



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC NO. 118 OF 2015 (OS)

REUBEN KOTWA MEDA ALAIS

REUBEN KODIA MENDA :::::::::::::::::::: PLAINTIFF/RESPONDENT

VERSUS

NORA KOLE

HENRY ANGATIA KOLE) :::::::::::::::::::: DEFENDANTS/ APPLICANTS

RULING

This application is dated 11th July 2017 and is brought under Order XVI Rule 5 (a) of the Civil Procedure rules, Section 3A of the Civil Procedure Act seeking the following orders;

1. THAT the application be given priority inter parties hearing.
2. THAT the case herein E & L CASE NO. 118 OF 2015 be dismissed for want of prosecution.
3. THAT the plaintiff/respondent be punished under law for intermeddling with a property of the deceased parcel number KAKAMEGA/BUSHU/489 measuring 8.2 HA.
4. THAT the sugarcane and maize crop planted thereon be preserved in the custody of the applicants/defendants pending determination of this case.
5. THAT the costs be in cause for the defendants/applicants.

The applicants' submitted that, they are the petitioners jointly intestate of the estate of the late Mr. Kole Inzianachi. That their late husband and father died on 19th September 1994 at the age of 53 years old and left MRS. NORA KOLE (WIDOW). HENRY ANGATIA KOLE (SON), DANIEL KOLE (SON & MR. KEFA MUYEKA KOLE (SON) surviving him and the parcel of land number KAKAMEGA/BUSHU/489 equivalent to 8.2 HA. That on or about 6th April, 2014, they proceeded to file a succession cause No. 633 of 2014 at Kakamega and obtained a Grant to that effect on 9th February, 2015. In the year 2016, they received a notice of motion under certificate of urgency from the plaintiff/respondent herein opposing them from obtaining a certificate of confirmation of grant dated 29th February 2016 attached and marked NK & HAK – 1. The Notice of Motion was accompanied with copies of originating summons in E & L Case No. 118 of 2015 at Kakamega and their copies are attached and marked NK & HAK – 2. On 1st April 2015 they proceeded to instruct their advocate who was on record to file a replying affidavit to both the Environmental and Land Case No. 118 of 2015 and that of Succession Cause No. 633 of 2014 at Kakamega and the copies of the replying affidavits on both are

attached and marked as NK & HAK – 3a & b. The plaintiff/respondent's notice of motion against their succession cause No. 633 of 2013 was heard and stopped their proceedings until this Environment & Land Case No. 118 of 2015 at Kakamega is determined. The plaintiff/respondent in this application has continued frustrating them, continued to construct structures, plant trees and sugarcane in their portion of land. The plaintiff/respondent's two land parcels numbers KAKAMEGA/BUSHU/1399 & 488 are surrounding that of their husband/father left them number KAKAMEGA/BUSHU/489 and the sketch map showing those three different portions of land is hereby attached and marked NK & HAK – 4. The plaintiff/respondent on 22nd April 2015 filed his ELC. Case No. 118 of 2016 at Kakamega with bad faith and they filed their response on 7th May 2015 and upto now the plaintiff/respondent has not shown any interest to complete this case, upto date, two years and two months have lapsed giving the plaintiff/respondent time to continue utilizing their ancestral land delaying and denying them justice. There is a newly constructed house photocopy of the photographs are attached and marked NH & HAK-5. The plaintiff/respondent is not related to them in any way and the purported people who sold to him the land are still alive and have become the plaintiff/respondent's witnesses and their witness statements are attached and marked as NH & HAK -6. The plaintiff/respondent has stated before this court that he bought the parcels of land known as KAKAMEGA/BUSHU/488 & 1399 which are different from theirs and his copy of the statement is attached and marked NK & HAK – 7. Their parcel of land number KAKAMEGA/BUSHU/489 belongs to the deceased Mr. Kole Inzianachi and the plaintiff/respondent is intermeddling with the estate of the deceased and ought to be punished. The 1st defendant/respondent is a widow and elderly and would like to die when she has completed distributing the property of her husband the way he instructed and the existence of this case is delaying the succession case number 633 of 2014 at Kakamega.

The applicant therefore, submitted that they seek to have this suit against them dismissed for want of prosecution reasons being that the plaintiff has not taken steps to have this matter dispensed with since its inception in the year 2015. The applicant claim is that the plaintiff filed this case under a certificate of urgency and obtained interim orders and has proceeded to relax and even constructed a house on the suit lands instead of proceeding with suit. This suit has banned succession proceedings against the estate of proceedings against the estate of Mr. Kole Inzianachi who is a father to the 2nd defendant and a husband to the 1st defendant. The delay on the part of the respondent is malicious, unjustified, inexcusable and all intended. In his replying affidavit dated 25th July, 2017. The plaintiff/respondent alleges to have not been served with replying affidavit to his application dated 29th February, 2016. This does not justify the delay and lack of seriousness on the plaintiff/respondent's part. They pray therefore that it be dismissed for want of prosecution and costs be awarded to the defendant.

