REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL SUIT 146 OF 1998

BERNARD MWITI ……PLAINTIFF

VERUS

ELIJAH KABURU……..DEFENDANT

RULING

The applicant by an application dated 14th September 2009 brought under Order XVI rule 5 and OXXIII r 4 and order L rule 1 of Civil Procedure Rules seeks the following orders:-

a. That this suit be dismissed for want of prosecution or/and for having abated.

b. That the costs of the suit be paid to the Legal Representative of the Defendant.

c. That the costs of this application be provided for.

which application is grounded on the affidavit of Julia TirindiKigunda the legal representative of the defendant and on grounds on the face of the notice of motion.

The grounds are listed as follows:-

(i) The plaintiff has lost interest in the suit as the same has not been fixed for hearing several years.

(ii) The case was filed on 25th November, 1998 and it has taken 11 years to finalize and as such no fair trial can be conducted as some witnesses are dead, lost memory or have relocated. The original land records may not be traced.

(iii) That the plaintiff has not been keen to prosecute the case.

(iv) That the Defendant died on 15th November, 2006.

The applicant aver that she is a legal representative of the deceased defendant who died on 5th November 2006 and that applicant was appointed to represent the deceased defendant following an application for substitution filed on 18th May 2009 and granted by court on 14th July 2009. That the suit was filed on 25th

November 1998 and is to-date 14 years old. The suit has since filing not been prosecuted by the plaintiff and by the time of filing the application the suit was 11years without having been prosecuted. The applicant aver that the courtmay not be able to conduct a fair hearing as some witnesses are either dead, relocated or lost memory of the exact events. That it is fair and just that this suit is dismissed with costs. The applicant also aver that the suit had abated and court should hold so and dismiss the suit.

The respondent filed replying affidavit which was undated but filed on 3.2.2010. The respondent aver that it is not true that he has lost interest in this matter and aver that the matter has always been active and the record would confirm so. The respondent claimed to have fixed the suit for hearing but the same was not listed for hearing. The respondent aver that it was on that day he learned of thedeath of the defendant (26/3/2007) that respondent embarked on tracing evidence of demise of the defendant to enable him take necessary steps but to no avail. That in May 2009 the respondent aver that he learnt from his advocate on record that the current defendant had since obtained letters of representation in respect of original defendant's estate and applied for distribution. The respondent averred that there was no action that he would have taken until substitution. That after substitution the applicant moved to court and filed the application before court. The respondent averred that the suit involves ancestral land and he has interest in the suit. He averred the witnesses in this matter are close relatives and they are available to come to court and testify. He urged the court to reject the application.

The learned counsel for applicant Mr. Rimita in his oral submission in support of the application stated that the application was brought under the old orderXVI rule 5 of theCivil procedure which provided:-

"**If, within three months after –**

(a) The close of pleadings; or

(b) Deleted

(c) The removal of the suit from the hearing list; or

(d) The adjournment of the suit generally, the plaintiff, or the court of its own motion on notice to the parties, does not set down the suit for hearing, the defendant may either set the suit down for hearing or apply for its dismissal."

The learned counsel also submitted that under order 54 of

The Civil Procedure Rules it has revocation and transitional provision which meant that Order 17 rule 2 of the New Civil Procedure Rules are inapplicable in this application.

Order 54 rule 1 and 2 of the Civil Procedures Rules 2010 provides:-

"1. The Civil Procedure Rules are revoked.

2. In all proceedings pending whether preparatory in incidental to, or consequential upon any proceedings in court at the time of the coming into force of these rules, the provisions of these rules shall thereafter apply, but without prejudice to the validity of anything previously done:

Provided that:

(a) If, and in so far as it is impracticable in any such proceedings to apply the provisionsof these rules, the practice and procedure heretofore obtaining shall be followed;

(b) In any case of difficulty or doubt the Chief Justice may issue practice notes or directions as to procedure to be adopted."

The learned counsel for applicant Mr. Rimita submitted that under Order 24 of Civil Procedure Rules the

respondentssuit abated against the defendant 1 year after his death as no substitution was done within a year from 15th November 2006.

Order 24 rule 4 (1) (2) and (3) of Civil Procedure Rules:-

"4. (1) Where one of two or more defendants dies and the cause ofaction does not survive or continue against the surviving defendant ordefendants alone, or a sole defendant or sole surviving defendant diesand the cause of action survives or continues, the court, on an applicationmade in that behalf, shall cause the legal representative of the deceaseddefendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriateto his character as legal representative of the deceased defendant.

(3) Where within one year no application is made under sub-rule(1), the suit shall abate as against the deceased defendant."

The learned counsel for the respondent strongly opposed the application and relied on the replying affidavit. He submitted the application is incompetent in light of order 17 Rule 2 Civil Procedure Rules. He argued it is only court which can give notice to defaulting party to show cause why suit cannot be dismissed for failure to have taken action for one year.

Order 17 rule 2 of Civil Procedure provides:-

"**2. (1) In any suit in which no application has been <u>made or steptaken by either party for one year, the court</u> may give notice in writingto the parties to show cause why the suit should not be dismissed, andif cause is not shown to its satisfaction, may dismiss the suit.**

(2) If cause is shown to the satisfaction of the court it may makesuch orders as it thinks fit to obtain expeditious hearing of the suit.

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.

(4) The court may dismiss the suit for non-compliance with anydirection given under this Order."

The learned counsel submitted further that the suit was in court on 25th July 2011 and a period of one year has not lapsed to warrant the dismissal of the suit for want of prosecution. He argued the respondent has explained the delay. He submitted that witnesses can be traced as this is a claim for land.

He further argued under Order 24 rule (1) of Civil Procedure Rules the death of the defendant do not cause the suit to abate.

Order 24 rule 1 of Civil Procedure Rules provides:-

"1. The death of a plaintiff or defendant shall not cause the suit toabate if the cause of action survives or continues."

The respondent filed this suit on 25.11.1998 against Elijah Kaburu seeking the following prayers:-

1. A declaration that the defendant holds L.R. NO.ABOGETA/U-KIUNGONE/1108 in trust for the plaintiff who is a beneficiary to the estate of the deceased.

2. An order directing the defendant to transfer LR NO.ABOGETA/U-KIUNGONE/1108 to the plaintiff and in default, the executive officer of this honourable court be empowered to sign all necessary documents to effect the said transfer

3. Costs and interest of this suit

4. Any other or such better orders which this court may deem fit to grant.

The court record show that this matter came up before court on 4.4.2000 for hearing of defendant's applicationseeking that the respondent do deposit in court security for defendant's costs in the tune of kshs.80,000/= which application was dismissed on the same date for non-attendance of the applicant. On 14.11.2000 both parties were absent. The suit was set down for hearing on 16th August 2011 and on said date the case was marked S.O.G. and again on 11.12.2001 when case came up for hearing was also marked S.O.G. On 18.6.2002 the case was again marked S.O.G. The suit came on 19.5.2009 for hearing of applicant's application for substitution which was granted on 14.11.2000.That applicant filed application for dismissal of the suit on 16.9.2009. The application also came before court on 8.2.1010, 28.6.2010, and 20.2.2012. The respondent's suit was set down for hearing lastly on 3.4.2003 when it was marked S.O.G.

The applicant's application is properly before this court. The application was filed when the old Civil Procedure Rules were in operation under Order IXVI Rule 5 of Civil Procedure rules.

Order 54 of the Civil Procedure Rules 2010 is clear that all proceedings which were pending whether preparatory or incidental to or consequential upon any proceedings in court at the time of the coming into force of the new rules, the provisions of the new rules shall thereafter apply, but without prejudice to the validity of anything previously done.

I therefore do not find merit in the respondent's argument that the application is incompetent in light of Order 17 rule 1 of Civil Procedure Rules.

In case of**Ivita–v-Kyumu [1984] KLR 44**Hon. Chesoni J, as he then was, in an application similar to this one under Order IXVI rule 5 of Civil Procedure Rules referred to post independence English cases and stated as follows:-

"This court has dealt with applications of this nature in the cases of Saldanah&Ors v Bhailal& Co. Ors [1968] EA 28; Sheikh v Guta&Ors [1969] EA 140 and the two unreported ones – ET Monks and Co. Ltd v Y Evans & Three others and City Council of Nairobi v HN Wandolo – ibid. In all these cases and in the East African Court of Appeal case of Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited [1969] EA 696, this court and the Court of Appeal relied and followed the English case of Fitzpatrick v Batger and Allen v MacAlpine ibid. Post independence English case have proved t be of great assistance and persuasive authority to this court.

In the Fitzpatrick case Lord Denning Mr. said at page 658:

"……it is the duty of the plaintiff's adviser to get on with the case. Public policy demandsthat the business of the courts should be conducted with expedition. Just consider the times here. The accident was on December 13, 1961….It is impossible to have a fair trial after so long a time. The delay is far beyond anything, which we can excuse. This action has gone to sleep for nearly two years. It should now be dismissed for want of prosecution."

Salmon L J entirely agreed with the Master of rolls and added at page 659:

'It is of the greatest importance in the interest of justice that these actions should be brought to trial with reason expedition."

In the Mukisa Biscuit Co. case Sir Charles Newbold P said at p 701:

"the second matter relates to the undoubted delay in the hearing by the High court of this case. It is the duty of a plaintiff to bring his suit to early trial, and he cannot absolve himself of this primary

duty by saying that the defendant consented to the position."

In that case the court was of the view that both parties had contributed to the delay in reaching a hearing. The suit was not dismissed but sir Charles Newbold P at the same p 701 added:

"I wish, however, to make it clear that in future a plaintiff who for whatever reason, delays for over six years before bringing his suit for trial can expect little sympathy."

There is one other local authority which was considered in case of ET Monk cited by Mr. Patel, which I should also consider. That is the case of *Abdul &Anor v Home and Overseas Insce Co Ltd [1971] EA 564*. This appears to be the latest East African authority. In that case the plaintiff filed an action against the defendant in January 1962. The cause of action arose in 1960. The case was fixed for hearing, but taken out of the list in August 1962. The 2nd plaintiff died in 1965. Although his administratrixobtained letters of administration in November 1968 she did not apply to be substituted for the deceased until July 1970. No steps were taken to set the action down for hearing for a further two months and the defendant applied for the suit to be dismissed for want of prosecution alleging that t fair trial could not be heard after so long a time as one witness was dead and three had left the country and their whereabouts were unknown. Simpson J. dismissed the action and the plaintiffs appealed. Simpson J had dismissed the action because he was, to quote his own words:

"entirely satisfied that there will be prejudice to the defendant if the case proceeds and that it will be impossible to have a fair trial"

The Court of Appeal for East Africa dismissing the appeal agreed with the judgment of Simpson J and Law JA (as he then was) said at p 568:

"I agree with Mr. Humphrey Slade, for the respondent, that the judge was justified in his decision that a fair trial of the suit could be heard to-day."

I should also mention that the Uganda High Court followed the English and East African authorities I have cited. That was in the case Of *Nilani v Pater &Ors [1969] EA 340* where the delay was for some nine years.

The authorities have considered here show that the law and principle upon which courts go are clear. The test was enunciated by Lord Denning MR *in Aleen V Sir AfredMcAlpine& Sons Ltd*at p 547 it was repeated by Edmund Davies LJ in *Paxton v Alsop* [1971] 3 ALL ER 370 at p 278, who put it as follows:

"if I may be acquitted of immodesty by quoting some words of mine used in *Austin Securities Lt v Northgate & English Stores Ltd* [1969] 2 All ER 753 where having set out the familiar tests t be applied in such cases, I said:

'But these questions are, as it were posed enroute to the final question which overrides everything else and was enunciated by Lord Denning MR, *I Allen v Sir Alfred Mac'Alpine& Sons Ltd*, in these words: "The principle on which we go is clear: when the delay is prolonged in inexcusable, and is such as to do grave injustice t one side or the other, or to both, the court may in its discretion dismiss the action straight away……". So the overriding consideration always is whether or not justice can be done despite the delay. Thus, Lord Denning MR referred later in his judgment in that case, to "delay…….so great as to amount a denial of justice'……"

It is clear from the above quoted case in determining an application for dismissal of suit for want of prosecution the delay has got to be considered whether it is prolonged and inexcusable and if it is, whether justice can be done despite that delay. Justice has to be considered in respect of both the plaintiff and the defendant. Both parties to the suit must be considered. The witnesses and documents may be missing and evidence may be very weak due to loss of memory. The defendant must also satisfy the court

that he shall be prejudiced by delay and that justice may not be done due to the prolonged delay on the part of the plaintiff before, the court can exercise its discretion in his favour and dismiss the suit for want of prosecution.

