



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 135 OF 2013

KIPROTICH KORIR.....1ST PAINTIFF

ATHUMAN MWAKAMOLE BUNDO.....2ND PLAINTIFF

-VERSUS-

SHIYOTOR HOLDINGS LIMITED.....DEFENDANT

RULING

1. For my determination is the notice of motion dated 10th July 2017 brought under the provisions of Order 17 rule 2 (1) & (3) and Order 2 rule 15 (1) (b), (c) & (d) of the Civil Procedure Rules, section 1A, 1B & 3A of the Civil Procedure Act and Article 159 (2) (b), 162 (2) (b) & 165 (3) of the Constitution 2010. In this motion, the Defendant/Applicant is seeking the following orders:

(i) That the plaintiffs' suit be dismissed for want of prosecution.

(ii) That the costs of the suit and of this application are awarded to the Defendant/Applicant.

(iii) That in alternative, the plaintiffs' plaint dated 27th June, 2013 is struck out and the plaintiffs' suit dismissed with costs to the Defendant.

2. The motion is premised on the grounds inter alia; that the defendant had by a motion dated 13.8.2015 applied to dismiss this suit for want of prosecution. The application was dismissed on 12th February 2016 and the Court directed parties to comply with Order 11 and thereafter set down the suit for hearing. That Mr. Gikandi subsequently filed on 12th April 2016 witness statements on behalf of for the 2nd plaintiff and a list of documents.

3. The defendant narrated further that he received a notice via mail informing his advocate that the matter was listed for pre-trial directions on 7.7.2016 yet the case did not appear on the cause list of that day. Since then the plaintiffs have not taken any steps to fix a date to progress the matter. That more than one year has lapsed since the plaintiffs were indulged by the Court. Further still that the suit by the 2nd plaintiff has abated following his demise on 3rd November 2015.

4. The application is also supported by the two affidavits dated 10th July 2017 and 25th July 2017 both sworn by Mr Jaideep Singh Vohra, a director of the defendant. Mr Jaideep deposed that the defendant is anxious to develop this property were it not for this suit. He annexed as "JVS – W56" being death certificate No 0435090 certifying the death of Athuman Mwakamole Bundo – the 2nd plaintiff. Mr Jaideep deposed that the plaintiffs are not keen on the case as they have no proper witnesses and/or documents to rely on. He urged the Court to exercise its powers and dismiss the suit.

5. The 1st plaintiff Mr Kiprotich Korir did not respond to this application. Mr Anyanzwa holding brief for Mr Kemosi Mogaka advocates for the 1st plaintiff informed the Court that Mr Mogaka had not received any instructions from his client. He sought for limited time to file an application to cease acting. This request was refused by the Court on account that the 1st plaintiff had had sufficient time to file a response to the application and or move the Court by filing the application to cease acting. The result is that the prayer for the suit to be dismissed against the 1st plaintiff is automatically allowed as no cause has been shown as required under the provisions of Order 17 rule 2.

6. The application is opposed by the 2nd plaintiff who filed a Replying Affidavit dated 25th September 2017. The affidavit is stated as sworn by Athuman Mwakamole Bundo under oath. In paragraph 2, the deponent said thus ***"I am the son of the 2nd plaintiff. My father passed away on 3rd November 2015. As a result of some family dispute, it was not possible to agree on who was to be appointed the***

administrator. That the issue has been resolved and now I have been mandated to apply for the letters of administration.”

7. The 2nd plaintiff deposed that he invited the defendant’s advocate in April 2016 to fix a date for hearing. That the matter was listed for pre – trial hearing on 7.7.2016. Unfortunately the matter has not been fixed so far after this date and that the obligation to fix a date was on both parties. In paragraph 10, the deponent states that the defendant has admitted trying to fix this matter for hearing several times without success hence this application is an afterthought. That this is a land matter which is very emotive and should thus be determined on its merits. He urged the Court not to allow the present application.

8. The advocates for the parties made oral submissions which expanded what is already set out in the pleadings. There are two issues I find arising for my determination;

(a) Whether the 2nd plaintiff has opposed this application.

(b) And if the answer to (a) above is yes; whether there is merit in the application.

9. The defendant/applicant annexed a death certificate serial number 0435090 and burial permit number 0916855 issued on 6th November 2015. The two documents confirm that Athuman Mwakamole Bundo died on 3rd November 2015. The deponent of the 2nd plaintiff’s replying affidavit confirmed this death at paragraph 2 thereof. This person other than stating he is the son of the deceased did not identify his name. Neither did he annex the letter of authority signed by the family of Athuman mandating him to take out letters of administration of his estate.

10. Mr Gikandi advocate for the 2nd plaintiff did not in his submissions and or as an officer of the Court disclose the name of the person who swore this affidavit. Order 19 rule 3 (1) provide thus:

“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove,”

And

Rule 4 “Every affidavit shall state the description, place of abode and postal address of the deponent, and if the deponent is a minor, shall state his age.”

11. The Court is faced with an affidavit sworn in contravention of the above two rules as the name or postal address of the deponent has not been stated. Given that the son swears the affidavit as if he is the 2nd plaintiff makes me wonder whether the facts he has deposed to are within his knowledge. The long and short is that the replying affidavit is sworn by an unknown person to these proceedings. I find the same as an abuse of the Court process and order it struck out. This leaves the application as unopposed by the 2nd plaintiff and therefore stands allowed.

12. However even if I presume that the replying affidavit is properly on record, this suit has not been set down for hearing for over one year since February 2016. This is inspite of the Court having declined to dismiss the suit for want of prosecution and given them second chance. I have read the entire replying affidavit and find no justifiable reason given why they had not set down the suit for hearing whether on 7.7.2016 or subsequently thereafter until the defendant filed the present application. It is argued for the 2nd plaintiff that both parties had an obligation to set down the suit for hearing. However Mr Mwenesi rebutted this averment that the burden was greater on the plaintiff.

13. The 3rd reason why I will allow the defendant’s application is that the suit has abated. Order 24 rule 3 (2) provides that where within one year no application is made under sub – rule 1 to substitute the plaintiff, the suit shall abate so far as the deceased plaintiff is concerned and on the application of the defendant the Court may award him costs of defending the suit.

14. The 2nd plaintiff herein died on 3rd November 2015, now two years has lapsed. Mr Gikandi was and still is on record for him. Mr Gikandi submitted that the family of this plaintiff is entitled to the suit land culturally under article 11 of the Constitution. He also submitted that the 2nd plaintiff has a family who has a right to pursue this claim although it is true the cause of action survives him but equity aids vigilant. He relied on the case of **Peter Ngugi vs Esther Wangari Githinji & Another (2015) eKLR**. Counsel however did not explain to this Court why he had not advised the family of the 2nd plaintiff to take out letters of administration and take steps to substitute the 2nd plaintiff as required under Order 19 rule 1 and rule 3 (1). In the absence of this explanation and no evidence of such steps having been commenced, the Court’s hand is tied to even apply the proviso to Order 19 (3) (2) in their favour.

15. In conclusion, I find both plaintiffs have not shown cause why their suit should not be dismissed for want of prosecution. Secondly I also find the 2nd plaintiff’s suit has abated. Consequently I find merit in the notice of motion dated 10th July 2017 and allow it in terms of prayer 1 & 2. The suit is hereby dismissed with costs of the suit and this application awarded to the defendant/Applicant.

Dated, signed and delivered at Mombasa this 10th November 2017.

A. OMOLLO

JUDGE