It is the plaintiff/respondent's submission that the applicant's application dated 11th July 2017 has been brought in bad faith with intent to attempt to defeat justice. The said application lacks merit and is an abuse of the due process of law. That it is true that the suit was filed on 22nd April 2015. That there was no Environment and Land Court in Kakamega by then and hence the respondent could not move the court which was not existing. The above fact is well known to the applicants. That while this case was pending, the plaintiff became aware of Kakamega High Court Succession Cause No. 633 of 2014 and he moved the court to have a grant revoked as his interest had not been taken into consideration by the applicants, who were moving the said court to have the land in question, to wit KAKAMEGA/BUSHU/489 to be distributed to the detriment of the respondent. That from the above it is clear that the delay in prosecuting the case cannot be blamed on the respondent at all. That on 25th May 2017 the Succession proceedings were stayed by the court to enable parties have this case heard and determined. Before the respondent could set down the suit for hearing, the applicants filed the present application, thus the case could not be set down for hearing. Hence the applicant has contributed to the delay and the applicant is enjoined in law to set down the suit for hearing. From 25th May 2017, to 12th July 2017, when the present application was made, is not a period for such an application to be made. It is trite law that the prayer for intermeddling with the deceased estate can only be made in the court dealing with the succession proceedings, it is clear that the claim is for adverse possession. The respondent and his family did not enter and cultivate the said land during the pendency of this case. The applicants cannot therefore bar the respondents and his family from using the land in whatsoever manner. The applicants or the deceased did not move the court since 1985 (annexture NK & HAK 2 paragraph 4 of the supporting affidavit to the

originating summons attached to the applicant's supporting affidavit.) Further, the applicants do not have any right over the sugarcane as it is not them who planted the sugar cane. Annexure NK & HAK-1 payment statement from West Kenya Sugar Company Ltd, for period 10th May 1998, clearly shows that the respondent has been receiving the proceeds of the sugar cane. It is clear from the above that the application dated 11th July 2017 lacks merit and is an abuse of the due process of law and should be dismissed with costs.

This court has carefully considered both the applicants' and the respondent's submissions. This court finds that, the case herein was filed in this court on 22nd April 2015 by the plaintiff/respondent and served on the defendants/applicants who filed a memorandum of appearance and defence and or replying affidavit on 7th May 2015. The matter has been dormant for over two years. The plaintiff/respondent's case has not been moved and the plaintiff has not shown any intention of proving his case. It was submitted that 1st defendant and the administrator of the suit estate herein is old and sickly and would like to die when she has distributed her land to her sons according to the promise or pledge her late husband left. The land in question herein KAKAMEGA/BUSHU/489 belongs to the late Mr. Kole Inzianachi and the defendants/applicants have filed a succession cause number 633 of 2014 which was stopped for the reason that the Environment and Land Case No. 188 of 2015 be concluded first the plaintiff/respondent it is alleged is using delaying tactics to delay the case as he continues cultivating the said land. That this suit has stopped the family of the defendants/applicants' succession cause No. 633 at Kakamega. The applicant's submitted that, the plaintiff/respondent has continued constructing houses/structures even as the case continues to give him false claim/power contrary to the process of law. The plaintiff/respondent has continued to plant sugarcane maize crops and other crops in question land number KAKAMEGA/BUSHU/489 that he doesn't have any relationship. The plaintiff/respondent owns his two portions of land numbers KAKAMEGA/BUSHU/1399 & KAKAMEGA/BUSHU/488 which he claims he bought not from the defendant/applicants nor the late Mr. Kole Inzianachi (now deceased).

In the case of **Utalii Transport Company Ltd & 3 Others v NIC Bank & Another (2014) eKLR**, the court held that it is the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court. The decision on whether the suit should be reinstated for trial is a matter of justice and it depends on the facts of the case. In **Ivita v Kyumbu (1984) KLR 441**, Chesoni J as he then was, stated that the test is whether the delay is prolonged and inexcusable and if justice will be done despite the delay. Justice is justice for both the plaintiff and the defendant. The applicant in the instant case submitted that they seek to have this suit against them dismissed for want of prosecution reasons being that the plaintiff has not taken steps to have this matter dispensed with since its inception in the year 2015. The respondent's response is that, it is true that the suit was filed on 22nd April 2015. That there was no Environment and Land Court in Kakamega by then and hence the respondent could not move the court which was not existing. The Environment and Land Court in Kakamega started sitting way back in February 2017 almost a year now and hence the respondent has had no excuse why he has not moved the court. Be that as it may, the plaintiff/respondent will be given the benefit of doubt and the court gives him one last chance. The application will not be allowed on condition the respondent obtains a hearing date within the next 30 days from today's date, in default this suit shall stand dismissed for want of prosecution. Costs of this application to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 23RD DAY OF JANUARY 2018.

N.A. MATHEKA

JUDGE