



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 150 OF 2017

DOMITILA AWUORI MAERO.....APPLICANT/2ND DEFENDANT

= VERSUS =

DR. PETER OLAKHI ODONGO.....RESPONDENT/PLAINTIFF

RULING

1. The application for determination is a Notice of Motion dated 17/10/2018 filed in court on the same date. The Applicant – **DOMITILA AWUORI MAERO** – is the second Defendant in the suit. The Application is brought against the Respondent - **DR. PETER OLAKHI ODONGO** – who is the Plaintiff. The Respondent is accused of filing the suit and then failing to serve **EGESA ODUORI WANYAMA**, who is the 1ST Defendant.

2. There are two prayers sought by the Applicant and they are as follows:

Prayer (1): That this suit be struck out for want of prosecution.

Prayer (2): Costs of the application and suit be met by the Plaintiff.

3. The application is premised on the grounds, *inter alia*, that the matter was filed way back on 24/8/2017 and since then the 1ST Defendant has never been served with summons to enter appearance.

4. The Respondent replied vide a replying affidavit dated 9/11/2018 and filed on 12/11/2018. He termed the Applicant's allegations as untrue. It was pointed out that service was effected on 1ST Defendant through a newspaper advertisement pursuant to an order granted by this court. An affidavit of service to that effect was filed. The order for substituted service was granted by the court on 16/4/2018 and the Respondent pointed out that before then, a hearing date could not be taken.

5. The Applicant's application was said to have been brought prematurely and was stated to have failed to meet the threshold required to dismiss a case for want of prosecution.

6. The application was canvassed by way of written submissions. The Applicant's submissions were filed on 15/1/2019. The submissions reiterate the substance of the application. It was alleged that the Respondent filed the suit with proper prior preparation.

7. The Respondent's submissions were filed on 18/2/2019. The application was said to be incompetent, with the approach taken to file it being excessively casual and careless. The wrong law was cited and the factual basis of the application was said to be wrong.

8. I have considered the application, the response made, and the rival submissions. I have to state right away that I agree with the Respondent. The application is incompetently done and its factual premise is wrong. As pointed out by the Respondent, the application should have been brought under Order 17 Rule 2. Just to be clear, the relevant provision is as follows:

Order 17 (2) (1)

“In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit”.

9. In simple terms, it is plain that this provision envisages a situation where a matter has stayed dormant in court for at least one year. The court may issue the required notice *Suo Moto* or on application by a party. The dismissal is not automatic. It only happens if cause is not shown to the satisfaction of the court.

10. In this matter, records show that the Respondent's side has been active. There had been an earlier application for substituted service by the Respondent. Records show that that application was allowed by the court on 16/4/2018. The application herein was filed on 17/10/2018. That is a far less period than the one year anticipated by law.

11. Besides, it would be wrong to say that the 1st Defendant was not served. Again, the court records show that the Respondent effected substituted service vide an advertisement in the Daily Nation of 14/9/2018. It is clear that by the time the application under consideration was filed, the 1st Defendant had been served about one month earlier. It is therefore plain, as alleged by the Respondent, that the application herein is based on falsehoods. It is easy to see why the justice of the issue at hand must be in the Respondent's favour.

12. Without much ado therefore, the application herein is dismissed with costs to the Respondent.

Dated, signed and delivered at Busia this 25th day of July, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Applicant/2nd Defendant: Absent

Respondent/Plaintiff: Absent

Counsel for the Applicant/2nd Defendant: Present

Counsel for the Respondent/Plaintiff: Absent

Court Assistant: Nelson Odame