REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC CASE NO. 260 OF 2017

PHILIP MWATU ITHUKA.....PLAINTIFF/APPLICANT

VERSUS

PASCAL KYENGO MUTEVU.....1ST DEFENDANT/RESPONDENT

MAURICE MUTETI MUTEVU.....2ND DEFENDANT/RESPONDENT

RULING

1. What is before this court for ruling is the Plaintiff's/Applicant's Notice of Motion Application dated 24th June, 2019 and filed in court on even date for orders: -

(a) Spent.

(b) THAT this Honourable Court be pleased to reinstate the suit herein;

(c) THAT the Order issued on 13th June 2018 dismissing the Suit for want of Prosecution be reviewed and/or rescinded.

(d) THAT upon reinstatement this Honourable Court be pleased to substitute the Plaintiffs from Philip Mwatu Ithuka to Sammy Wambua Ithuka the Administrator of the Estate;

(e) THAT the costs of this Application be in the cause.

2. The application is expressed to be brought under Order 24 Rule 3 of the Civil Procedure Rules, Section 13 (2) of the Environment and Land Act and all other enabling provisions of law and is predicated on the grounds on its face and is supported by the supporting and supplementary affidavits of Sammy Wambua Mwatu, the personal representative of the estate of the late Philip Mwatu Ithuka, sworn on 24th June, 2019 and 13th September, 2019 respectively.

3. The Defendants/Respondents have opposed the application through the replying affidavit of Pascal Kyengo Mutevu, the 1st Respondent herein, sworn at Machakos on 06th August, 2019 with the authority of the 2nd Respondent and filed in court on 14th August, 2019.

4. On the 31st July, 2019 the court directed that the application be disposed off by way of written submissions. Pursuant to the Court's directions on the mode of disposal of the application, the Counsel on record for the Applicant and the Respondents filed their submissions on 03rd October, 2019 and 18th November, 2019 respectively.

5. The Applicant has deposed in paragraphs 2, 3, 5, 6 and 7 of his supporting affidavit that the grant of letters of administration ad litem were issued by this court on 29th April, 2019, that the suit matter is the property of the estate of the late Philip Mwatu Ithuka and the beneficiaries will be gravely prejudiced if the dispute is not heard on merits, that when the matter was before the court on the 13th June, 2018, the estate had not obtained letters of administration and their advocates efforts to explain the issue was not successful, that prior to the death of the deceased, the advocates on record had sought and obtained records confirming the suit property namely plot No.90 be lawfully registered in his name as per the letter dated 25th August, 2017 from the Department of Lands, Mining and Physical Planning – Makueni and a Beacon certificate dated 11th September, 2017 (marked "C" and "D") and that he and the advocates have always been keen on prosecuting this matter and that the delay in obtaining letters of administration was not their fault as demonstrated in the proceedings of the court marked "E".

6. The Applicant has further deposed in paragraphs 2, 3, 4, 5, 6 and 8 of his supplementary affidavit that he is advised by his advocates on

record which information he verily believes to be true and correct that it is not true that the court is functus officio as it has the discretion in setting aside the dismissal and abatement orders for sufficient cause under Order 17 and Order 24 of the Civil Procedure Rules respectively which discretion is unfettered and available in this case, that the certificate of death was issued on 06th June, 2018 but the demise of the Applicant's father was untimely and the estate required time to establish the deceased's affairs, including this court case, consult and accordingly advise the advocates on record in order to commence the process of filing the letters of administration hence the delay, that the demise of the deceased was untimely and unforeseen by the time the court gave the six months conditional dismissal order on 04th December, 2018, that although the proceedings closed way back in 2015 as deponed in paragraphs 5, 6 and 7 of the replying affidavit, there was an application dated 09th November, 2014 which was to be dispensed with before directions would be taken on the hearing of the main suit and which is still pending before this court and the application had tended to delay the case, that he has been reliably advised by his advocates on record which information he verily believes to be true and correct that further delay in prosecuting this case was occasioned by the delay in setting up of the ELC Court at Machakos and later in the transfer of the file from Machakos Law Courts for hearing and determination in Makueni Law Courts which has the jurisdiction to hear this case and that this is a suitable case for the court to use its pecuniary and inherent jurisdiction under the law in relation to the right to property under Article 40 of the Constitution and the balancing need to preserve the rights of the estate of the deceased for the benefit of the dependants and prevent the said property going to waste.

7. The Applicant's Counsel framed four issues for determination. The issues were: -

(i) Whether it is in the interest of justice that the suit herein be reinstated;

(ii) Whether delay in prosecuting the case is sufficiently explained, unintentional and excusable;

(iii) Whether the Defendant will suffer prejudice due to reinstatement of suit;

(iv) Whether the delay is an abuse of the court process.

8. The Respondents' Counsel did not frame any issues.

9. On the first issue, the Applicant's Counsel cited ***Order 24 Rule 1 of the Civil Procedure Rules*** which provides that: -

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

10. The Counsel further cited ***Rule 3(2)*** of the same Order which provides that:-

"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."

