



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

IN BUSIA

LAND & ENVIRONMENTAL DIVISION

ELC NO. 148 OF 2014

RAPHAEL ONDETO.....PLAINTIFF

VERSUS

LUDOFIKO OKUMU.....1ST DEFENDANT

VICTOR OKIDOR.....2ND DEFENDANT

RULING

1. The application before me is a Notice of Motion dated 18/7/2016 and filed on 19/7/2016. It is brought under Order 51 Rule 1 of Civil Procedure Rules and was brought by the Applicant / 1st Defendant – **LUDOFIKO OKUMU** – against the Respondent / Plaintiff – **RAPHAEL ONDETO IWUON** – whom he accuses of not being interested in prosecuting the suit he filed here on 25/7/2014.

2. The Applicant/1st Defendant wants the suit dismissed for want of prosecution. According to the Applicant/1st Defendant, the Respondent/Plaintiff has never bothered to put down the matter for hearing ever since it was filed.

3. The application was opposed vide a replying affidavit dated 31/8/2016 filed here on the same date. It was deponed, inter alia, that the Plaintiff/Respondent has been sick and even succumbed to his sickness on 25/2/2016. The case was said to have come up in court on 9/12/2016 and 2/3/2016. The court was said to have been informed of the death of the Plaintiff/Respondent on 2/3/2016. It was pointed out also that one year had not lapsed between the time the matter was in court and the time the application was filed.

4. On 31/8/2016 it was agreed that the application be canvassed by way of written submissions. The Applicant/1st Defendant has filed his submissions; the Plaintiff/Respondent has not.

5. The submissions of the Applicant/1st Defendant generally reiterate his complaints as contained in his application. In simple terms, it was pointed out that it is the Respondent's/Plaintiff's duty to set down the matter for hearing within reasonable time. He has not done so. According to the Applicant/1st Defendant, even service itself has not been done. The Applicant/1st Defendant pointed out that according to Order 17 rule 2(1) of Civil Procedure Rules, the court has discretion to dismiss a suit where no step has been made or taken by either party for one year.

6. I have had a look at the suit as filed, the application, response to the application; and the 1st Defendant/Applicant's submissions. I need to point out right at the outset that by the time the application herein was filed, one year had not lapsed since the matter was last in court. The matter was last in court on 2/3/2016 and record shows that the court was informed of the passing on of the Plaintiff/Respondent and the intention to substitute him later. The application was filed on 19/7/2016. That was only about five(5) months later.

7. Order 17 rule 2(1) of Civil Procedure rules provides as follows:

“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”.

And where the court does not take the initiative to act in order to actualize the intentions of rule 2(1) rule 2(3) of the same order provides as follows:

“2(3) Any party to the suit may apply for its dismissal as provided in subrule 1.”

In other words, dismissal under rule 2(1) can be applied for by a party to the suit. I think that is what the 1st Defendant/Applicant decided to do in this suit.

8. It is important to appreciate that the action envisaged by the law is not necessarily that of setting the matter down for hearing. It could be any kind of action that moves the matter forward. In this matter itself, the court was informed of the death of the Plaintiff/Respondent. When something like that happens, substitution entails a different legal process which sometimes take a long time. The court was told of the intention to undertake substitution of the Plaintiff. And that was done in presence of the 1st Defendant/Applicant’s side on 2/3/2016. A question arises: why then rush to court five months down the line to ask for dismissal of the case?

9. Although the Plaintiff/Respondent has not filed submissions in this matter, justice is still on his side as regards this application. One year had not lapsed since the matter had come up in court. The 1st Defendant/Applicant knew the Plaintiff/Respondent was dead and, being represented by counsel, knew, or should have known that substitution takes time. There is indeed no telling how long the necessary legal process may take so that the necessary legal capacity can be acquired to enable substitution.

10. When all is considered, the 1st Defendant/Applicant was abit rash in bringing this application. He needed to be more patient. He needed to appreciate the difficult circumstances facing the Plaintiff/Respondent’s side. As things stand, there is no merit in the 1st Defendant/applicant’s application and I hereby dismiss it with costs.

Dated, signed and delivered at Busia this 24th day of July, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff:

1st Defendant:

2nd Defendant:

Counsel of Plaintiff:

Counsel of Defendants: