



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
FAMILY DIVISION
CIVIL SUIT NO. 2 OF 2014

JAMES OVID SHUGARS YHAP.....PLAINTIFF/RESPONDENT

VERSUS

ERIC OKENO

JUDITH ZEMBI OKENO

TONY OKENO.....DEFENDANTS

RULING

1. By a Notice of Motion dated 28.2.17 (“the Application”) Eric Okeno, **Judith Zembi Okeno and Tony Okeno, the Defendants/Applicants**, seek in the main dismissal of the suit with costs for want of prosecution. The grounds of the Application are set out in the Application and the Affidavit of Eric Okeno sworn on even date. The Defendants/Applicants are siblings of Rosemary Anne Akinyi Okeno (deceased) who passed away. The Plaintiff/Respondent filed the suit herein on 10.4.14 together with 2 applications just after the demise of the deceased; that the Plaintiff/Respondent thereafter filed 2 applications which have been heard and determined. That since the filing of the suit, the same has never been set down for hearing; that by a Ruling of this Court on 17.11.16, this Court did order that the suit be set down for hearing within 60 days which the Plaintiff/Respondent has failed to do; that no application for leave to extend the said time has been made; that it is in the interest of justice that proceedings should come to an end; that delay in the hearing and determination of this matter is prejudicial to the **Defendants/Applicants and that it is** only fair and just that the same be dismissed for want of prosecution.

2. In a Relying Affidavit sworn on 5.4.17, Samuel Odhiambo Eleakim, advocate avers that he is seized of the matter herein on behalf of the Plaintiff/Respondent. According to him the reason why the suit cannot be set down for hearing is that there are pending applications which the Court has to deal with first; that the suit cannot be heard before directions are taken in respect of the Plaintiff/Respondent’s 2 applications in respect of which submissions have been filed by both parties; that the file could not be found to take a mention date even after he visited the registry and archives several times after delivery of the Ruling; that he also sent Shem Abudho a process server to look for the file to fix a date for mention who also informed him that the file could not be found; that it is not in the interest of justice that the suit be dismissed which dismissal will not serve any useful purpose as far as the interests of the Plaintiff/Respondent and the estate of the deceased are concerned; that no prejudice will be suffered by the Defendants/Applicants who are in actual occupation of the estate herein to the detriment of the Plaintiff/Respondent who is a co-owner and dependant of the estate of the deceased; that the Defendants/Applicants should not be granted audience for failure to pay costs of Kshs. 80,000/= as ordered by the Court on 14.9.14 and 17.11.17. The

Plaintiff/Respondent prayed that the Application be dismissed with costs.

3. In their submissions, the parties reiterated the averments in their respective affidavits. It is the Respondents/Applicants' case that from the time the ruling was delivered to date the Plaintiff/Respondent has not set down the suit for hearing, nor has he invited the Defendants/Applicants to fix a hearing date. It was further submitted that the record shows that it was the Defendants/Applicants who have in most cases moved the Court. No application for review of the order of 17.11.16 or application to enlarge time has to date been filed in Court. The Plaintiff/Respondent is an indolent litigant and clearly no longer interested in conclusion of the suit herein. Equity aids the vigilant and not the indolent. The Defendants/Applicants continue to suffer prejudice as they cannot effectively administer the estate of their late sister because of this suit.

4. For the Plaintiff/Respondent, it was submitted that the Plaintiff/Respondent's applications dated 9.4.14 and 30.4.14 are yet to be heard and determined though his submissions were filed on 12.11.15 in compliance with Court orders. The Court ordered that the Plaintiff's applications await the outcome of the Defendants/Applicants' application to strike out the suit dated 8.1.16 which was dismissed on 17.11.16. The Defendants/Applicants' advocates were invited to fix a date for directions on the 2 applications but the file could not be traced thus no date was fixed. It was further contended that 1 year from 17.11.16 has not passed as required under Order 17 Rule 2 of the Civil Procedure Rules. Further pre-trial conference under Order 11 has not taken place for directions to be given before hearing of the suit. This is the third time the Defendant/Applicants have applied for dismissal or striking out of the suit yet what is at stake is the estate of the deceased which is co-owned by the Plaintiff/Respondent. According to the Plaintiff/Respondent, it is apparent that the Defendants/Applicants are not interested in the suit being heard on merit. The Plaintiff/Respondent urged the Court to dismiss the Application and order the Defendants/Applicants pay costs of this and other applications.

5. The Application is expressed to be brought under Order 17 Rules 1, 3 and 4 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. Order 17 makes provision for prosecution of suits. Rule 1 stipulates that suits shall be heard from day to day without adjournment save for good reason. Rule 3 sets out the procedure if parties fail to appear on day fixed for hearing while Rule 4 provides that the Court may proceed notwithstanding either party fails to produce evidence. The foregoing provisions have no relevance to the Application. Section 3A of the Civil Procedure Act outlines the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Notwithstanding the citation of the wrong provisions of the law, the Court will consider this Application in exercise of its inherent power.

6. The thrust of the Application is that in the ruling on 17.11.16, the Court directed that the Plaintiff/Respondent to fix the suit for hearing within 60 days of that date a direction that the Plaintiff/Respondent has failed to comply with. In his defence, the Plaintiff/Respondent contends that the Defendants/Applicants' advocate were invited to fix a date for mention on 1.12.16 but the file was missing so no date was fixed. I have seen the invitation letter exhibited in the Replying Affidavit. It is dated 23.11.16. It is not clear whether this letter ever reached the Defendants/Applicants' advocates who claim that they have never been invited. This notwithstanding, no evidence has been produced to show that the file was missing on 1.12.16. Further no evidence for instance by way of letter to the Deputy Registrar drawing the Court's attention to the missing file has been produced. The Court is therefore not satisfied that the file was missing on 1.12.16 as claimed by the Plaintiff/Respondent or that he made any effort thereafter to fix the matter for hearing as directed by the Court.

7. It was submitted for the Plaintiff/Respondent that there are pending applications, which are yet to be determined. The record does show that the ruling of the applications dated 9.4.14 and 30.4.14 was deferred pending the hearing and determination of the application dated 8.1.16. Section 1A Civil Procedure Act provides:

“The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.”

8. In the exercise of its powers this Court is required to give effect to the above stated overriding objective in the administration of justice in a just, fair and expeditious manner. The overriding objective requires parties to civil proceedings and their advocates to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court. The Court notes that the Plaintiff/Defendant has not been diligent in pursuing the expeditious disposal of the matters herein. The delay in prosecuting this matter goes against the principle of administration of justice set out in Article 159(2)(b) of the Constitution of Kenya 2010 that justice shall not be delayed. However, it is the view of the Court that for the purpose of furthering the overriding objective it is necessary there be a just determination of the 2 applications which are pending before the Court.

9. In view of the foregoing, I decline to grant the orders sought by the Defendants/Applicants and dismiss the Application dated 28.2.17 but with no order as to costs. The matter shall be mentioned for directions on 25.1.18.

DATED, SIGNED and DELIVERED in MOMBASA this 19th day of January 2018

M. THANDE

JUDGE

In the presence of: -

..... **for the Defendants/Applicants**

..... **for the Plaintiff/Respondent**

.....**Court Assistant**