



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**ENVIRONMENT AND LAND COURT**

**ELC NO. 99 OF 2014**

**FRANCIS W. BUDAHA.....PLAINTIFF/RESPONDENT**

**VERSUS**

**CHARLES O. OGUTU .....DEFENDANT/APPLICANT**

**RULING**

1. The application before me for determination is a Notice of Motion filed by the Applicant – **CHARLES O. OGUTU** – on 29/9/2016 and dated the same. The Applicant is the Defendant in the suit. The application is against the Respondent – **FRANCIS W. BUDAHA** - who is the Plaintiff in the suit. The parties have competing claim.....s of ownership of land parcel No. SAMIA/BUTABONA/1266, with the Applicant claiming it through purchase while the Respondents claim is based on adverse possession.

2. The application is expressed to be brought under Sections 3 and 3A of the Civil Procedure Act and Order 17 Rule 2(3) of the Civil Procedure Rules. The prayers sought are as follows:

(1) This honourable court be pleased to dismiss this suit for want of prosecution.

(2) That the Respondent be condemned to pay costs.

3. The application is premised on grounds, *inter alia*, that it is over 3 years since the matter was last in court; that the Plaintiff has not been keen to prosecute it; that the resulting delay is causing anxiety to the Applicant; and that it is in the interest of justice that the orders sought be granted.

4. According to the Applicant, the suit was filed in the year 2010 and has been pending hearing since 2014. The Applicant said he has not been able to utilise the land due to the pendency of this suit.

5. The Respondent's response is contained in a replying affidavit filed here on 25/1/2018 and dated 13/1/2018. The response is brief and is to the effect that the Respondent died quite sometimes back. Infact a burial permit annexed (WOO1) shows he died on 7/2/2015.

6. The application was canvassed by way of written submissions. The Applicant's submissions were filed on 20/2/2018. It was submitted that the **"respondent's estate is clearly not interested in prosecuting this matter.."** as since 2015 **"they have not taken any steps to ensure that they get or procure the letters of administration for the estate of the deceased Plaintiff for the sake of prosecuting this matter"**. It was further submitted that **"the application should be granted in the interest of justice"**. The Applicant's submissions ultimately urged that there be a dismissal of the suit for want of prosecution or a declaration that the suit has abated owing to the death of the respondent.

7. The Respondent's submissions were filed on 5/10/2018. It was submitted, *inter alia*, that the suit should not be **"dismissed for want of prosecution for the reason that the Plaintiff/Respondent died and the Defendant/Applicant is aware of the fact that the Plaintiff/Respondent is the deceased who cannot prosecute a suit"** (sic). It was submitted further that the **"Application is not seeking for declaratory orders of abatement of suit and the Applicant cannot therefore come around and pray for the same in his submissions"**. The court was ultimately asked to dismiss the suit with costs to the Respondent.

8. I have considered the application, the response made, and the rival submissions. I have also had a look at the suit generally. The application under consideration was filed here on 29/9/2016. The response to it came rather late on 25/1/2018. The response disclosed some sad news, which was that the Respondent died way back on 7/2/2015. If one tries to put the application in perspective, or contextualise it in the proceedings, one would realise that the Respondent had been dead for more than one and a half (1½) years when the application was filed.

9. When the application was filed, the Applicant could be excused because knowledge of the Respondent's death had probably not reached him. But when the response to the application was made, the Applicant obviously became aware that the Respondent was dead. At that point, it should have dawned on him that when he filed the application, he was not bringing it against a living person. By their very nature and purpose, application seeking the orders to dismiss a matter for want of prosecution should be between living parties or persons. And this is so because the person filing it is accusing the person against who it is brought of failing to prosecute the case. Dead people do not prosecute suits; only living ones do. The point here is that the Applicant should have realised immediately upon seeing the response made that his application was untenable, nay, even incompetent in the circumstances.

10. But the Applicant decided to proceed with the application instead of withdrawing or abandoning it. There was lack of legal acuity on his part. It should have been obvious to him that where death of a party occurs in pending proceedings, different legal considerations and/or arrangements come into play. In a situation like the one obtaining here, where the estate of the deceased seems to have no representation, there is always the appropriate legal recourse to resort to at the right time. But all this seemed to escape the Applicant. He didn't seem to realise that he couldn't sanely accuse a person who has gone to his maker of not prosecuting a suit here on earth.

11. The submissions filed by the Applicant seems to me jumbled and misguided. In the submissions, the Applicant ends up asking for orders against the estate of the Respondent. Yet the application as filed was not against the estate but the Respondent himself. Some of the orders, like that of declaration of abatement, are not even in the application itself. I agree with the Respondent in the aspects of his submissions that I have highlighted herein. The Applicant was wrong to press on with the application even after becoming aware that the Respondent was dead. He should have changed tact and adopted a different legal strategy. He goofed big. And his application was a non-starter.

12. It is for all these reasons that I find the application herein unmeritorious and hereby dismiss it. I make no order as to costs.

**Dated, signed and delivered at Busia this 25<sup>th</sup> day of July, 2019.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Plaintiff/Respondent: Absent

Defendant/Applicant: Present

Counsel for the Plaintiff/Respondent: Absent

Counsel for the Defendant/Applicant: Absent

Court Assistant: Nelson Odame