



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ELC NO. 992 OF 2007

MUNGAI MBAE & GRACE W MUNGAI.....PLAINTIFFS
VERSUS
JAMES MWANGI NDUATIDEFENDANT

RULING:

The Defendant/Applicant herein **James Mwangi Nduati** has brought this Notice of Motion dated 19th July, 2012 under **Section 63(e), Order 17 Rule 3 of the Civil Procedure Rules** and all other enabling provisions of the law seeking for orders that;

- a. ***That the court do dismiss the current suit for want of prosecution.***
- b. ***That the cost of this application and the entire suit be borne by the plaintiffs.***

The application is supported by the grounds on the face of the application and by the supporting affidavit of **James Mwangi Nduati**. These grounds are: -

1. ***That the originating summons on this suit was filed on 25th March 2003 by the Plaintiffs/Respondents and the same was served upon the Defendant/Applicant who consulted his advocates.***
2. ***That the Defendant filed a Memorandum of Appearance on 18th May, 2004 and served it upon the plaintiffs' advocates on 31st May, 2004.***
3. ***That the plaintiffs' suit was filed on 25th March, 2003 and no action has been taken to prosecute the same for over 3 years by the Plaintiffs/Respondents.***
4. ***That the Defendant has a good and genuine Defence on the case but the Plaintiffs/Respondents have failed to prosecute the case and set down the matter for hearing.***

The Deponent, **James Mwangi Nduati** averred that the instant originating Summons was filed on 25th March, 2003 and no action has been taken to prosecute the case for over 3 years. Further, the

Defendant/Applicant has filed all the necessary documents and served the Plaintiffs/Respondents Advocates on record to necessitate the fixing of the hearing date. He further averred that the matter is partly heard and the Plaintiffs/Respondents have already closed their case. However, the Plaintiffs have failed to set it for hearing despite being invited to take a hearing date on 27th October, 2010. It was his contention that the Plaintiffs/Respondents have lost interest on this suit and they are not ready to prosecute the matter and it would be **just** to have the matter dismissed for want of prosecution.

The Plaintiffs/Respondents did not file their Replying Affidavit since I have not seen any on record. However, the Plaintiff, **Grace Wangechi Mungai** filed an application for substitution as Personal Representative of **Mungai Mbae** (deceased) on 7th August, 2012. The said Grace Wangechi Mungai alleged that the 1st Plaintiff Mungai Mbae is now deceased and she had applied for limited grant to represent the 1st Plaintiff (deceased) but she had not obtained the said letters by the time this instant application was filed. She further averred that the claim herein is over land which survives the deceased.

When the matter came up for hearing of the Notice of Motion dated 19th July, 2012, on 2nd July, 2013 Mr. Mwendwa was holding brief for M/s Talum for the Plaintiffs/Respondents and Mr. Kinuthia was acting for Defendant/applicant. However, Mr. Mwendwa did not indicate that he wished to prosecute the application dated 3rd August, 2012 for substitution of the 1st Plaintiff (now deceased). Mr. Kinuthia was ready to proceed with his application dated 19th July, 2012 for dismissal of the suit for want of prosecution.

The parties were ordered to put in their written submissions and on 3rd October, 2013, the matter was set down for Ruling.

I have now considered the written submissions by both parties. The application is brought under Order 17 rule 3 which states as follows:-

“Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the modes directed in that behalf by Order 12, or make such other order as it thinks fit”.

It is indeed true that this Originating Summons was filed 25th March, 2003. That is more than 10 years ago. This suit commenced for hearing on 29th July, 2009, wherein the Plaintiff called a total of three witnesses. On 28th October, 2009, the suit was adjourned to 16th December, 2009. However, from the courts records, there was no action on 16th August 2009. The next action on the file was on 17th July, 2011 when the suit was mentioned before J, Mbogholi but the Plaintiffs’ advocate was absent. Matter was fixed for mention on 25th September, 2011 when again it was not listed.

