

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 302 OF 2011

KENYA IHENYA COMPANY LIMITED.....PLAINTIFF

VERSUS

TIMOTHY KIMANI MUGAI.....DEFENDANT

RULING

The matter herein was on 3rd November, 2017 listed for Notice to show cause why it should not be dismissed for want of prosecution. The notice dated the 9th day of October 2017 was issued by the court under Order 17 Rule 2 of the Civil Procedure Rules.

In response to the notice, the plaintiff filed an affidavit sworn by Othiniel Kobogo Waiguru on the 23rd March 2017. The deponent who is a director of the plaintiff depones that after the suit was filed on 29/7/2014, the summons were served upon the defendant who entered appearance but failed to file a defence following which an interlocutory Judgment was entered.

That on 11/4/2012, a decree was issued but on the 24/10/2014, the defendant filed an application seeking orders for setting aside of the same, which application is still pending.

That in the meantime, the defendant died, and on the 5/2/2016, the plaintiff's advocate filed miscellaneous cause no 13 of 2016 in the High court family Division seeking an order that Jane Wanjiku Kimani, the deceased defendant's wife, be compelled to take out letters of administration to represent the estate of the deceased. The said application is still pending.

Counsel for the plaintiff has asked the court to either dismiss the defendant's application dated 24/10/2014 to allow the plaintiff proceed with execution or to allow the High Court Family Division to issue a grant of letters of administration to the deceased's wife for purposes of substitution.

The court has considered the submissions by the Counsel for the plaintiff, and the reasons given why the suit has not been prosecuted for a period of more than two years since it was last in court. The fact that there is a pending application by the defendant, to set aside interlocutory Judgment is neither here nor there as the plaintiff can either set down the said application for hearing or apply for it to be dismissed, which it has not done.

However, the court has noted that the defendant's death has affected the pace of prosecution of the case. It has been deponed that he died on the 7/7/2015 and on the 5/2/2016, the plaintiff filed an application dated 2/2/2016 for orders to compel the wife of the defendant to take out letters of administration or in the alternative, the court do issue a grant of letters administration for purposes of substituting the deceased. A copy of that application is annexed to the affidavit in response to the Notice to show cause.

I find that a good reason has been given why the suit has not been prosecuted and therefore, I will spare the suit but order that the two pending applications be set down for hearing within 30 days from the date of this ruling failing which the suit shall stand dismissed.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 15th day of November, 2017

.....

L. NJUGUNA

JUDGE

In the presence of:-

.....*for the plaintiff*

.....*for the defendant*