



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO.538 "A" 1998

ELIZABETH NYAMBURA KAMAU.....PLAINTIFF

VERSUS

JOSEPH CHRISTOPHER NJIRIRI.....1ST DEFENDANT

BARCLAYS BANK LIMITED (NAKURU BRANCH).....2ND DEFENDANT

RULING

1. The application is brought by way of Notice of Motion under the provisions of **Section 3A** of the **Civil Procedure Act** and **Order 51** of the **Civil Procedure Rules** and the Applicant who is the 2nd Defendant, herein seeks orders for dismissal of the suit and costs.
2. The application is premised on the general grounds on the face of the application and the supporting affidavit of **MARION KARANJA**.
3. The Applicant depones that the original Plaintiff namely **ELIZABETH NYAMBURA KAMAU** is deceased and that instead of pursuing this current suit to its logical conclusion the Administrators of the estate of the deceased Plaintiff opted to institute another suit, that is HCCC No.42 of 2013 (Nakuru).
4. The suit is also as against the Applicant who also appears as the 2nd defendant therein, the subject matter and the issues raised are exactly the same as in the current suit, herein and the Applicant depones that this action of filing the latter suit amounts to an abuse of due process.
5. On the 4th June, 2013 this latter suit HCCC No.42 of 2013 (NAKURU) was marked '**BY CONSENT**' as settled as against the 2nd defendant, and as stated hereinbefore is the 2nd Defendant therein is the 2nd Defendant/ Applicant herein.
6. That pursuant to the abovementioned consent order it is the Applicant's contention that the current suit has therefore been compromised.
7. The Applicant further avers that the Administrators in the current suit have made no effort to move the court for the substitution of the deceased Plaintiff and that one year has since lapsed since the deceased plaintiff passed on and therefore the current suit has now abated.
8. Further to the above the Applicant avers that the current suit was instituted on the 7th December, 1998 and the suit has subsisted un-litigated ever since. Therefore the Applicant prays that the application be allowed and the current suit be dismissed for want of prosecution and costs be awarded to the Applicant.
9. This court notes that the Respondents' advocates were served but were not in attendance at the hearing of this application nor was a Relying Affidavit filed in response, the application therefore proceeded unopposed.
10. The issues that arise after taking into consideration the submissions made by Counsel for the Applicant are:

- a) Whether this suit has been compromised?
- b) Whether this suit has abated?
- c) Whether this suit ought to be dismissed for want of prosecution?

11. On the first issue of compromise, this court has had the occasion to peruse the Complaint filed herein and the Complaint filed in HCCC No.42 of 2013 (Nakuru). A copy of the Complaint for the latter suit was annexed to the supporting affidavit of the Applicant herein and was marked “MK2.”
12. From perusal of the Complaint it is noted that the Defendants therein are the same as the Defendants herein, the subject matter is the same, the issues raised and prayers sought are exactly the same.
13. It is not disputed that the Plaintiffs in the latter suit namely, Daniel Kamau Mwangi and Hannah Wanjiku Mwangi are both joint administrators of the Estate of P. M. Kamau and are also the joint administrators of the Estate of Elizabeth Nyambura Kamau. Further it is not disputed that the two deceased persons prior to their demise were husband and wife. That the husband had predeceased his wife and that the wife as his administrator had filed the current suit before her demise.
14. The Plaintiffs in the latter suit then proceeded to file another suit instead of pursuing the current suit, for reasons that are only within their knowledge.
15. This court has also had occasion to peruse the Consent Order recorded on the 4th June, 2013 in HCCC No.42 of 2013.
16. Indeed, the court notes that the Plaintiff's claim as against the 2nd Defendant/Applicant was marked as settled and consequential thereto as submitted by the Applicant in the current suit, has therefore been compromised.
17. This court is of the view that if the Discharge of Charge over Title No. Njoro/Ngata Block 1/103 has been drawn and signed by the 2nd Defendant/Applicant herein and delivered to the Respondents then, there is nothing left to litigate upon as between the Respondents and the Applicant herein.
18. This court concurs with Applicant's submissions that this suit as against the Applicant has also been compromised by a lawful agreement, which is the Consent Order of 4th June, 2014.
19. On the issue of abatement, it is not in dispute that the Plaintiff herein is deceased and her advocates have confirmed the same vide their letter dated 20th February, 2013 and that one (1) year has since lapsed from the date of writing of the aforementioned letter.
20. **Order 24 Rule 3 (2)** of the **Civil Procedure Rules** provides for the abatement of a suit, if within one year from the date of demise of the Plaintiff, no application has been made for substitution. The current suit is therefore deemed to have abated.
21. The last issue for determination relates to dismissal for want of prosecution. There is evidence on record that the suit was filed in 1998. The court on its own motion in February, 2013 issued a Notice To Show Cause under the provisions of Order 17 Rule 2 for the dismissal of this current suit for want of prosecution.
22. The suit had lain dormant from the 11th December, 1998 and it was the Notice to Show Cause that jump started the suit. On the 15th March, 2013 when the Notice came up for hearing, Counsel for the deceased plaintiff intimated that they would apply for substitution of the Plaintiff, which to date has not been done.

FINDINGS

23. For the reasons stated above:
 - i. This court finds that this suit was compromised by a lawful agreement.
 - ii. This court finds that the suit has also abated.
 - iii. Finally this court finds that this suit has not been prosecuted for a period of over one year and is ripe for dismissal.

CONCLUSION

24. Accordingly, this court finds that the application has merit and it is hereby allowed.
25. The suit is dismissed with costs to the Applicant.

26. The Applicant's costs for defending the suit to be recovered from the Estate of the deceased Plaintiff.

It is so ordered.

Dated, Signed and Delivered at Nakuru this 10th day of July, 2014.

A. MSHILA

JUDGE