11. Arising from the above, the Counsel submitted that the cause of action herein survives the deceased and that the right claimed involves property to the suit premises which remains a right to the beneficiaries of the estate of the deceased of which the Applicant is also the administrator. The Counsel went on to submit that the Applicant seized the opportunity to act with speed after obtaining the letters of administration on 07th May, 2019 which empowered him to file this application on the 24th June, 2019. It was further submitted that the delay in procuring the necessary letter from the chief and certificate of death as well as choice of the administrators was unintentional and gravely contributed to the delay in applying to the court to revive the suit.

12. In support of his submissions the Applicant's Counsel cited the case of ***Kishor Kumar Dhanji Varsani vs. Amolak Singh & 4 others [2016] eKLR*** where the Court of Appeal stated thus: -

"The issue in this appeal is simple. That is, whether the 1st Respondent established sufficient cause for failing to continue with the suit after the death of the deceased, to justify the learned Judge of the High Court exercising his discretion in allowing the revival of the suit following its abatement. In his judgment, the learned Judge took into account the object of limitation enactments as stated in Mehta vs Shah [1965] EA 321: "The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on one hand and on the other hand to protect a defendant after he has lost the evidence of his defence from being disturbed after a long lapse of time.

The learned judge also took into account the explanation given by Punny. This is how the learned Judge rendered himself:

"…The Applicant has been candid that she did not know that she was required to do anything in relation to the case….is this candid admission the same thing as sufficient cause? It may be that ignorant of law is no defence. In my humble view that may apply more to criminal matters than civil litigation. There are many Kenyans even the educated who may not unlike lawyers be aware of the existence of Order 23 Rule 8. It is clear that immediately the Applicant became aware, she applied and obtained the grant and without further delay brought the instant application. Her claim cannot be described as stale nor can it be said the 2nd Respondent has lost his defence. After all there are still three plaintiffs in the matter. They were joined by an order of this court (Kamau, J) which order has not been set aside.

In view of the contest in this matter, it would be unconscionable to lock out a party who has expressed serious keenness in proceeding with the case. The questions regarding her capacity, whether the other plaintiffs are properly on record or whether the suit property has ceased to exist can only be canvased after the suit is revived and the Applicant joined. For those reasons, I allow

the application dated 4th December, 2008 and order that the 1st Plaintiff's suit be and is hereby revived…."

13. The Counsel was of the view that the Applicant has shown sufficient cause for the delay in substituting the Plaintiff and bringing this application to warrant the exercise of jurisdiction by this court in his favour.

14. On the issue of whether or not the delay in prosecuting the case is sufficiently explained, unintentional and excusable, the Applicant's Counsel's submissions were that the law grants discretion to the court to regard matters dismissed for want of prosecution and cited ***Order 17 Rule 2(1) of the Civil Procedure Rules*** which provides: -

Under 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 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.

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

15. The Counsel relied on the case of ***Mwangi S. Kimenyi vs. Attorney General & Another [2014] eKLR*** where the court stated as follows: -

"There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. Caution is, however advised for courts not to take the word "inordinate" in its dictionary meaning, but to apply it in the sense of excessive as compared to normality. Therefore, inordinate delay for purposes of dismissal for want of prosecution should be one which is beyond acceptable limits in the prosecution of cases."

16. It was also submitted on behalf of the Applicant that the nature of this case would dictate that a second thought be given before upholding the dismissal in that the dismissal will affect many dependants of the deceased person who stand a chance to lose part of their inheritance and the deceased's estate will go to waste. The Counsel cited the case of ***Utalii Transport Company Ltd & 3 others vs. NIC Bank & Another [2014] eKLR*** where the court held thus: -

"When the Applicant states and CORRECTLY so, that: "It is the primary duty of the Plaintiffs to take steps to progress their case since they are the ones who dragged the Defendant to court." Then exhorts that "Over one year has lapsed without the Plaintiffs taking any step to progress their case." And makes a strong conclusion that "The Plaintiffs" inertia runs contra to the overriding objective of the court stipulated in section 1A, 1B and 3A of the CPA."

"The first intuitive feeling one gets is that the offending proceeding should quickly be removed out of the way of the innocent party. But, the law prohibits a court of law from such impulsive inclination, and requires it to make further enquiries into the matter under the guide of defined legal principles on the subject of dismissal of cases for want of prosecution; a view which is undergirded by the fact that dismissal of a suit without hearing the merits is draconian act which drives the plaintiff from the judgment-seat…. Accordingly, I will discern the principles which the law has developed to guide the exercise of discretion by court in an application for dismissal of suit for want of prosecution."

17. It was also submitted that leniency is most applicable by the nature of this case where the Applicant intends to come in as an administrator following the demise of the plaintiff to protect the interest of the estate of the plaintiff. The counsel relied on the case of ***Basil Criticos vs. Third Engineering Bureau of China City Construction Group Company Limited [2018] eKLR*** where the court stated thus: -

"Dismissal of a case is a draconian judicial act which drives the plaintiff away from the seat of judgment. It should be done sparingly and in cases where dismissal is the feasible and just thing to do. Therefore, courts should strive to sustain suits rather than dismiss them especially where justice would still be done and fair trial had despite the delay. Any explanation for the delay which is given should be properly evaluated by the court to see whether it is reasonable. That notwithstanding, a court of law should not hesitate to dismiss a suit for want of prosecution where it strongly feels the substance of the suit will only breed extreme prejudice to the defendant. It must also weigh the prejudice the dismissal with cause the plaintiff."

