remains in force.
9. The Respondents opposed the application through filing a notice of preliminary objection dated 13th December, 2018 on the grounds that the application is a nullity as it has not been signed as required by *Order 51 rule 13* of the *Civil Procedure Rules, 2010*.
10. Secondly that the application is a nullity having been made when the 3rd plaintiff had already died in 2005 and was yet to be substituted by the personal representatives duly appointed under *Section 82* of the *Law of Succession Act*.
11. The application was canvassed by way of written submissions. The applicant submitted that the court should overlook the technicalities and consider the substance of the application as envisaged under *Articles 159(2)(d)* of the *Constitution*.

12. Further, that *Order 24 rules 2* of the *Civil Procedure Rules 2010* provides that:-

“where there are more plaintiffs or defendants than one, and any of them dies and where the cause of action survives or continues to the surviving plaintiffs alone or against the defendants, the court shall cause an entry to that effect to be made on record and the case shall proceed at the instance of the surviving plaintiffs or against the surviving defendant or defendants”.

13. Lastly, that the court had already adjudicated this matter on 14th July, 2005 when all the plaintiffs were alive. The Respondent filed an appeal which was later dismissed by the court prompting the present application.

14. The issues raised in the preliminary objection are merely procedural issues about signing of the application. As regards to the substitution of the deceased plaintiff, order 24 rules 2 provides that where the plaintiff's or defendants are more than one, in the event that one dies, the case shall proceed at the instance of surviving plaintiffs against surviving defendant or defendants.

15. Order 17, rule 2 of the Civil Procedure Rules provides that:

“(1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

2. If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

3. Any party to the suit may apply for its dismissal as provided in sub-rule 1.

4. The court may dismiss the suit for non-compliance with any direction given under this order”.

16. In the interpretation *Section* of the *Civil Procedure Act*, the word **“suit”** means all Civil proceedings commenced in any manner prescribed.

17. It is clear that the respondent filed its application dated 22nd November, 2012 and went into slumber, he has never set it down for hearing.

18. The applicant has therefore rightly brought the application seeking orders for dismissal of the said application. As long as the application is subsisting, it remains a burden to applicant and will continue to remain so unless this court takes action as per law required.

19. In the case of *Safina Ltd. vs Jamnadas (K) Ltd. [2006] eKLR* Kasango J observed that: -

“It is obvious that when parties file court actions it is expected that they would follow the prosecution of such action with diligence. It was the plaintiff's responsibility to ensure that the case was prosecuted without delay ... any delay in such proceedings can sometimes lead to prejudice to the defendant. The plaintiff has itself to blame for having gone to sleep in this matter.”

20. The application has merit, it is allowed as prayed.

21. Application dated 22/11/2012 is hereby dismissed for want of prosecution and eviction order of 27/9/2011 reinstated.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 22nd day of December, 2020.

In the presence of:-

Mr. Kisuya for the Respondent

Ms. Cheronno for the plaintiff (absent)

Gladys - Court Assistant