



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 395 OF 2014

FRANCIS NJOROGE MUIRU &

PETER KARANJA MUIRU

(Suing as administrators of the

Estate of MUIRU NJUGUNA-Deceased).....PLAINTIFFS/RESPONDENT

-VERSUS-

ESTATE OF THE LATE

RODRICK MUHORO.....1ST DEFENDANT/APPLICANT

KIMANI THUO.....2ND DEFENDANT/APPLICANT

ESTATE OF THE LATE

MWAURA NJOROGE.....3RD DEFENDANT/APPLICANT

KINYUA NAGANGA.....4TH DEFENDANT/APPLICANT

NGIGI RODRICK.....5TH DEFENDANT/APPLICANT

GIBSON NGIGI.....6TH DEFENDANT/APPLICANT

ESTATE OF THE LATE

NJENGA KINYUA.....7TH DEFENDANT/APPLICANT

ESTATE OF THE LATE

NDUNGU MUCHIRI.....8TH DEFENDANT/APPLICANT

ESTATE OF THE LATE

KIARIE MURABA.....9TH DEFENDANT/APPLICANT

ESTATE OF THE LATE

KAGOTHU MUNYUA.....10TH DEFENDANT/APPLICANT

GITAU KIRUMBA.....11TH DEFENDANT/APPLICANT

ESTATE OF THE LATE

NGANGA KIOI.....12TH DEFENDANT/APPLICANT

GEORGE MURIRA.....13TH DEFENDANT/APPLICANT

ESTATE OF THE LATE

WARUNGU THIANI.....14TH DEFENDANT/APPLICANT

ESTATE OF THE LATE

ZAKARIA WAINAINA.....15TH DEFENDANT/APPLICANT

JAMES GATHURU.....16TH DEFENDANT/APPLICANT

NGUGI MBUGUA.....17TH DEFENDANT/APPLICANT

DAGORETTI SLAUGHTERHOUSE LTD.....18TH DEFENDANT/APPLICANT

RULING

1. This ruling is the outcome of the notice of motion dated 13th September, 2017 filed by the defendants/applicants and supported both by the grounds set out on its face and the facts stated in the affidavits of *Grace Waringa* and *Eunice Mutile Mukuvi*. The applicants herein are seeking for the dismissal of the plaintiffs'/respondents' suit for want of prosecution.

2. In opposition thereto, the replying affidavit sworn by *Phillip Karanja Wachira* on 23rd October, 2017 was filed on behalf of the respondents, to which the 2nd respondent rejoined with a further affidavit sworn on 6th March, 2019.

3. Thereafter, the parties were directed to file written submissions on the application which they did. The applicants began by submitting that the respondents have to date failed to provide them with their list and bundle of documents despite having been requested to do so way back in 2015.

4. It is also the applicants' submission that despite having invited them to attend the registry to fix a hearing date for the suit on 16th December, 2016, they did not turn up nor provide any explanation for their non-attendance. The applicants aver that since then, the respondents have not taken any steps to prosecute their suit.

5. On the basis of the foregoing, the applicants have urged this court to consider the principles applied in applications for dismissal of suits for want of prosecution and proceeded to dismiss the respondents' suit.

6. In their submissions, the respondents averred that they invited the applicants to fix a hearing date but on that date they could not be given a hearing date because the 2016 court diary had been closed and the 2017 diary was yet to be opened. It is thus the respondents' submission that time began to run from 16th December, 2016 therefore the present application has failed to comply with the provisions of Order 17, Rule 2 of the Civil Procedure Rules.

7. The respondents also pointed out that while they have since complied with the pre-trial requirements set out under Order 11 of the Civil Procedure Rules, the applicants are yet to comply accordingly and further that the applicants have taken over one (1) year to prosecute this application, thereby contributing to the delay in the matter.

8. It is further the respondents' argument that the parties had at one point attempted to negotiate for an out-of-court settlement which eventually did not materialize.

9. The brief background of this matter is that the respondents instituted this suit against the applicants in their capacity as the administrators of the estate of Muiru Njuguna, deceased, by way of the plaint dated 14th November, 2014 in which they sought for *inter alia*, injunctive and declaratory orders against the applicants over various assets said to belong to the deceased.

10. The subject matter of this ruling is an application for dismissal of the suit for want of prosecution. The relevant provision is **Order 17, Rule 2 (1)** as read with **sub-rule 3** of the **Civil Procedure Rules** expressing that:

“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.”

11. Sub-rule 3 of the above provision enables any party to the suit like in this case to apply for its dismissal for want of prosecution.

12. Both the applicants and the respondents are in agreement that they were to attend the registry on 16th December, 2016. The applicants have averred that the respondents did not send a representative on the scheduled date whereas the respondents contend that the 2016 diary had been closed.

13. The respondents have in their written submissions urged this court to compute the time from 16th December, 2016 to ascertain whether a period of one (1) year had lapsed by the time the current application was filed. This court was beseeched to find that the Motion was premature since the time fixed by the Rules had not lapsed.

14. It is apparent that the period between 16th December, 2016 and 13th September, 2017 when the instant Motion was filed, only nine (9) months had lapsed. It is thus evident that the present application was prematurely filed, hence incompetent.

15. Consequently, the Motion is ordered struck out with costs abiding the outcome of the suit.

Dated, signed and delivered at NAIROBI this 18th day of July, 2019.

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J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiffs/Respondents

.....for the Defendants/Applicants