



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO. 73 OF 2005

BISMARCK NYAKUNDI NYANYUKI.....PLAINTIFFS

VERSUS

DAUDI RUTO CHEPSAT.....1ST DEFENDANT

MAGDALENE CHEPKORIR RUTO.....2ND DEFENDANT

RULING:

This is an application brought under Order 17 Rule (2) (3) of the Civil Procedure Rules and Section 3 and 3A of the Civil Procedure Act.

The Applicant's Counsel and Respondents both opted to argue the application by way of written submissions.

The Applicant herein is the 3rd Defendant in this matter and is pursuing dismissal of the Plaintiff/Respondents case for want of prosecution. The application is supported by the Affidavit of Magdalene Chepkorir Ruto and grounds set out in the application.

The dispute relates to 3 acres of the property known as PIONEER/NGERIA BLOCK 1 (EATEC)/113. The Respondent claims to have bought the portion from the 1st Defendant, Daudi Ruto Chepsat (now deceased). The Respondents prayers in the Plaint were for a declaration of ownership and transfer of the said portion of land to the Respondent.

The 1st Defendant passed away and the suit stagnated as the Respondent awaited Letters of Administration to be taken out by the 1st Defendant's legal representatives and thereafter a substitution and amendment be made to the pleadings.

On the 9th August, 2006 the 2nd Defendant (now the 3rd Defendant/Appellant) made an application under Order 17 Rules 5(d) of the Old Civil Procedure Rules for the dismissal of the suit for want of prosecution. The same was correctly dismissed by the court.

On the 10th April, 2008 Counsel for the Respondent filed an application under Order XXIII Rules 4, 5 & 8 of the old Civil Procedure Rules for the revival of the suit, and under Order VIA Rules 3 & 4 for leave to amend the Plaint and also under Sections 3 & 3A of the Civil Procedure Act.

The orders sought were granted by the Honourable Mwilu J on the 13th May 2009.

Later Counsel for the Applicant made an application for leave to amend the amended defence which leave was granted on the 10th day of February, 2010 by the Honourable Osiemo J.

The Applicant's Counsel drew up issues and filed the same on the 9th June 2000. Thereafter the Applicant who then was the 2nd Defendant changed advocates and a Notice of Change of Advocates was filed on the 25th March, 2011 by the new firm of Advocates known as Kigen & Company.

A further Amended Defence was filed on the 22nd June 2011 by the Applicant's advocates.

Lastly the Applicant filed this application for dismissal of the Respondent's suit for want of prosecution.

The court has taken time to peruse the court records and has read both the written submissions of the Applicant and the Respondent's.

The chronology of events set out herein before has been obtained from the court file and the written submissions.

The issue for determination is whether the Respondent has failed to take any steps to prosecute the suit and that the same warrants dismissal.

Order 17 Rule 2 sub rule (3) as read with a sub rule (1) allows **“.....any party to apply for dismissal of the suit if no application has been made or step taken by either party for one year, the court may give notice to the parties to show cause and if cause is not shown to its satisfaction, may dismiss the suit.....”**

The chronology of events shows that there has been a lot of activity going on in the culminating in the last action by the Applicant of filing a further Amended Defence on the 6th July 2011.

The court finds that the Applicant has greatly contributed to the delay in prosecution of this case through her various acts of omission and commission.

The court also finds that the suit has not been dormant for the period of one year. There has been constant activity in the court file mainly at the Applicant's behest.

The court is satisfied that there has been activity ongoing and that the suit has not been dormant as alleged by the Applicant.

The court finds that the Respondents have been unable to prosecute suit and pursue the same to its logical conclusion due to the various activities of the Applicant as spelt out, herein before.

The court finds that the application has no merit and it is hereby dismissed with costs to the Respondent.

Further and pursuant to Order 17 Rule 2 (2) of the Civil Procedure Rules the court directs the parties to comply with Order 3 and 11 of the Civil Procedure Rules by exchanging all requisite documents, issues and witness statements within thirty (30) days from the date hereof. The suit should then be listed for pretrial conference within fourteen (14) days from the said date.

Dated and delivered at Eldoret this 29th day of March 2012.

A.MSHILA
JUDGE
Coram:

Before Hon. Mshila J

CC: Andrew

Counsel for Plaintiff.....

Counsel for Defendant.....

**A.MSHILA
JUDGE**