Since the filing of this matter the plaintiff has not been serious with prosecution of this matter. The case to date is 14 years old. The plaintiff has not given satisfactory excuse for the prolonged delay in setting the matter down for hearing. The original defendant died about 6 years ago. I do not see how a fair trial of the suit could be heard today. This court is not impressed at all by the Plaintiff's unexplained delay. The court must ensure justice is done to both the plaintiff and the defendant by considering both sides. I am satisfied if this suit is allowed to proceed after unexplained delay of over 14 years; the defendant would be prejudiced and it would be difficult to have a fair trial.

On the issue of the suit having abated, the provisions of order 24 rule 3 of Civil Procedure rules is clear, that where within 1 year no application is made under rule 1 of Order 24 of civil Procedure Rulesthe suit shall abate against the defendant. Any suit against a deceased person, if no application is filed within one year after his death stands abated. The court in view of the clear expression of the said provision need not make any order as the suit automatically abated after one year from the date of death of the defendant.

Secondly, in the applicant's application, there is no prayer for the suit to be declared to have abated and court need not make such orders as they have not been sought in the application. I would add that prayer in any application cannot be sought as in this case, through an affidavit or through oral submissions by counsel or a party. It must be in the body of the notice of motion or chamber summons as case may be.

In case of **Chalicha F.C.S Ltd-v- Odhiambo& 9 others [1987] KLR 182**

Court of Appeal stated:-

"**As stated earlier, there was no counter-claim filed. However, sympathetic the judge may be towards the defendants, no order can be made (unless by consent) outside the pleading. Two decisions of this court are on this pint one in *Captain Harry Gandy v Caspair Air Charters Ltd (1956) 23* EACA 139 at page 140 Sinclair V P stated:**

"The object of pleadings is of course, to secure that between them, so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule relief not founded on the pleadings will not be given. As the English Practice Scrutton, L J said in *BlayvsPolland and Morris [1930] 1 KB 628.*

Cases must be decided on the issue son the record, and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the judge decided was raised byhimself without amending the pleadings, and in my opinion he was not entitled to take such a course".

I had pointed out that the respondents affidavit was not dated.

Under Section 5 of the Oaths and Statutory Declaration Act (Cap 15) it is provided:-

"5.Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made."

The respondent's replying affidavit in the jurat it is not stated on what date the oath or affidavit was taken or made. Such particulars are supposed to be stated in the jurat or attestation clause. The purported replying affidavit is no affidavit for failure to comply with provisions of section 5 of Oaths and Statutory Declaration Act. The purported affidavit is a nullity.

In view of the foregoing and by virtue of Order 19 rule 6 of Civil Procedure Rules the entire respondent's

affidavit is struck out for failure to comply with the provisions of the Oaths and Statutory Declaration Act.

I have that notwithstanding in this application considered the points of law raised by counsel for the respondent.

The respondent from what I have noted and stated herein above, has not shown any sufficient, excuse or cause for his inordinate delay in prosecuting this suit. The applicant has to the satisfaction of this court shown that the respondent has inordinately delayed in prosecuting this suit. That since applicant was substituted as defendant for a period of over 3 years the respondent has never made a single attempt to set the suit down for hearing. In the circumstances of this case, and in absence of any credibleexcuse made by the respondent, I find the delay in this case to be inordinate, and inexcusable and by letting this matter continue the applicant would be prejudiced and justice would not be done.

The public has been concerned with backlog of cases at the court's and matters such as this case which were filed long time ago, and parties go to sleep have contributed alot to backlog of cases at courts in the country.The applicant in this matter has no interest in having this matter determined and by letting it continue pending at the registry would be contributing enormously to the backlog that the judiciary is doing all it can to clear. Such matters as this case should be dealt with by making appropriate orders as justice delayed is justice denied to all litigants; who are looking forward to have swift decisions.

In the instance and in exercise of my discretion the applicant's application is allowed and the respondent/plaintiff suit is dismissed for want of prosecution.

The applicant is awarded costs of the suit and the application.

DATED, DELIVERED AT MERU THIS 15TH DAY OF MARCH 2012.

J. A. MAKAU
JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF

1. Miss Nelima h/b Mr. M. Kariuki Advocate for Respondent

2. Miss Kiome h/b Rimita Advocate for Applicant

J. A. MAKAU
JUDGE