



REPUBLIC OF KENYA
IN THE E.L.C. COURT OF KENYA AT EMBU
E.L.C. NO. 95 OF 2013
FORMERLY HCC NO. 187 OF 2010

ELIUD NYAGA NAMU THIGARI.....PLAINTIFF/RESPONDENT

VERSUS

ROBERT KIRIGA MWARANIA.....1ST DEFENDANT/APPLICANT

DUNCAN ELIAS MUTURI.....2ND DEFENDANT/APPLICANT

GEOFREY IRERI.....3RD DEFENDANT/APPLICANT

MURIRU MUCUMO.....4TH DEFENDANT/APPLICANT

IRERI MWARANIA.....5TH DEFENDANT/APPLICANT

JOSEPHAT NGUNGI NJERU.....6TH DEFENDANT/APPLICANT

MUCUMO MWARANIA.....7TH DEFENDANT/APPLICANT

RULING

1. By a Notice of Motion dated and filed on 11th December 2012, the Defendants sought orders for dismissal of the suit for want of prosecution. The Defendant also sought a declaration that the suit had abated against all the Defendants and that costs of the application be provided for.
2. The said application was supported by the affidavit of the 1st Defendant who swore it on his behalf of himself and on behalf of the 2nd, 5th, 6th and 7th Defendants. The 3rd and 4th Defendants are said to have died before the filing of the suit and despite the Plaintiff being accorded an opportunity to substitute them in 2011, the Plaintiff had not taken any steps in that regard.
3. It is also sworn in the said affidavit that the suit was last listed for hearing on 2nd November 2011 when the matter could not proceed and that the Plaintiff had not taken any steps since then to have the suit prosecuted.
4. The Plaintiff's advocate, Mr Mogusu & Co Advocates, did not file any response to the said application and neither did he attend court on 19th April 2017 when the said application was listed for hearing. The court, therefore, allowed the Defendants' advocate to prosecute the said application *ex-parte*.

5. Mr A.P. Kariithi Advocate for the Defendants relied entirely upon the grounds shown on the face of the said Notice of Motion together with the 1st Defendant's supporting affidavit. He pointed out that the Plaintiff had not taken any steps to prosecute the suit in the last five years and asked the court to grant the prayers sought.

6. I have considered the said application and noted that it is not opposed by the Plaintiff. No explanation has been tendered for the delay of several years in the prosecution of the suit. Where there is inordinate delay in the prosecution of a suit, the court has power to dismiss it for want of prosecution under **Order 17 Rule 2 of the Civil Procedure Rules**, see **Nilan v. Patel & others [1969] EA 340.** In the circumstances of this case, the court shall dismiss the suit as against the 1st, 2nd, 5th, 6th & 7th Defendants for want of prosecution under **Order 17 Rule of the Civil Procedure Rules**.

7. In the replying affidavit sworn by the 1st Defendant, Robert Kiriga Mwarania on 10th January 2011 in response to the Originating Summons dated 15th December 2010, he swore at paragraph 2 that the 3rd and 4th Defendants were deceased and that they could not defend themselves. There is no affidavit or other materials on record to the contrary. I therefore accept the evidence by the 1st Defendant that the 3rd and 4th Defendants were deceased, at any rate, as at 10th January 2011.

8. It is also apparent from the court file that those 2 Defendants have never been substituted and as such the suit against them is really a non-starter. The court shall, therefore, grant the declaration sought for abatement of the suit as against the 3rd and 4th Defendants. There is no justification for a declaration that the suit has abated against all the Defendants as sought in the Notice of Motion dated 11th November 2012.

9. The upshot of the foregoing is that the Notice of Motion dated 11th November 2012 has merit and the same is allowed in the following terms:

- a. The Plaintiff's suit against the 1st, 2nd, 5th, 6th and 7th Defendants is hereby dismissed with costs for want of prosecution.
- b. It is hereby declared that the suit as against the 3rd and 4th Defendants has abated.
- c. of the application to the Defendants.

10. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **21st day of JUNE 2017.**

In the presence of Mr A.P. Kariithi for the Defendants and in the absence of the Plaintiff.

Court clerk Njue/Leadys

Y.M. ANGIMA

JUDGE

21.06.17