



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL SUIT NO. 427 OF 1997

ABDI SITIENEI & 4 OTHERS.....PLAINTIFFS

VERSUS

KAPTUKTUK FARM LTD & 6 OTHERS.....DEFENDANTS

RULING

1. The defendants pray that this suit be dismissed for want of prosecution. In the alternative, the 2nd to 7th defendants seek a declaration that the suit against them has abated.
2. The grounds are set out in the notice of motion dated 14th November 2014. There are two depositions in support of the motion: the first is sworn by Edwin Boen, a director of the 1st defendant, on even date; the second is a further affidavit by the same deponent sworn on 2nd June 2015. The pith of the motion is that the plaintiffs have lost interest in prosecuting the suit; that the 2nd to 7th defendants are dead; and, that the 1st defendant went into receivership on 26th October 1976. Death certificates, a burial permit and a letter from the area Chief are annexed to prove the death of the 2nd to 7th defendants. There is also annexed a letter dated 25th August 2005 from the Registrar of Companies stating that a *notice of appointment of the receiver* was filed on 26th October 1976. The applicants aver that the matter was last in court on 28th January 2012.
3. The plaintiffs oppose the application. There is a replying affidavit sworn on 19th January 2015 by Abdi Sitienei, the 1st plaintiff. At paragraph 13, he deposes that the matter was in court on a number of occasions between 10th October 2012 and 28th November 2012. He denies that the 1st plaintiff went into receivership in 1976. He says the company allocated land to its members as late as 1992. He alleges that the court file disappeared at some point. Some letters to the Deputy Registrar are attached including a reply dated 12th May 2014 confirming that the file was now available. There is also a letter dated 16th May 2012 requesting the defendants' counsel to "*move with speed to substitute the deceased defendants*". A number of notices to the defendants' counsel to take a hearing date are also annexed. In a nutshell, the plaintiffs' case is that the delay is not deliberate; and, that they are keen on prosecuting the suit.
4. On 27th May 2015, learned counsel for the applicants and respondents appeared before me and made brief oral submissions. I have considered the rival arguments. I have also paid heed to the records before me, the pleadings, and depositions.
5. The plaintiffs filed the suit nearly *eighteen* years ago. To be more precise, the plaint was filed on 22nd December 1997. The plaintiffs claimed that the defendants had defrauded them of their land as pleaded at paragraph 16 of the plaint. They sought a declaration that they were entitled to the land; *mesne* profits; interest and costs. The defendants filed a statement of defence denying the claim *in toto*. The plaint was amended on 21st September 2010. There were additional prayers for an account or a refund.

6. Under Order 17 rules 2 (1), (2) and (3) of the Civil Procedure Rules 2010, if no step is taken in any suit by either party for *one year*, any party may apply to the court for dismissal of the suit. I have studied the court record. The suit was last in *court for mention* on 28th November 2012. So a period of *over two and a half years* has passed.
7. The court has inherent power to strike out a dormant suit. The power was well explained in *Mukisa Biscuit Manufacturing Company v West End Distributors Ltd* [1969] EA 696. The test in a matter of this nature was well laid out in *Ivita v Kyumbu* [1984] KLR 441. It is whether the delay is *prolonged* and *inexcusable*, and if it is, whether justice can still be done. In that event, instead of dismissal, the court may exercise its discretion to set the suit down for hearing.
8. Like I have stated the suit was last in court for mention on 28th November 2012. The parties informed the court that some defendants had passed on; and, that substitution of the parties was necessary. The learned judge noted that the court diary for the year was full. On 7th December 2012, the plaintiffs obtained a date for directions for the 23rd January 2013. It would appear the court was not sitting or the matter was not listed. On 28th June 2013, the plaintiffs obtained a hearing date for the 17th October 2013. The date was endorsed by the Deputy Registrar. It again appears that the matter was not listed or the court was not in session. A further hearing date was taken on 18th July 2014 for the 20th November 2014. It is not clear why the matter was not listed. But on the same day, the defendants filed the present motion for dismissal.
9. From that record, it is *not* true that the plaintiffs have not taken any steps to fix the matter for hearing since 28th November 2012. Two hearing dates had been taken for 17th October 2013 and 20th November 2014. The allegations by the defendants that the file was *missing* at some point have not been controverted. The claim is also borne out by the record by dint of the reply from the Deputy Registrar dated 12th May 2014. The 2nd to the 7th defendants are dead. The 1st defendant is a limited liability company. The applicants say that the company has gone into *receivership*. It has *not* gone into *liquidation*. It would not then be right for the defendants to benefit from their own failure to substitute the deceased defendants. I *cannot* say in the circumstances that the delay is *prolonged* and *inexcusable*. *Ivita Vs Kyumbu* [1984] KLR 441.
10. This court is now enjoined by article 159 of the Constitution and sections 1A and 1B of the Civil Procedure Act to do substantial justice to the parties. That is the overriding objective. *Harit Sheth Advocate v Shamas Charania* Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] eKLR, *Stephen Boro Gitiha v Family Finance Bank & 3 others*. Nairobi, Court of Appeal, Civ. Appl. 263 of 2009 (UR 183/09) [2009] eKLR. The instant suit relates to the emotive matter of land. There are allegations of fraud against the 1st defendant company. There is no evidence that the company has gone into *liquidation*. The defendants are only saying it went into *receivership*, a fact contested by the plaintiffs. A limited liability company has *perpetual succession*. I am thus *not* satisfied that it would be *just* to dismiss the suit for want of prosecution.
11. I will now turn to the other limb of the motion. The plaintiffs do not seriously contest that over a year has passed since the 2nd to 7th defendants passed on. No *application* has been *made* within one year of their death to substitute them in the suit. By dint of Order 24 Rule 3 of the Civil Procedure Rules 2010, the suit has abated against the 2nd to 7th defendants. The plaintiffs concede as much at paragraphs 6 and 11 of the replying affidavit. I thus declare that the suit against the 2nd, 3rd, 4th, 5th, 6th, and 7th defendants has abated. I have already stated that the 1st defendant is a limited liability company. It has perpetual succession. I have no evidence it has gone into *liquidation*. The claim by the plaintiffs will thus proceed against the 1st defendant.
12. In the result, the notice of motion dated 14th November 2014 succeeds *only in part*. The prayer for dismissal of the suit for want of prosecution is devoid of merit. That prayer is *refused*. I declare that the suit against the 2nd, 3rd, 4th, 5th, 6th, and 7th defendants has *abated*. For the avoidance of doubt, the suit by the plaintiffs shall proceed against the 1st defendant company. I grant general leave to amend the pleadings accordingly. The plaintiffs shall set down the case for hearing within *one hundred and twenty days* from today's date. In default, the suit shall stand dismissed. Costs shall be in the cause.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 15th day of October 2015.

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

Mr. Miyianda for Mr. Okara for the plaintiffs instructed by Buluma & Company Advocates.

Mrs. Khayo for the defendants instructed by Nyairo & Company Advocates.

Mr. J. Kemboi, Court clerk.