



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 270 OF 2017

MARGARET KYALO PLAINTIFF

VERSUS

EQUITY BANK (K) LIMITED DEFENDANT

RULING

(Application seeking orders to mark suit as abated or dismissed for want of prosecution; one year lapsed since it was mentioned that the plaintiff died though no proof of death supplied; no substitution made within one year; suit would thus abate in the event of the death of the plaintiff; if plaintiff not deceased, suit will stand dismissed for want of prosecution as one year has lapsed since it was stood over generally)

1. The application before me is that dated 13 February 2020 filed by the defendant. It seeks an order that this suit be marked as abated in terms of Order 24 Rule 3 of the Civil Procedure Rules, 2010, or in the alternative, the suit be dismissed for want of prosecution.
2. The genesis of the suit is a plaint that was filed on 20 July 2017. The plaintiff averred that she is the owner of the land parcel Mombasa/Block XVIII/168 which she had charged to the defendant/applicant. She filed this suit seeking to stop the applicant from selling the suit property in exercise of the applicant's statutory power of sale. It was her contention that the intended sale was illegal. Together with the suit, the plaintiff filed an application for injunction to stop the intended sale. Interim orders were given, and after the application was heard inter partes, a ruling was delivered on 7 February 2018, vide which the application was dismissed. Aggrieved, the plaintiff filed a Notice of Appeal, and followed it up with another application for stay pending appeal. When that application came up for hearing on 19 June 2018 counsel for the plaintiff stated from the bar that the plaintiff died on 28 January 2018. The court then directed that the case be stood over generally.
3. Nothing has transpired in this case since it was in court on 19 June 2018 until this application was filed on 9 April 2020. I have already mentioned that the application seeks orders to have this case marked as abated or dismissed for want of prosecution. No reply has been filed to the application despite counsel on record for the plaintiff being duly served.
4. I have not seen any proof of death although I do not doubt the word of counsel for the plaintiff when she said that her client is deceased. If we proceed on the basis that the plaintiff died on 28 January 2018, she needed to be substituted within one year of death or else the suit would abate as provided by Order 24 Rule 3 which is drawn as follows :-

3. Procedure in case of death of one of several plaintiffs or of sole plaintiff

[Order 24, rule 3.]

(1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff:

Provided the court may, for good reason on application, extend the time.

5. Thus, if indeed the plaintiff died on 28 January 2018, this suit has abated.

6. If we assume that counsel was mistaken in stating that the plaintiff died, the suit would be liable for dismissal for want of prosecution under Order 17 Rule 2 which is drawn as follows :-

Notice to show cause why suit should not be dismissed [Order 17, rule 2.]

(1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

(2) If cause is shown to the satisfaction of the court it may make such 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 any direction given under this Order.

7. Given the above, I make the order that in the event that the plaintiff died on 28 January 2018, this suit is marked as abated, but in the event that the plaintiff is not deceased, then this suit is dismissed for want of prosecution. Either way, the costs of the suit will be to the defendant/applicant payable by the estate of the plaintiff in the event that she is deceased, or payable by the plaintiff herself, in the event that she is alive.

8. Orders accordingly.

DATED AND DELIVERED THIS 20 DAY OF JANUARY 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA