



Maiyo & 146 others v Okumu & Okumu (Sued as the Administrators of the Estate of Charles Okumu & 2 others (Environment & Land Case 126 of 2021) [2022] KEELC 3683 (KLR) (2 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3683 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 126 OF 2021
MN MWANYALE, J
JUNE 2, 2022
FORMERLY ELDORET E&L CASE NO 24 OF 2019**

BETWEEN

BENJAMIN MAIYO & 146 OTHERS APPLICANT

AND

**PETRONILLA A OKUMU, FREDRICK OKEDA OKUMU (SUED
AS THE ADMINISTRATORS OF THE ESTATE OF CHARLES
OKUMU 1ST RESPONDENT
AGRICULTURAL DEVELOPMENT CORPORATION 2ND RESPONDENT
LAND LIMITED 3RD RESPONDENT**

RULING

1. Before the Court for determination is the Notice of Motion application dated 7th March 2022. The said application seeks the following orders.
 - a) That the Plaintiff has failed to take steps to prosecute the suit for more than one year without just cause one excuse.
 - b) That this suit be struck out for failure to serve summons to enter appearance and pleadings
 - c) That this suit be dismissed for want of prosecution.
 - d) That the Plaintiff be condemned to pay costs of the suit and this application to the Defendants.
2. The application is expressed pursuant to Section 1A, 1B, 3A of the Civil Procedure Rules, Order 51 Rule 1 Oder 5 Rule 1 and 6, Order 17 Rule 2 and 3 of the [Civil Procedure Rules](#) 2010.



3. The application is grounded on the grounds on the face of it interalia
- i) Suit was filed in 2019, and the Plaintiff has never bothered to serve the 1st Defendant with the summons to enter appearance and pleadings, despite request to do so by the 1st Defendants Advocates on record.
 - ii) Nonetheless the 1st Defendant has entered appearance on 6th March 2019
 - iii) The 1st Defendant has not been served with pleadings, and have sought for the same through correspondences.
 - iv) That it is over one year since the suit was filed, the Plaintiff has not bothered to take any steps to prosecute the suit by setting down for hearing and even on a number of occasions when the matter has been mentioned in Court without any justifiable/credible cause or excuse.

4. For the above reasons the Applicant seeks that the suit be dismissed. Although the Respondent/Plaintiff did not file any Respondent/Plaintiff did not file any response to the application and the Court deemed the application unopposed on 4/4/2022 nonetheless the Court reserved its Ruling on the application.

Indeed under 5 Rules 1, 2 and 6 of the Civil Procedure Rules upon which the application is premised on requires the Plaintiff to serve summons to enter appearance to the Defendant ordering the Defendant to appear within the time specified.

The said provisions further requires the Summons be served with a copy of the plaint, within 30 days failing which the suit shall abate.

5. It is the Applicant's contention that she has not been served with the summons nor copies of the pleadings and that the suit against her should abate. As observed the Respondent did not oppose this application, and the depositions by the Applicant are therefore uncontroverted.
6. The Court has perused the Court record and finds that vide a Memorandum of appearance dated 28th February 2019, the firm of Kalya and Company Advocates entered appearance for the 1st Defendant, which Memo of Appearance was filed in Court on 6/3/2019.
7. On the same 6th March, 2019, the firm of Ligunya Sande Advocates equally filed the Memorandum of appearance dated 5th March 2019.
8. Therefore two firms of Advocates appeared for the 1st Defendant on the same day. It follows there from the 1st Defendant must have instructed either of them. It is important to note also that the 1st Defendant is the Estate of the late Charles Okumu, which has 2 Administrators, Petronillah A. Okumu and Fredrick Okeda Okumu.
9. The purposes of service of summons is to inform the Defendant of the filing of the suit. Since the 1st Defendant entered appearance vide two law firms, it is logical that at the time of entering appearance that service must have been effected and there is therefore no prejudice that has been visited on the 1st Defendant.
10. With regard to the submissions that no steps have been taken by the Plaintiff to fix the matter for hearing. Under Order 17 Rule 2, under which this application is premised to same provides.

“in any suit in which no Application has been made or step taken by either party for one year, the Court may give notice.....”



That provision thus requires that firstly no application or step taken by either party for one year.

11. In this suit however, the 2nd and 3rd Defendants had a chamber Summons application dated 5th May 2011. It follows there from, that an application within the meaning of Order 17 Rule 2 had been filed by one party in the year presiding the application subject of this ruling which was filed on 9th March 2022.
12. The 2nd and 3rd Defendant had again filed an application of 2/2/2022. It follows there from record that two applications had been filed by the 2nd and 3rd Defendants before the instant application for dismissal.
13. This suit was transferred to this Court in September 2021. There is therefore no prolonged delay from September 2021 to date to warrant dismissal of the same.
14. It is true however that the Plaintiff had not taken any steps to prosecute the matter. The test to be applied for and application under this order was developed in the decision in Ngwabu ivita –vs- Akton Mutua Kyumbu. The Court observed that;

“The test is whether the delay is prolonged and inexcusable, afide if it is can justice be done despite delay. Justice is justice to both Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents and or witnesses may be missing and evidence is weak due to the disappeared of human memory resulting from lapse of time..... thus even if delay is prolonged if the Court is satisfied with the Plaintiff’s excuse for the delay to action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time...”
15. The Court however notes the anxiety caused to the 1st Defendant/Applicant and from the record the Plaintiff and/or his Advocate have been missing at times when the matter is mentioned and there seems to be lack of interest in the matter on their part.
16. Accordingly, the Plaintiff is granted 90 days from today to take steps to 6secure a hearing date, by compiling with Order 11.
17. In the meantime the 1st Defendant is granted leave to file their defence within 15 days from the date hereof, and comply with Order 11 within 45 days. Failure by Plaintiff to take measures to secure a hearing date, within the 90 days this suit shall stand dismissed.

Orders accordingly.

DATED AND DELIVERED AT KAPSABET THIS 2ND DAY OF JUNE, 2022.

HON. JUSTICE M. N. MWANYALE

JUDGE.

In the presence of;

Ms. Okumu holding brief for Mrs Ligunya for Defendant

No appearance for Magut for Plaintiff

