



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

ELC CASE NO. 773 OF 2012

MARY CHEPCHUMBA ROTICH.....PLAINTIFF/APPLICANT

VERSUS

ESTHER CHEBET MALEL.....DEFENDANT/RESPONDENT

RULING

This ruling is in respect of an application dated 26th June 2020 by the plaintiff/applicant seeking for the following orders:

- a. Spent
- b. Spent.
- c. That pending the hearing and determination of this application the court be pleased to grant an order of stay of execution of ex parte taxed costs of Kshs. 143,551.00 and that the warrants of attachment issued herein be vacated forthwith.
- d. Costs of this application be provided for.

Counsel agreed to canvas the application vide written submissions of which the applicant never filed any submissions.

APPLICANT'S CASE

The applicant did not file submissions as agreed, therefore the court will rely on the supporting affidavit filed by the applicant. The applicant deponed that she would like M/s Komen Kipchirchir & Company Advocates to come on record and act for her in place of M/s A.K Chepkonga & Company Advocates.

The applicant stated that the court dismissed the plaint and the application dated 27th October 2011 for want of prosecution with costs to the defendant and that she was not served with the notice of the said dismissal.

That on 27th May 2017 the defendant passed on and that the advocates on record were not served with the deceased defendants' party and party bill of costs dated 3rd July 2019 filed in court on 4th July 2019. Further that the instant suit abated after 1 year and the defendant's counsel did not take any steps to have the deceased defendant substituted. That the applicants advocate lacked instructions to move this honourable court by way of oral and substantive application dated 14th May 2019 to have the abated suit dismissed for want of prosecution.

It was the applicant's case that the bill of costs dated 3rd July 2019 was drawn and filed on 7th July 2019 without instructions having been drawn and filed more than 2 years after the defendant died. The applicant stated that prior to the death of the defendant, the parties had reached an out of court settlement.

The applicant sated that on 23rd June 2020 the advocates firm on record for the defendant improperly issued instructions to the auctioneer's firm of M/s Seventy-Seven Auctioneers who proceeded to issue a proclamation notice to attach moveable property against the applicant pursuant to warrants of attachment issued herein.

The applicant therefore urged the court to vary, review or set aside the order awarding costs as the same was granted without instructions after the death of the defendant.

RESPONDENT’S CASE

Counsel for the respondent filed submission in opposition to the application and cited the provisions of Order 17 rule 2(1)(3) of the Civil Procedure Rules. Counsel submitted that the respondent filed an application for dismissal for want of prosecution dated 6th April 2018 which was duly served upon the applicant’s counsel on record M/s A.K Chepkonga & Company Advocates.

Counsel submitted that Order 17 rule 2(1)(3) of the Civil Procedure Rules gives the court discretion to dismiss a suit where no action has been taken for one year. That a party can move the court for such orders as justice delayed without explanation is justice denied and delay defeats equity.

Counsel submitted that both counsel agreed to canvass the application by way of written submission but the respondent did not file any response hence it was unopposed. A ruling notice was issued to the respondents’ office for delivery of the ruling on the 14th of May 2019 and Ms Kibichiy held brief for Mr. Chepkonga for the plaintiff/applicant and in the absence of the respondent.

On the issue of stay of execution counsel submitted that the applicant must meet the threshold of Order 42 rule 6(2) of the Civil Procedure Rules. Further, that Order 24 Rule 4(3) of the Civil Procedure Rules provides;

“Where within one year no application is made under sub rule 1, the suit shall abate as against the deceased person.”

It was counsel’s submission that a suit can abate only one year after the death of a party. That the application was filed for dismissal for want of prosecution within one year before the alleged death of the plaintiff hence the suit had not abated. Counsel therefore urged the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION

The issue for determination in this application is as to whether the court should set aside or vary or vacate the order dated 14th May 2019 dismissing the suit for want of prosecution and the order dated 22nd November 2019.

From the record, it is evident that the applicant was represented when the ruling for dismissal of the suit was delivered on 14th May 2019 therefore it is not plausible that they were not served with the notice for dismissal.

On the issue of the bill of costs dated 22nd November 2019 that awarded the respondent the costs of the suit, I find that the bill of costs was properly filed before the court as the advocate had the authority to do so. The applicant alleged that the defendant had passed on by the time the bill was filed but there is no evidence to support such allegation. No death certificate was attached to confirm the same. The burden of proof is on he who alleges and therefore the applicant has failed to prove that the defendant had passed on.

Order 24 rule 4 (4) of the Civil Procedure Rules provides as follows;

4. (1) Where one of two or more Defendants dies and the cause of action does not survive or continue against the surviving Defendant or Defendants alone, or a sole Defendant or sole surviving Defendant dies and the cause of action survives or continues, the Court, on an application made in that behalf, shall cause the legal representative of the deceased Defendant to be made a party and shall proceed with the suit.

(2)

(3) Where within one year no application is made under sub rule (1), the suit shall abate as against the deceased Defendant.

The respondents filed their application for dismissal on 6th April 2018 and the applicant claims that the plaintiff passed away on 27th May 2017. This is therefore indicative that the suit had not abated of which the applicant has not produced proof of death.

I have considered the application and the submission by counsel and find that the application lacks merit and is dismissed with costs to the respondent.

DATED and DELIVERED at ELDORET this 27TH DAY OF October, 2020

DR. M. A. ODENY

JUDGE