



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC NO 379 (O.S) OF 2013**

**PETER NJOROGE JAIRO.....PLAINTIFF**

(Administrator of the Estate of JAIRO

KIAMBUTHI MAGONDU - Deceased)

**VERSUS**

**GEORGE MBURU MARURI....1ST DEFENDANT**

**MARY WAMBUI MARURI.....2ND DEFENDANT**

(As Administrator of the Estate of

JOSHUA MARURI THUO - Deceased)

**RULING**

1. The dispute in this suit relates to Land Title Number Limuru/Bibirioni/1284 (**the suit property**). The defendants through a Notice of Motion dated 18/5/2017 pray that the suit herein be dismissed for want of prosecution. The application is supported by an affidavit sworn by John Mburu Maruri and is opposed by the respondents through a replying affidavit sworn on 17/7/2017 by Peter Njoroge Jairo.
2. The plaintiff contends that the suit property is also the subject matter in Nairobi High Court Succession Cause No 2931 of 1999. The plaintiff further alleges that advocates for both parties agreed to keep this suit in abeyance to await judgment in the succession cause which would determine whether this suit would proceed to hearing or be withdrawn.
3. The applicant has deposed that the plaintiff's originating summons dated 30/10/12 has been lying in court since 11/11/2014 without any attempt by the plaintiff to prosecute it. He has deposed further that the delay in prosecuting this suit is inexcusable and that this suit should be dismissed for want of prosecution.
4. The respondent opposes the application, contending that advocates for both parties agreed to put the suit in abeyance until the outcome of the succession cause which was scheduled for hearing on 20/06/2017 but the court did not sit on the said date. He contends that the present application was brought in bad faith.
5. At the hearing, counsel for the applicants argued that there is no consent on record with regard to allegations that the suit was to be kept in abeyance. He referred to **Article 159(2) (b) of the Constitution** and **Section 3A of the Civil Procedure Act** which provides that justice shall not be delayed. Counsel further submitted that under **Section 1A and 1B of the Civil procedure Act** justice should be delivered expeditiously. He relied on the cases of **Fredrick Mukabi Kamwati v Bernard Mutembei Bundi (2015) eKLR**; **Njue Ngai v Ephantus Njiru Ngai & Another (2016) eKLR**; and **Salkas Contractors Ltd v Kenya petroleum Refineries**. He urged the court to dismiss the suit.
6. Counsel for the plaintiff argued that the suit property is also the subject matter of a dispute in Succession Cause No 2931 of 1999 and that, the advocates for both parties had agreed to await judgment in the succession cause before proceeding with the suit herein. He submitted that the said judgment has not been delivered and hence the application should be dismissed.
7. I have considered the rival affidavits and the relevant law and jurisprudential principles. The jurisprudential criteria upon which this court exercises the jurisdiction to dismiss a suit on the ground of want of prosecution is whether the delay is prolonged and inexcusable, and whether there would be grave injustice if the suit were to proceed to hearing against the background of the prolonged delay. (see **Ivita v Kyumbu (1984) KLR 441** and **Mwangi S Kimenyi v Attorney General and Another, Civil suit Misc No 720 of 2009**). It is with the

above criteria in mind that I proceed to make a brief pronouncement on the application.

8. The present suit was filed on 18/3/2013 through an originating summons dated 30/10/2012. The defendant filed a replying affidavit to the originating summons on 23/4/2013. The plaintiff filed a further affidavit in support of the originating summons on 10/1/2014. Thereafter, neither party took steps to set down the originating summons for directions. On 30/5/2017, the defendant brought the present application.

9. The plaintiff contends that parties, through their respective advocates, agreed that they keep this suit in abeyance pending the hearing and determination of the pending succession dispute involving the suit property. It is not contested that the succession dispute exists. What is contested is the alleged agreement. The court record does not bear anything to suggest that indeed the agreement was reached.

10. I have considered the framework in Order 17 of the Civil Procedure Rules. I have no doubt that the application satisfies the one year threshold contemplated under Order 17 of the Civil Procedure Rules. There is also no doubt that there has been inordinate inaction on part of the plaintiff. The court is however not satisfied that a proper case has been made to satisfy the court that the defendant is gravely prejudiced and that no fair trial can be conducted owing to the delay in this suit. Consequently, I will not lock the plaintiff out of the seat of justice. I will conditionally allow him the opportunity to ventilate his claim through a trial of the issues herein.

11. In light of the above finding, I make the following disposal orders.

**a) The defendants' Notice of Motion dated 18/5/2017 is declined**

**b) The plaintiff shall however pay to the applicant costs of the application assessed at Kshs 10,000 to be paid within 45 days.**

**c) The Plaintiff shall file and serve a bound, paginated and indexed bundle of pleadings, witness statements and documentary evidence within 30 days. In default, this suit shall stand dismissed.**

**d) A pre-trial date shall be fixed at the time of reading this ruling**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF JULY 2018.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr Oguye Advocate for the defendant

Ms Halima Abdi - Court Clerk