



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO.755 OF 1993

KIHOTO FARMERS COMPANY LTD. PLAINTIFF

VERSUS

DANIEL GITONGA CHEGE 1ST DEFENDANT

REUBEN GITONGA CHEGE 2ND DEFENDANT

PATRICK WAIRAGU GITHAKWA 3RD DEFENDANT

JACINTA WAIRIMU KIRUGI 4TH DEFENDANT

RAPHAEL RUTHITU MAINA 5TH DEFENDANT

BARASA (D.O. BAHATI) 6TH DEFENDANT

COMMISSIONER OF LANDS 7TH DEFENDANT

RULING

The application dated 11/11/2011 made pursuant to **Order 17 Rule 1 and 3, Order 51 Rule 1 Civil Procedure Act** and **Section 3A of the Civil Procedure Act** seeks that the suit be dismissed for want of prosecution.

It is premised on grounds that a period of over six months has lapsed since the matter was last in court, and the plaintiff has no conceivable interest on the matter. Further, the continued pendency of this suit is prejudicial and vexatious to the 3rd defendant/applicant.

The application is supported by the affidavit sworn by the applicant's counsel who deposes, that this suit was instituted in 1993, (which is actually 18 years ago). It has been in court on several occasions, resting with 9th March 2011, when the plaintiff's advocate sought an adjournment and as usual, it was granted.

On 9th March 2011, the 1st defendant's counsel went an extra mile by inquiring from the 1st Defendant's estate but received no response regarding the position of the Succession Cause. The plaintiff's counsel has not fixed the suit for hearing in the last six months, hence this application.

The application is opposed and in a replying affidavit sworn by the plaintiff's counsel he deposes that

although the suit was filed in 1993, the delay in its determination has not been occasioned by the plaintiff in any way. It is explained that the matter has been in court on several occasions and the adjournments have always been merited.

The plaintiffs are said to be committed to having the suit concluded, only that one of the defendants died and the plaintiff's advocate have not been furnished with sufficient details to enable them apply for substitution. On 21/11/2011, the plaintiff's counsel invited the other parties to attend court for purposes of fixing a hearing date, but was upon attending the registry they could not get a date because this particular application had already been fixed for hearing on 27/03/2012.

In arguing the application, the applicant's counsel submitted that the plaintiff has been given time to effect substitution following the 1st defendant's death but as at the time of filing this application; they had not taken any steps to substitute. It is his contention that this suit only exists as a way of punishing the defendants and the plaintiff is not in a hurry because he is in occupation of the land. Further, that this suit can proceed even in the absence of the 1st defendant.

In response, the Respondent's counsel argues that the problem arose in the year 2004 following the death of the 3rd defendant, and for 3 years, nothing could proceed until they obtained letters of administration and the suit was revived. Immediately upon that revival the 1st defendant passed on. It is further explained that the suit here is based on an alleged fraud by the 1st defendant, so the matter cannot proceed without him as he was the principal architect of the fraud. Counsel argues that the administrators of the 1st defendant's estate are not known and they contacted the 1st defendant's advocate but got no fruitful response.

I have considered all the arguments presented – the plaintiff has not demonstrated any effort at prosecuting this matter and what this court is being asked to do is to keep the matter alive and allow the plaintiff to keep hoping that he will trace administrators of the 1st defendant. Surely 18 years for a matter to remain in court with almost nothing concrete happening is a mockery to the concept of justice and indeed this is a case of justice delayed being justice denied.

The only reason why the plaintiff invited the others to take a date on 29/11/2011 is definitely because this application dated 11/11/2011, had been served so that invitation to take a date was calculated at scuttling this application. That was done malafides.

Surely if no information has been forthcoming regarding the administration of the 1st defendant estate, given the age of this matter, due diligence demands that plaintiffs demonstrate initiatives at establishing who they are, by for instance getting in touch with private investigators to try and locate them – after all wasn't the 1st defendant described by the plaintiff in the pleadings as a shareholder of the company who held himself as a director of the plaintiff.

My finding is that, there is no effort demonstrated by the plaintiff to have this matter prosecuted, and the defendants deserve to be relieved of these endless court attendances spanning 18 years. This is a matter which no longer deserves to remain alive and I have no hesitation in allowing the application as in my view it is merited. The suit is thus dismissed for want of prosecution with costs to defendants.

Delivered and dated this 16th day of December, 2013 at Nakuru.

H.A. OMONDI

JUDGE