

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 502 OF 2017

REGINA MUKHABI SHITAKHWA

KHASUNGU MACHUMA.....PLAINTIFFS/RESPONDENTS

VERSUS

JENIPHER BUSOLO PATYA.....DEFENDANT/APPLICANT

RULING

The first application is dated 31st August 2017 seeking the following orders;

1. That the honourable court be pleased to dismiss the plaintiff's suit herein for want of prosecution.
2. That costs of this application be provided for.

It is based on the following grounds and on the annexed affidavit of Jenipher Busolo Patya and the following grounds; That the suit herein was filed way back on 21/9/2011. That the defendant/applicant herein entered appearance on 1/11/2011 and filed his defence on 8th December, 2011. That the case came up in court for the first time on 24th July, 2012 but did not proceed as the 2nd plaintiff/2nd respondent was deceased and thus ought to be substituted and thus adjourned to 5th November, 2012. That on 5th November, 2012 the suit did not proceed as the substitution had not been done and thus it was adjournment indefinitely. That on 12th November, 2014 the matter came up again in court but was adjourned as parties needed to comply with the new Civil Procedure Rules 2010. That on 9th March, 2016 the defendant/applicant filed her statement of issues in court which issues the plaintiff/respondent has never acted upon. That on 25th January, 2016 the matter came up for hearing but did not proceed. That since then the plaintiffs/respondents have never taken any steps to proceed with the suit. That it is apparent that the plaintiff lack interest in the same and it only fair and just to have the suit dismissed.

The second application is dated 26th May, 2016 by the plaintiff prays for orders of stay of this suit pending the hearing of Kakamega succession Cause Number 226 of 2012. This matter was filed in court in the year 2011. A look at the plaint paragraph 13 shows that this case was filed pursuant to limited letters of administration being granted to the plaintiff's in Kakamega Succession Cause Number 137 of 1991. The letters of Administration were granted because the husband of the defendant herein had failed to apply for letters of succession in regard to the estate of one Angote. Later the plaintiffs realized that the defendant had got the estate of the late John Patya Angote succeeded in Succession cause number 226 of 2012. It is because of the interest they are having in the estate that they objected the letters of Administration to the defendant. That objection is pending hearing and the plaintiff has elected to pursue the objection in succession cause number 226 of 2012. This will avoid the situation where the High Court will have two conflicting decisions as continuing with the cases simultaneously may not be in the interest of justice. The application to stay the proceedings herein is made in good faith and should be allowed.

As relates the application for dismissal they have filed a reply affidavit which they relied on. They could not list the case for hearing as there was a pending application to be disposed off before any other procedure could be initiated. They that the application to dismiss the case be dismissed and this matter to remain stayed till the outcome of the succession case is finalized.

This court has considered both applications and submissions herein. I have perused the court record and find that since 26th May 2016 the plaintiffs/respondents have never taken any steps to proceed with the suit. The plaintiff has now applied for the proceedings to be stayed pending succession cause number 226 of 2012 no particulars of the said case have been given. It is apparent that the plaintiff lack interest in the same and is wasting the court's time. I find the application dated 26th May 2016 has no merit and I dismiss the same. I find the delay in prosecuting this matter is prolonged and inexcusable.

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 or be dismissed 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. I find this application dated 31st August, 2017 has merit and I grant the same with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26TH DAY OF SEPTEMBER 2018.

N.A. MATHEKA

JUDGE