



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**HCC NO. 12 OF 2012 (OS)**

**L N.....PLAINTIFF/APPLICANT**

**VERSUS**

**A N ALIAS N M.....DEFENDANT/RESPONDENT**

**RULING**

1. By Originating Summons dated 2<sup>nd</sup> February 2012 and filed in court on 7<sup>th</sup> February 2012, L N herein referred to as the plaintiff filed this suit against her husband A N alias N M seeking division of movable and immovable property allegedly acquired during the subsistence of their marriage. The properties in question includes four motor vehicles, a water pump, sewing machine, a plough, two cows, two bulls, 10 goats and LR Mbeti/Kirima/[particulars withheld] which has since been sub-divided into various parcels of land.
2. Sometime on 20<sup>th</sup> December 2012, the couple divorced as evidenced by a decree nisi made on 20<sup>th</sup> March 2013 in divorce cause No. 181/2011 Nairobi High Court.
3. The petitioner having failed to move the court and prosecute her case, the respondent moved the court vide application dated 1<sup>st</sup> September 2015 seeking to dismiss the suit for want of prosecution. After hearing the said application, the court dismissed the suit on 21<sup>st</sup> January 2016 and allowed parties in the interest of justice to have the matter heard and determined on merit.
4. Despite that opportunity, the matter again remained dormant for over one year thus prompting the court to issue a notice to show cause why the suit should not be dismissed for want of prosecution. Consequently, the court dismissed the suit on 17<sup>th</sup> May 2018 as none of the parties turned up to show cause.
5. Aggrieved by this dismissal, a son to the parties one P M through the firm of Obel and Co. Advocates, filed a notice of motion dated 7<sup>th</sup> June 2018 seeking reinstatement of the suit on grounds that the plaintiff was not given a notice to show cause why the suit should not be dismissed as required in law and that the dismissal of the suit amounted to a violation of the plaintiff's constitutional rights. He further stated that, the plaintiff's failure to fix the suit for hearing was inadvertent and beyond her control and that the plaintiff was keen in prosecuting the suit.
6. The application is further supported by an affidavit sworn by the applicant on 7<sup>th</sup> June 2018 in which he disclosed that the plaintiff herein who was his mother had died on 27<sup>th</sup> November 2017. He therefore expressed his intention to be substituted in place of his deceased mother to continue with the case on his behalf and that of his siblings.
7. In response, the defendant who is a father to the applicant filed a replying affidavit on 3<sup>rd</sup> October 2018 and grounds of opposition filed the same day. The respondent expressed shock that his son wants a share of matrimonial property which is the subject of determination between a husband and a wife being property allegedly acquired during the subsistence of their marriage. He termed the applicant (son) as a stranger to these matrimonial proceedings.
8. During the hearing, Mr. Maina for the applicant made oral submissions reiterating the averments contained in the affidavit in support of the application. Equally, Mr. Chadiany for the respondent expressed dismay that the application seeking reinstatement of the suit has been filed even before substitution is made.
9. I have considered the application herein, supporting affidavit, replying affidavit and oral submissions by both counsels. There is no dispute that the plaintiff is deceased. A death certificate S/No.[particulars withheld] annexed to the applicant's affidavit marked "PM3" is sufficient proof that the plaintiff had died on 27<sup>th</sup> November 2017.
10. Under Order 17 rule 2 of the Civil Procedure rules, a court can dismiss a suit for want of prosecution if no steps are taken to prosecute the matter within one year. The matter herein was last before court on 16<sup>th</sup> November 2015. Since no action was taken within the prescribed

period, the court was under obligation to dismiss the same.

11. Order 24 of the Civil Procedure rules provides for reinstatement of suits and substitution of parties in case of death of a plaintiff or defendant. However, sub-rule 2 of Order 24 provides that the death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives.

12. Before me is an application by a son to the parties seeking to reinstate the suit. He has not applied for substitution in place of his deceased mother. He cannot therefore seek reinstatement of a suit to which he is not yet a party. To that extent, I agree with Mr. Chadiany that the applicant is a stranger hence the application before court is incompetent and bad in law.

13. The next question is whether the suit herein survives the plaintiff's death. This is a suit anchored on division of matrimonial property acquired by a couple during the subsistence of their marriage. Since the suit was filed the year 2012 before the current Matrimonial Property Act 2013 came to force, the relevant law is Section 17 of the Married Women Property Act of 1882.

14. Obviously, the applicant is not a spouse to claim a right or a share from the defendant his father under the law governing division of matrimonial property. He cannot ride on his late mother's vehicle to arrive at the destination. The death of the plaintiff marked the end of the road in this case. The suit cannot survive her death. Accordingly, the application herein is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF DECEMBER 2018.

J.N. ONYIEGO

JUDGE