



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CIVIL CASE NO.27 OF 2017

JAMES MWANIKI IMUYO & OTHERS.....PLAINTIFF

V E R S U S

MUNUHE MWANIKI.....DEFENDANT

RULING

The Notice of Motion dated 5/7/2018 is brought by the 2nd and 4th plaintiffs/applicants. They seek orders that this court be pleased to set aside the orders issued on 7/2/2018 dismissing the plaintiff's suit for want of prosecution and the consequential orders thereto; that the plaintiff's suit that was dismissed on 7/2/2018 for want of prosecution be reinstated. They also pray for costs of the application.

The application is premised on the joint affidavit sworn by the applicants on 5/7/2018 and grounds found in the body of the application.

This matter was filed on 25/2/2013 in Nakuru High Court as HCC.19/2013 through Olonyi & Co. Advocates. The matter was first heard on 3/2/2014 and 14/7/2017 when PW1 testified and it was adjourned. The matter stalled because the 1st and 3rd plaintiffs passed away on 3/9/2014 and 5/11/2015 respectively (C.K.I. Death Certificate). The advocate on record insisted on substituting the plaintiffs before the matter could proceed.

The applicants contend that they were surprised to be served with a Hearing Notice for taxation on 10/7/2018. That is when they learnt that the suit had been dismissed for want of prosecution; that though their former advocate was served with the notice to show cause scheduled for 7/2/2018, they were not informed of the dismissal nor did the defence counsel inform the court that some of the plaintiffs had died; that they are still keen on prosecuting the suit and it should not have been transferred from Nakuru High Court as the case was part heard.

The application was opposed and the defendant swore a replying affidavit dated 17/8/2018, in which he admitted that indeed the matter was part heard and that the 1st and 3rd plaintiffs had died but the applicants had never taken steps to prosecute the matter; that they have not demonstrated the steps taken to have the matter heard; that the applicant's advocate was duly served with the Notice to Show Cause and there is no good reason why they did not appear. The respondent urges the court to decline to grant the application because litigation must come to an end.

I have perused the court file and do note that before this matter was fixed for Notice to Show Cause, the firm of Olonyi had been served with notice of mention dated 10/10/2017 but failed to appear in court on 30/11/2017. Mr. Nderitu, counsel for the respondent appeared and that is when the court issued a Notice to Show Cause why the matter should not be dismissed for want of prosecution. It is therefore not true that the applicant's counsel M/S Olonyi was not aware that this matter had been transferred to Nyahururu. There was no bar to transferring cases to Nyahururu just because they were partly heard in Nakuru. After all, the Judge who had partly heard the case was no longer in Nakuru High Court.

This matter was before J. Mshila on 22/10/2014 when it was adjourned because the 1st plaintiff was deceased. The court was told that the 3rd plaintiff also died on 5/11/2015, over a year later. There is no evidence that any steps have been taken to substitute the 1st plaintiff and thereafter the 3rd plaintiff. From 2015 upto 7/2/2018, when this matter was dismissed was over 2 years. If the plaintiff's counsel was not taking action, it was the duty of the two applicants to take interest in the matter themselves to ensure it was prosecuted in good time. It seems that once they left the case with their advocate, the applicants did nothing to ensure that their case is prosecuted. The case does not belong to the advocate but the applicants.

From the time of filing of the suit to the dismissal, this case had taken over 5 years. That is a very long time and I do agree with the respondent that litigation cannot go on forever. It must come to an end so that the respondents can also know their fate and move on.

An application to set aside appeals to the court's discretion and the court has to exercise the said discretion judiciously to ensure that none of

the parties is prejudiced. The applicants were jolted into action once they were served with the application for taxation. It seems they are keen to have the matter determined on the merits. In doing my best, I will allow the application, set aside this court's orders of 7/2/2018 dismissing the suit and order this suit reinstated. The applicants will however pay to the respondent all the thrown away costs and costs of this application.

I further direct that the parties must comply with Order 11 Civil Procedure Rules and have the suit set down for hearing within 90 days from today's date. In default, the suit will stand dismissed.

Dated, Signed and Delivered at NYAHURURU this 29th day of March, 2019.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Nderitu for defendant/respondent

Ms. Wangeci holding brief for Mr. Waichungo for applicant

Soi – Court Assistant