



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENTAL & LAND DIVISION
ELC SUIT NO. 486 OF 2007

**IN THE MATTER SECTION 38(1) AND (2) OF THE LIMITATIONS OF ACTIONS ACT CAP 22
LAWS OF KENYA**

BETWEEN

RUTH WANGUI KAGUNDA.....1ST PLAINTIFF/RESPONDENT

(As Personal; Representative of Keziah

Wanjiru Gitau – the Deceased 1st Plaintiff)

CYRUS REUBEN KAGUNDA.....2ND PLAINTIFF/RESPONDENT

FELIX MUCHOKI WAMBUGU.....3RD PLAINTIFF/RESPONDENT

KEVIN KARIUKI.....4TH PLAINTIFF/RESPONDENT

-VERSUS-

BEATRICE MUTHONI THUMBI.....1ST DEFENDANT/APPLICANT

BEATRICE WAMBUI KIGONDU....2ND DEFENDANT/APPLICANT

(Sued as Administrators of Estate of Godon Kigono Reuben)

RULING

The 1st Defendant by a Notice of Motion Application dated 5th September, 2012 seeks the following orders:-

1. That the suit herein be marked as having abated because the 1st Plaintiff has since died.
2. That the suit by the 2nd, 3rd, and 4th Plaintiff's herein against the 1st Defendants be dismissed for want of prosecution.

3. That the costs of this application be provided for.
4. That such other and or further relief be granted as the Honourable court may deem fit and just to grant.

The application is predicated on the grounds set out on the face of the application and on the grounds contained in the affidavit sworn in the support of the application by Beatrice Muthoni Thumbi the 1st Defendant/Applicant.

The 1st defendant contends that the plaintiff's suit has abated following her death on 1st July, 2008. The 1st Defendant states that even though the legal representative of the 1st plaintiff applied for substitution nearly two years from the date of the 1st plaintiff's death and was granted orders to substitute the 1st plaintiff on 15th November 2010 no substitution has been done to date and neither has any action been taken on behalf of the 1st Defendant since the order permitting substitution was made. On this account the 1st Defendant argues that 1st Plaintiff suit has abated.

As relates to the 2nd, 3rd and 4th plaintiffs the 1st Defendant contends that they have not taken any action to prosecute the suit for more than four years and urges the court to dismiss the plaintiff's suit for want of prosecution as the plaintiffs have shown no interest in prosecuting their suit.

The 1st plaintiff, Ruth Kagunda has sworn a replying affidavit dated 10th April 2013 in opposition to the 1st Defendants application and contends that the application for substitution of Keziah Wanjiru Gitau (deceased) was heard and granted by the court and that she was substituted in place of the deceased 1st plaintiff. The 1st plaintiff further states that the plaintiffs went slow in prosecuting the suit as out of court settlement negotiations were ongoing between the parties and contends that the defendants are insincere in bringing the instant application seeking to have the suit dismissed for want of prosecution.

The 1st Defendant has filed written submissions while the plaintiffs have equally filed their written submissions in support of their respective positions as regards the defendant's application herein. The 1st Defendant in her submissions has impugned the conduct of the plaintiffs which she alleges has been dilatory all through and has further impugned the replying affidavit filed by the plaintiffs which she claims was filed in breach of the court directions of 12th November, 2012 that directed that the plaintiffs response be filed within 10 days of that day. The plaintiff filed the replying affidavit on 10th April, 2013 quite evidently way out of time and without leave.

The matter subsequent to 12th November, 2012 has come up in court on 21st February, 2013 and the plaintiffs did not see it fit to seek an extension of time within which to file their response. Indeed even on 10th April, 2013 when the matter was scheduled to be heard and the plaintiffs had on the very day belatedly filed their replying affidavit though the Counsel apologised for late filing the plaintiff's counsel did not apply for the replying affidavit to be admitted out of time. Orders and directions of the court are meant to be obeyed and complied with. The filing of the replying affidavit on 10th April, 2013 by the plaintiffs over 4 months after the period within which the response was supposed to be filed was clearly in breach of the directions given by the court and though the court will in view of the circumstances of this matter restrain itself from striking out the affidavit, the court admonishes the plaintiffs for the casualness with which they have treated the court. It is not lost to the court that the plaintiff's counsel has in his submissions endeavoured to explain the delay in filing the replying affidavit stating that the client had been sick for two months. The explanation is wanting and the court finds the same unconvincing considering the application was served way back in September, 2012 and the directions were given on 12th November, 2012.

The 1st Plaintiff after being granted the order for substitution and on 15th November, 2010 did not formalise the substitution and for nearly 2 years up to the time the 1st Defendant filed this application did not take any action or step towards the prosecution of the suit. The 1st plaintiff avers that the parties were

engaging in out of court settlement negotiations but the 1st defendant who is the registered proprietor of the suit property denies there have been any such negotiations. From the court records there has never been any indication that the parties were negotiating an out of court settlement. No evidence has been furnished to show that any negotiations have indeed been taking place and the assertion remains just that without anything to back it. The plaintiffs in the circumstances have no reasonable explanation for the delay in the prosecution of this suit. On the part of the 1st plaintiff no explanation is given for inaction at least for the last 2 years after the order of substitution was granted. Equally the 2nd, 3rd and 4th Plaintiffs have not taken any action and/or offered any viable reason for the inaction towards the prosecution of the suit for the last 4 years or so.

From the evidential material placed before the court it is not in doubt that the 1st defendant is the registered proprietor of the suit property resulting from a confirmation of grant issued by Hon. Justice Githinji on 3rd July, 2001 in regard to the estate of Gordon Kigomo Reuben (deceased). The plaintiffs lay claim to the suit premises on the basis of alleged adverse possession where they claim they have adversely possessed the suit property even before the death of the deceased. The plaintiffs have in the submissions filed in their behalf indicated their willingness to fast track the expeditious disposal of the suit.

Whereas I find the conduct of the plaintiff's to have been dilatory I do not suppose the ends of justice in this matter will be served by ordering the suit to be dismissed for want of prosecution. It is a fact no party wishes to have a suit hanging over their heads for longer than is necessary as it is not possible to make any concrete or final decisions in regard to any matter that is even remotely affected by the matter pending before the court. I have considered the unfortunate events related to the death of the 1st plaintiff which perhaps may have derailed the prosecution of the suit and I have determined to exercise my discretion in favour of not dismissing the suit for want of prosecution and I direct that the parties and in particular the plaintiffs take urgent and expeditious steps to ensure compliance with order 11 Civil Procedure Rules is complied with and that this suit is fixed for hearing within the next 90 days from the date hereof failing which this suit will stand dismissed with costs as against the plaintiffs.

The overriding objective of the court in terms of Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya is to as much as possible endeavour to do justice to the parties having regard to the attendant circumstances. I have elected against not shutting out the plaintiffs from the seat of justice and to allow them an opportunity to have the suit heard on merits.

The defendant can be compensated for the delay by an award of costs and I award costs which I assess at Kshs. 5,000/= to the 1st Defendant payable to the 1st Defendant before the suit is fixed for hearing.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JULY 2013.

J. M. MUTUNGI

JUDGE

In the presence of:

..... **for the Plaintiffs**

..... **for the Defendants**