I have noted that **Mr. L.M Kinuthia Advocates** for the Defendant attempted to fix the matter for hearing on 8th December, 2011. He later filed the instant application on 20/7/2012. There is no doubt that after the Plaintiffs gave their evidence, they seemed to have lost their interest in this suit case.

Section 1A of the Civil Procedure Act provides for the overriding objective of the Act which are:-

1A (1) 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.

Section I B of the same Act empowers the court to do all that is possible to ensure that the overring objectives of the Act have been achieved. This matter was last in court for hearing of the main suit on 28th October, 2009. The Defendant alleges that the Plaintiffs have lost interest in the suit and so the same should be dismissed for want of prosecution.

However, the Plaintiff alleged that she has filed an application for substitution of the 1st Plaintiff (now deceased). The said application was filed on 7th August, 2012 and it is evident that its filing was

prompted by the instant application. The Plaintiff has not bothered to prosecute that application dated 7th August 2012. She had not informed the court whether she has now obtained limited letters of Administration or not. The Plaintiffs seems to be less interested in the prosecution of the Notice of Motion dated 7th August,2012 and the main suit. Each party in a suit , no matter whether it is the Plaintiff or defendant should have its matter decided expeditiously. The Defendant herein has a right to have this matter where he is sued as a party to have it decided expeditiously so that he would know his fate. The Defendant is therefore entitled to bring this application in court to have it dismissed for want of prosecution. I have noted that the Plaintiffs herein have already given their evidence. The Defendant has not given his evidence. In the case of **Titus Ngatia Vs Danyla Pereiro & Another , Nairobi High Court, Civil Case No. 536 of 1970** the court held that:-

“ It is discretionary on the part of the court to grant an application for dismissal of civil suit for want of prosecution but it should not in any event be exercised without giving the plaintiff an opportunity of remedying his default unless the court is satisfied that the default has been intentional”.

Though the Plaintiffs herein did not file their Replying Affidavit, have noted what they have alleged in the Notice of Motion dated 3/8/2012 that they are awaiting Letters of Administration so that 1st Plaintiff can be substituted . However, the Plaintiff is also not keen in prosecuting that Notice of Motion dated 3rd August,2012 . I would call that an excusable delay.

I have however, noted the plaintiffs have called their witnesses. There is no Rule which states that only Plaintiff can set the matter down for hearing. The Defendant herein has a right to set the matter down for hearing and call his witnesses so that the case can be concluded. There is no evidence that the Defendant has exhausted that channel.

However, it should always be borne in mind that the suit was filled by the Plaintiff and it is therefore the responsibility of the Plaintiff to prosecute the suit for hearing and determination and that responsibility lies squarely on his shoulder and that of his advocate (See **National Bank of Kenya Ltd Vs Joseph Philip Onyango and another, Kisumu High Court Civil case No. 489 for (1994).**

Though in the instant suit, there has been inordinate delay in prosecution of the case to conclusion, I find the Plaintiff at fault but I find it just and fair to allow her an opportunity to remedy the default within the next three months. I will be guided by the case of **Chepsire Vs Rosemond (1965) 1 ALL ER 145** where the Court held that:-

“ In an application for dismissal for want of prosecution , the court can make the Plaintiff give an undertaking that if the case is not set down for hearing within a specific time, the same to stand dismissed”.

In this suit, I will make a finding and an order that the plaintiff herein **Grace Wangeshi Mungai**, to prosecute her application for substitution dated 3rd August 2012, within the next 30 days from the date of this Ruling and set down the main suit for hearing within the next three (3) months from the date of this Ruling. Failure to do so, the suit will stand dismissed automatically for want of prosecution .

It is so ordered.

Dated, signed and delivered this **23rd day of May , 2014**

L. GACHERU

JUDGE

In the Presence of:-

Mr.Nzioka holding brief Miss Burungu for the Plaintiffs/Respondents

Mr.Gachimo holding brief for Mr.Kinuthia for the Defendant/Applicant

Lukas: Court Clerk

L. GACHERU

JUDGE