



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO. 789 OF 1997

JOHN NJARIA MUTUNGA1ST PLAINTIFF

PENINA KARUTA2ND PLAINTIFF

PRISCILLA KALINGU3RD PLAINTIFF

VERSUS

GODFREY MUHURI MUCHIRI 1ST DEFENDANT

EMBAKASI RANCHING COMPANY LTD.....2ND DEFENDANT

RULING

The Plaintiff/applicant has moved this court by Notice of Motion dated the 17th May, 2016 under Order 17 Rule 2(1) of the Civil Procedure rules, Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act. The applicant has sought the following orders:-

- a. *That this application be certified urgent.*
- b. *That the order made by Justice Wakiaga on 26/2/2015 dismissing the plaintiff's suit be set aside.*
- c. *That the plaintiffs suit herein once reinstated be set for hearing within 30 days of the order.*
- d. *Costs of this application be costs in cause.*

The application is supported by the affidavit of Gitonga Kithinji Muriuki annexed to the application and is premised on the grounds set out in the body of the same.

The applicant seeks to reinstate the suit which was dismissed on the 26th February, 2015. In the supporting affidavit, it is averred that the matter has come up in court on several occasions and the Plaintiffs have been ready to proceed with the same most of the times. That on the 26th February, 2015 when it was dismissed the plaintiff was not aware of the advertisement to dismiss the suit. It was dismissed during the judicial service week.

In addition to the affidavit by Gitonga Muriuki, the first plaintiff swore an affidavit on 17th May, 2015 in support of the application. In the said affidavit, he avers that for about three years, he could not get a

hearing date for the matter and further that the court file could not be traced in the court registry for more than two years. He has urged the court to reinstate the matter.

The 2nd defendant has opposed the application vide a replying affidavit sworn by Njora Waweru and by grounds of opposition filed in court on the 14th July, 2016. In the said affidavit, it has been deponed that the 1st defendant died on the 31st May, 2006 and the Plaintiffs' despite having known of the death have not sought to substitute the deceased as a result of which the plaintiffs' case, against the first defendant abated in June 2007. It is further averred that the alleged actions by the deceased forms the basis of the Plaintiffs' suit and as such the claim is evidentially indivisible and the Plaintiffs cause of action cannot stand without the deceased.

It was deponed that the suit was filed in 1997 and almost twenty years down the line, it has never been finalized and the Plaintiffs are guilty of laches. That there has been inordinate and unexplained delay on the part of the Plaintiffs in prosecuting this application and that the Plaintiff has not attached any correspondences from the deputy registrar indicating that the court file was missing and/or could not be traced necessitating reconstruction. It is further averred that the application is misconceived and vexatious as there has been inordinate delay and the same should be dismissed.

The application proceeded by way of oral submissions which this court has duly considered. In addition to the facts contained in the affidavits, it has been submitted that counsel for the plaintiffs did not have the opportunity of seeing the cause-list for dismissal in the internet and that there could have been an omission on the part of his office. He further submitted that he has already complied with Order 11 by filing the list of documents and the witness statements and that once the matter is reinstated he is ready to have the same heard and to abide by any conditions that the court shall impose. He has further submitted that the matter involves property worth twenty million (Kshs.20,000,000) and it's only fair that the Plaintiffs be given a chance to prosecute the suit. It is his contention that though the case against the 1st defendant has abated the cause of action against the 2nd defendant still subsists and it can still be pursued, the death of the 1st defendant notwithstanding. According to him the delay has been explained.

He took issue with the supporting affidavit and argued that the affidavit was sworn by an advocate who is not possessed of the facts of the case in that he has never attended court and therefore the facts in the affidavit are not within his knowledge.

On the part of the 2nd defendant, it was submitted that the case has been in court for nineteen years (19) and that though it has been alleged that the court file was missing, there is no evidence on record to that effect and the annexures to the affidavit in support are irrelevant to the application in question. It was further submitted that the Plaintiffs are not parties in whose favour the discretion of the court can be exercised as they have been indolent in prosecuting the matter and even in filing the application herein. The defendant's counsel further submitted that it has not been shown that the Plaintiffs visited their advocate to enquire the position of their matter and therefore they cannot blame their advocate for their own mistake. He averred that the orders sought in the application cannot be granted under Order 17 as they are not provided for.

It was his submission that the issue of service week was notorious and that matters listed for dismissal were listed on court notices, in the internet and also they were advertised in the print and electronic media and in the circumstances, it was insincere for the counsel for the plaintiffs to say that he was not aware of the judicial service week. He relied on the provisions of Order 17 (2) which provides that the court may give notice not serve notice on the parties. That upon the said dismissal, it has taken the plaintiffs one year and two months to file an application to reinstate the suit and it was six years after the last action was taken in the matter. He submitted that article 159(2) (d) relied on by the plaintiff is not a panacea for everything, it is about technicalities but the issue before the court is a matter of law.

On the issue of swearing of the affidavit by the advocate for the 2nd defendant, he submitted that the said advocate is on record in the matter and even if he does not attend court, he is seized with the brief and he has been following up the same. He averred that the case between the two defendants is intertwined and

the same cannot proceed as it is, without the 1st defendant.

The applicants have sought the reinstatement of the suit herein and the reason given by the learned counsel is that he was not aware that the suit was coming up for dismissal. I have considered the arguments advanced by both parties. As rightly submitted by the counsel for the 2nd defendant, the judicial service seek was highly publicized and notices were issued in both print and electronic media and counsel for the Plaintiffs cannot therefore state that he was not aware that matters were coming up for dismissal. Considering the circumstances of this case and even if the court was minded to give the learned counsel the benefit of doubt, this court finds that there was inordinate delay in filing the application herein. As submitted by the counsel for the 2nd defendant, there was a delay of 1 year and 2 months which delay, in my view, was not sufficiently explained. Counsel for the Plaintiffs told the court that he learnt of the dismissal of the matter one year after. His client has not explained why he was not following up the matter with his lawyer. The impression given by the Plaintiffs is that of parties who are not desirous of prosecuting their matter. Though it has been alleged that the court file was missing no evidence has been availed to court in support of that allegation by way of letters to the deputy registrar requesting for assistance in tracing the file.

It is also noted that before the matter was dismissed for want of prosecution, it had been inactive for more than three years. This is a very old matter dating way back to the year 1997 almost twenty (20) years ago and there are no good reasons given to this court why it has not been prosecuted. Litigation has to come to an end and a party who files a suit in court has a duty to prosecute the same expeditiously. The plaintiffs herein have not been eager to prosecute their matter.

Regarding the issue raised by the counsel for the plaintiffs that the replying affidavit was sworn by an advocate who never used to attend court, I find that he was the advocate on record and was seized with the matter and there was nothing wrong in him swearing the affidavit.

In the upshot, the court finds that the application dated the 17th May, 2016 has no merits and it is hereby dismissed with costs.

DATED, SIGNED and DELIVERED at Nairobi this 31st day of October, 2016.

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L NJUGUNA

JUDGE

In the presence of:-

.....*for the Plaintiff*

.....*for the Defendant*

.....*clerk*