18. It was also the Counsel's further submissions that the estate of the plaintiff stands to suffer irreparable harm and injustice if the suit were to stand dismissed as they risk losing their inheritance and the plaintiff's property going to waste. The Counsel cited the case of ***Mwangi S. Kaimenyi*** case (supra) where the court stated thus: -

"In assessing the prejudice caused to the Defendant by the delay, the court should also assess the likely prejudice the dismissal of the suit will occasion upon the plaintiff. See ALLEN VS. ALFRED Mc ALPHINE, BIRKET VS JAMES and AGIP (KENYA) LTD. The prejudice to the plaintiff will be ascertained by looking at a number of varying facts which, among the major ones are: the nature of the case – e.g. public litigation, representative suit etc., importance of the claim or subject matter, legal capacity of parties, rights of the parties in the suit and so on. The cause of action in this case is quite substantial and raises serious issues of breach of contract of employment and rights of the employee. The defence in its counter-claim raises serious allegations that the Plaintiff made irregular payment to himself. In law the counter-claim survives on dismissal of the suit and Order 7 rule 13 is instructive thereto; a fact that gives this case a different dimension and which makes it desirable that the suit is reinstated. These matters will squarely and truly be considered by the court if the case is heard on merit and in order to avoid a miscarriage of

justice."

19. On the issue of whether the Defendant will suffer prejudice due to reinstatement of the suit, the Applicant's Counsel submitted that the Defendants will be allowed to defend the suit on merits and be entitled to the award of costs in the unlikely chance that the case is determined in their favour and thus they will suffer no prejudice or injustice.

20. On the other hand, the Counsel for the Defendants/Respondents submitted that the Respondents stand to suffer prejudice in having to defend a suit that was dismissed for want of prosecution all over again. It was also submitted that the court is functus officio and not properly moved. It was further submitted that Sammy Wambua Mwalu who is the deponent in the purported supporting affidavit is not properly enjoined in the suit to enable him make any application.

21. In support of his submissions, the Counsel cited the case of ***Wanjala Mutonga vs. William Barasa Wanjala [2016] eKLR*** where Mukunya, J held interalia: -

> *"The suit was dismissed by the court under Order 17(2) of the Civil Procedure Rules. Under that Order, it is the court that summons the parties to show course why their suit should not be dismissed for want of prosecution for pending for over one year without any action being taken. If no cause is shown the suit is dismissed. In this case a Notice went out to the Applicant asking him to come and show cause on 1/7/2015. The Applicant did not come to show course why his case could not be dismissed. It was therefore dismissed. At that stage the court's order was perfected. Under order 17(2) there is no provision for varying or setting aside the order, the court becomes functus officio once the suit is dismissed. The only option open to the party is to appeal against the dismissal.*
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> *In petition No.5 of 2013, Raila Odinga vs. Independent Electoral and Boundaries Commission and others the Supreme Court quoting" The origin of functus official doctrine with specific reference to its application or Administrative Law" (2005) 122 SALJ 832, has thus explicated this concept:*
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> *"The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter …. The [principle] is that once such a decision has been given, it is (subject) to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."*

22. Having read the application together with the supporting and supplementary affidavits as well as the replying affidavit and rival submissions, I wish to state the following: -

23. Firstly, I would like to clear the misconceptions raised in paragraph 2 of the Applicant's supporting affidavit to the effect that the grant of letters of administration ad litem were issued by this court. Let it be known that this court has no jurisdiction to issue such letters. I will however assume that the deponent had the Senior Principal Magistrate's Court in mind when he made the deposition in his affidavits.

24. Secondly having held the above, the Applicant herein is properly enjoined to make this application by virtue of the grant of letters of administration ad litem that have authorized him to file and prosecute this suit before this court. It therefore cannot be said that the Applicant is not properly enjoined.

25. Thirdly, whereas Order 17 of the Civil Procedure Rules does not provide for setting aside of orders made therein, the said rules are procedural and not statutory. It should be noted that Article 159 2(d) of the constitution requires that justice be administered without undue regard to procedural technicalities and I am persuaded by the Applicant that there is need for this court to exercise its discretion so as to avoid causing injustice to the Applicant and also to have the substantive suit herein heard and determined on merit. The Applicant has not only shown sufficient cause why the suit should be reinstated but has also explained the reasons for the delay in prosecuting the same.

26. The upshot of the foregoing is that the application has merit and I hereby proceed to allow it in terms of prayers (b) (c) (d) and (e).

Signed, Dated and Delivered at Makueni this **15th** day of **January, 2020.**

MBOGO C. G.

JUDGE.

In the presence of: -

Mr. Hassan holding brief for Mr. Kiluku for the Defendants/Respondents

No appearance for the Plaintiff/Applicant

Ms. C. Nzioka – Court Assistant

MBOGO C. G., JUDGE,

15/01/2020.