



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUSIA**

**CIVIL CASE NO. 37 OF 2016**

**MAGDALINA ATIENG**

**MICHAEL ELEKOTU OBARI**

**STEPHEN OMUSOLO.....PLAINTIFFS**

**VERSUS**

**CHRISTIAN WAFULA OMUSOLO**

**& EAVILINA AKISA OMELA (Both sued in their own capacity and in the Legal Representatives**

**of the Estate of ENJESLOYO OMUSOLO OBARI (Deceased)..... DEFENDANTS**

**RULING**

1. For determination is the application dated 18<sup>th</sup> September 2019 brought under the provisions of section 1A, 1B and 3A of the Civil Procedure Act and Order 17 Rule 2(3) of the Civil Procedure Rules. The applicant prays for Orders;

**1) This suit be dismissed for want of prosecution.**

**2) The costs of this application and the entire suit be borne by the plaintiff.**

2. The application is supported by the affidavit of Juma Collins and the following grounds;

*(a) That it is now over one year since neither the plaintiffs' nor their advocates on record have taken any steps to have this matter set down for hearing.*

*(b) That there has been prolonged or inordinate and inexcusable delay on the part of the plaintiffs' or their advocates.*

*(c) That it is unconscionable for the defendants to suffer indefinitely from an imminent prosecution towards which the plaintiffs' have refused and/or neglected to take any action.*

*(d) That it is unfair to subject the defendant to the prejudices of pending litigation that is not going to be resolved.*

*(e) That in the premise it is only fair and just that this matter be dismissed for want of prosecution so that justice can be served.*

3. The plaintiff/respondent opposed the application by the replying affidavit of Wickliff Ejakait Omare. He deposed that the application was prematurely filed because the matter has only remained dormant for a period of 8 months from 6/2/2019. That the dormancy was as a result;

*(a) One intended applicant had passed on and his son had to take out letters of administration to bring the claim.*

*(b) That upon grant of letters the son filed a suit vide Originating Summon Case No. 87 of 2018 which Case he intends to consolidate with this suit.*

4. Order 17 Rule 2(1) of Civil Procedure Rules reads as follows;

**“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(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1”.**

5. The plaintiff/respondent argues that the suit has only been dormant for 8 months but not one (1) year as the last date they were served with the defendant’s documents was on 6/2/2019. The defendant/applicant further deposes that the matter was in court lastly on 19/9/2018. From the court record, the matter was last in Court on 19/9/2018 when the trial judge ordered parties to comply with Order 11 requirements. As at this date, the plaintiffs had already complied with the provisions of Order 11 as the record does show they filed their documents alongside the Originating Summons on 9<sup>th</sup> April 2016.

6. The question for my determination is whether or not the plaintiff is guilty of laches hence his suit should be dismissed for want of prosecution. Nyakundi J in the Case of *Seafront Multipurpose Co-operative Society Limited Vs Lucas Owiti & 3 Others (2019) eKLR* stated that the test of whether or not the provisions of Order 17 Rule 2 Civil Procedure Rule wholly applies to the facts of each Case was laid down in the Case of *Ivita Vs Kyumbu (1975) eKLR* thus;

***“Justice is Justice to both the plaintiff and the defendant, so both parties to the suit must be considered and the position of the Judge too, because there is an easy risk for the documents, and or witnesses may be missing and evidence is weak due to the disappearance of the human memory resulting from lapse of time. The defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before court will exercise its discretion in his favor and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff’s excuse for the delay the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time.”***

7. The issue therefore is whether the plaintiff has given a reasonable explanation to this Court for the delay. The reason given is that they were waiting for an intended claimant who passed away and whose son was processing letters of grant before bringing the suit/claim which is similar to this claim. The plaintiffs however do not give the relationship they share with the Sophia Akolo Odima-deceased and or his son Felix Ronald Asamal Odima who are the claimants in the Originating Summon No. 87 of 2018. Secondly the date of death of the said Sophia is not disclosed. Thirdly, the applicants deposed that this suit was to be consolidated with theirs. The annexed undated application for consolidation is yet to be filed. It appears the same was drawn to defeat the current application.

8. This Court can only exercise discretion where a party explains away the delay satisfactorily. In this instant, I find no justifiable reason offered to explain the delay as the failure to serve the defendant’s list of documents did not stop the plaintiff from setting down the suit for hearing. Neither would a distinct suit with a distinct claimant be a basis for stopping the plaintiffs from pursuing their remedy. The orders commending themselves would be to allow the application. But in the interest of justice and fair hearing, I will grant the plaintiffs a last opportunity to prosecute their case on the following conditions;

**(i) The Plaintiffs shall pay the defendants/applicants costs of this application which I hereby assess at Kshs.20,000 payable within 30 days of today. In default execution to issue.**

**(ii) The plaintiffs to attend the registry for purposes of fixing a hearing date not later than 45 days of the delivery of the ruling. In default, the suit shall stand dismissed.**

**Dated, signed and delivered at BUSIA this 15<sup>th</sup> day of April, 2020.**

**A. OMOLLO**

**JUDGE**