



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 101 OF 2014

NDICHU KAHUHA.....PLAINTIFF

VERSUS

STANLEY NJERU PETER.....DEFENDANT

RULING

1. By a notice of motion dated 30th April 2018 brought under the provisions of **Order 17 Rule 2 (3) of the Civil Procedure Rules**, the Defendant sought the following orders;

- a. That the originating summons dated 14th October 2011 be dismissed for want of prosecution.*
- b. That all restrictions, cautions, inhibitions lodged by the Plaintiff on suit land Nthawa/Riandu/1235 be lifted.*
- c. That costs of the entire suit and this application be awarded to the Defendant herein.*

2. The said application was based upon the grounds shown on the face of motion. It was contended that the Plaintiff had failed to take steps to prosecute the suit for over two (2) years and that the parties had lost interest in the suit. It was supported by a brief affidavit sworn by the Defendant's advocate which reiterated the grounds stated in the motion.

3. The Plaintiff's personal representative one, Daniel Kamau Ndichu filed a replying affidavit sworn on 6th June 2018 in opposition to the said application. It was stated that the suit could not be prosecuted for the last two years because the Plaintiff had passed on. The Plaintiff was said to have died on 12th July 2016 in consequence of which an application for letters of administration *ad litem* was made. The said limited grant was issued on 4th August 2017 as a result of which an application for extension of time for substitution of the deceased Plaintiff was made on 7th June 2018. The said personal representative stated that he was still interested in prosecuting the suit to its logical conclusion.

4. When the said application was listed for hearing on 12th June 2018, Mr Muraguri prosecuted the said application on behalf of the Defendant whereas Mr P.N. Mugo opposed it on behalf of the Plaintiff. Mr Muraguri submitted that the Plaintiff had not been diligent in the prosecution of the suit and that, in any event, the suit had abated by operation of law since the Plaintiff died in July 2016.

5. The court has considered the Defendant's said application, the replying affidavit in opposition thereto as well as the oral submissions made on behalf of the parties. The court has considered the record of proceedings as well.

6. The court record shows that the suit was active until 11th May 2016 when the hearing of suit was adjourned on account of the Plaintiff's illness. As it has now emerged, the Plaintiff eventually died on 31st July 2016. In those circumstances, the suit could not be prosecuted without a personal representative being appointed and joined in the instant suit.

7. The court is satisfied that a reasonable explanation for the delay has been given in the circumstances. The principles to be considered in an application for dismissal of a suit for want of prosecution were considered in the case of **Ivita Vs Kyumbu [1984] KLR 441**. It was held that the court should consider whether there has been inordinate delay, what explanation has been given for the delay, and whether the Defendant is likely to suffer any prejudice on account of the delay. So, a court may still decline to dismiss a suit where justice can still be done in spite of the delay. The principles were summarized thus by the late **Chesoni J** (as he then was);

“So, the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is

justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the Plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the Plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the Plaintiff's excuse for the delay and that justice can still be done to the parties notwithstanding the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."

8. The Defendant has neither alleged nor demonstrated what prejudice, if any, he may suffer if the suit were to proceed for hearing. It was not shown that the Defendant's witnesses were no longer available or that he had lost any vital evidence which would make it impossible to have a fair trial.

9. The upshot of the foregoing is that the court finds no merit in the Defendant's notice of motion dated 30th April 2018 and the same is consequently dismissed with costs to the Plaintiff. Since there is an application dated 6th June 2018 for enlargement of time for the substitution of the deceased Plaintiff with his personal representative, the court shall fix the same for hearing upon delivery of the ruling.

10. It is so decided.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 22nd day of NOVEMBER, 2018.

In the presence of Ms Maina holding brief for Mr P.N. Mugo for the Plaintiff and Mr Mogusu holding brief for Mr Muraguri for the Defendant.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

22.11.18