



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT EMBU**

**MISC. SUCCESSION CAUSE NO. 36 OF 2011**

**ODARIA WANJA.....APPLICANT**

**VERSUS**

**CHARLES KINYUA NJOKA.....RESPONDENT**

**RULING**

**A. Introduction**

1. The applicant moved court vide summons general dated 5.03.2021 seeking for orders that:

i. The orders dismissing the application for the revocation of grant dated 11.05.2011 and issued on 25.10.2018 be set aside and the application dated 17.05.2011 be set down for hearing.

ii. The costs be in the cause.

2. The application is grounded on the reasons as exhibited on the face of the summon general and supported by a sworn affidavit by Odaria Wanja in which she depones that her attempts to prosecute this matter has been rendered difficult due to the fact that despite going to the registry severally, she has been unable to trace the file and further could not therefore fix the hearing date for her application to be heard.

**B. Applicant's Case**

3. The applicant further deponed that during the entire period, the applicant was always desirous to prosecute the matter but the confusion came in when the court ordered for the typing of the proceedings and; that the applicant never received the dismissal notice as required by the law.

4. That it was until 25.10.2018 when she realized that the court on its own motion had dismissed the suit for want of prosecution pursuant to Order 17 Rule 2(1) of the Civil Procedure Rules.

5. She urged this court to reinstate the suit so that all parties can have a fair hearing for a just determination of the suit as the deceased estate remains undistributed to date and that it is fair that each and every party is heard so that this Estate can be distributed as required by the law.

**C. Respondent's Case**

6. The respondent in his replying affidavit argued that the application is an abuse of the court process since it has been brought late in the day and it is an exercise meant to frustrate the confirmed grant. The respondent further reasoned that the application was meant to frustrate the beneficiaries of the estate who have not enjoyed their inheritance for over a decade.

7. The respondent's submitted that equity aids the vigilant and not the indolent; further, that there was no good reason proffered before the court to justify why the applicant took seven years without prosecuting the matter. According to him, the delay is prolonged and inexcusable.

8. The respondent relied on the case of **Ronald Mackenzie v Damaris Kiarie Embu Civil Suit No. 11 of 2016**. On that account, the respondent prayed for the application to be dismissed with costs to the respondent.

**D. Analysis and Determination**

9. The application herein seeks to reinstate the suit. The test applied by the court in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the applicant's excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of the discretion of the court.

10. Order 17 Rule 2(1) which governs dismissal of suits for want of prosecution, provides as follows:

**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 dissatisfaction, may dismiss the suit.**

11. Notably, every person is entitled as envisaged under Article 50 of the constitution of Kenya to have a fair trial. The said article provides that:

**“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”**

12. It therefore follows that every person ought not to be shut out from accessing court or having his day in court. Indeed, the right of the respondent (representing sons) to enjoy the property of the deceased's estate to the exclusion of the daughters must be weighed against the right of the applicant (representing daughters) to access court to have this dispute heard and determined by a court or tribunal of a competent jurisdiction.

13. It is given that whether to exercise the power of dismissal for want of prosecution under Order 17 is however a matter that is within the discretion of the court. In its decision in **Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v M.D. Papat and others & Another [2016] eKLR**, the court stated as follows:

**“Nonetheless, Article 159 of the Constitution and Order 17 Rule 2(3) gives the court discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable and is likely to cause serious prejudice to the defendant on account of that delay. This is what the case of Ivita v Kyumba [1984] KLR 441 also espoused.**

14. Under Order 17 Rule (2) (1), the court or a party can issue a notice where a matter has been inactive for over a year. In regard to the case at hand, the suit is ripe for dismissal given that it has taken over seven years since it was filed. But on the other hand, the estate of the deceased to date has never been probated and so the estate stands a chance to be misappropriated if this court does not step in to guard its interest.

15. The court in the case of **Allan Otieno Ofula v Gurdev Engineering & Construction Ltd [2015] eKLR** where Aburili J observed that ***‘the right of appeal is a constitutional right and in as much as there has been delay which has not been satisfactorily explained by the applicant’***, the court has to weigh the cost and prejudice a respondent is to suffer if the application in this case is struck out before it is heard on merits. In regard to the case at hand, the parties were moved by the court and not the respondent; that notwithstanding, the respondent never presented to court any harm he would suffer if at all the suit herein were to be reinstated.

16. For the fore going reasons, the upshot of this humble ruling is that:

- i. The application has merits and it is hereby allowed.
- ii. The application dated 17/05/2011 be set down for hearing on priority basis.
- iii. The respondent is awarded costs of Kshs. 15,000/= to be paid within 14 days.

17. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 10<sup>TH</sup> DAY OF NOVEMBER, 2021**

**L. NJUGUNA**

**JUDGE**

.....for the Applicant

.....for the Respondent