



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC CASE NO. 68 OF 2017**

**(Formerly ELC CASE No. 710 of 2013 (OS))**

**JOSEPH MBOYA AWINO (Suing as Executor of the Estate of  
PATRICIA SHIELD).....PLAINTIFF**

**VERSUS**

**ALBERT OMARI.....DEFENDANT**

**RULING**

What is before Court for determination is the Defendant's Notice of Motion dated the 17<sup>th</sup> May, 2017 brought pursuant to Order 17 Rules 2(3) and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and sections 1A & 1B of the Civil Procedure Act. The Defendant seeks for orders that this suit should be dismissed for want of prosecution. The Application is premised on the grounds that the Plaintiff has not taken any step to prosecute and or set down this suit for hearing. Further, that the delay in prosecuting this case is inordinate, prolonged and inexcusable and litigation must in one way or the other come to an end.

The application is supported by the affidavit of ALBERT OMARI the Defendant herein where he avers that the suit herein was instituted in 2013 seeking declaratory orders that property in title number KAJIADO/ KAPUTIEI – NORTH/ 14766 consisting of 4.05 hectares (10 acres) belongs to the estate of the late Patricia Shields. He deposes that the plaintiff also sought an order that the suit premises presently in his name be cancelled and instead registered in the name of Seventh Day Adventist Church Eastern Union Conference. He claims the deceased was his wife and he purchased the suit land with his own funds. He explains that since 30<sup>th</sup> April, 2014 when he filed a replying affidavit, the suit has been dormant as the Plaintiff has not taken any steps to prosecute it.

The Plaintiff JOSEPH AWINO opposed the application and filed a replying affidavit where he averred that after filing the instant suit, the Defendant herein filed NAIROBI HCCC No. 516 of 2014 which relates to the same subject matter. He contends that the Defendant has not made full disclosure as in Nairobi ELC 516 of 2014 ( OS) he has expressed his intention of relying on documents filed in this instant suit which the Defendant seeks to be dismissed. He explains that in the interests of justice, the NAIROBI ELC 516 of 2014 and the instant suit ought to be merged in order for the matter to be determined conclusively as well as avoid multiplicity of suits. He reiterates that it is mischievous for the Defendant to seek for this suit to be dismissed.

The Defendant filed his submissions but the Plaintiff did not do so.

**Analysis and Determination**

Upon consideration of the application dated the 17<sup>th</sup> May, 2017 including the supporting and replying affidavits as well as the submission filed herein, the only issue for determination is whether this suit should be dismissed for want of prosecution.

I note the Plaintiff has not taken any steps to set the suit down for hearing since 2014. I however note there is another related suit NAIROBI ELC No. 516 of 2014 which relates to the same subject matter where the Plaintiff herein had already expressed his intention rely on documents filed in this instant suit to oppose the said NAIROBI ELC No. 516 of 2014 where he is a Defendant.

Order 17 rule 2(1) and (2) of cpr provides as follows '(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. (2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.**'

In the case **Ivita vs. Kyumbu [1984] KLR 441** the Court established the test to be applied by the courts where there is application for the dismissal of a suit for want of prosecution. It was emphatic that the delay should be a prolonged one and inexcusable. Further that if the delay is excusable, whether justice can still be done to the parties despite the delay.

In line with the above legal provisions, the above cited judicial decisions as well as the circumstances at hand, I find that insofar as the Plaintiff had failed to take steps to set the instant suit down for hearing, the act of dismissing this suit for want of prosecution, should be exercised cautiously. In the current scenario, I note there are two related suits and concur with the Plaintiff that the same should be merged,. I further note that the Plaint herein raises triable issues and it would be pertinent if the same was set down for hearing to enable the court determine the same on its merits.

In the circumstances, I will decline to dismiss this suit for want of prosecution and direct that it should be set down for hearing within the next 90 days from the date hereof. I will further direct that in the interest of justice, the Parties herein should file a formal application to consolidate this suit with NAIROBI ELC No. 516 of 2014

Costs in the cause.

**Dated signed and delivered in open court at Kajjado this 10th day of December, 2018.**

**CHRISTINE OCHIENG**

**JUDGE**