



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 306 OF 2015

ADAM SAID JUMBE

MERCELINE KISHAGA BULUMA.....PLAINTIFFS

VERSUS

PRESTON MWAKIO JUMBE.....DEFENDANT

RULING

1. This is the Notice of Motion dated 9/10/2013. It is brought under Section 1, 1A, 1B and 3A of the Civil Procedure Act (Chapter 21 Laws of Kenya) and Order 12 Rule 7 of the Civil Procedure Rules, 2010.

2. It seeks orders;

a. Spent

b. That the interlocutory judgment entered in favour of the Defendant on 3/4/2008 be set aside and the Plaintiff be allowed to file a reply to the defence and defence to the counterclaim.

c. That costs of this application be provided for.

3. The grounds are in the face of the application. The main ground being the Plaintiff's advocate on record in advertently forgot to file a reply to defence and defence to counterclaim within the stipulated time and as ordered by the court on the 3/4/2008.

4. The application is supported by the affidavit of Merceline Kishaga Buluma, the 2nd Plaintiff sworn on the 9/10/2013.

5. The application is opposed. There is a replying affidavit sworn by Preston Mwakio Jumbe, the Defendant herein sworn on the 12/11/2013.

6. It is the Plaintiff/Applicant's case that the first Plaintiff has since passed on. That the cause of action continues with the surviving Plaintiff. That when the application was filed the 1st Plaintiff was alive and that no prejudice will be occasioned to the Defendant if this application is allowed.

7. It is the Defendant/Respondent's case that he filed a counterclaim to the Plaintiff's suit on 3/4/2008 the Defendant requested for judgement on his counterclaim and the same was duly entered.

That later the 1st Plaintiff passed on. The 2nd Plaintiff appeared to have lost interest in the case until 9/10/2013 which she filed this application. That equity aids the vigilant and the Plaintiff is guilty of laches.

The 2nd Plaintiff does not have a defence to counterclaim and has not annexed any draft defence for the court to ascertain whether she has any triable issues.

They have put forward the case of *Yamko Yadpaz Industries Limited –versus- Kalka Flowers Limited, Nairobi HCCC No 591 of 2012.* Further that the Defendant will be highly prejudiced if his application is allowed as he is the registered proprietor of the suit property.

8. I have considered the application and the supporting affidavit. I have considered the replying affidavit, the submissions of both counsels and the authorities cited.

The issues for determination are;

- i. Whether or not the suit has abated by reason of the 1st Plaintiff's death.
- ii. Whether the application dated 9/10/2013 was brought with inordinate delay.
- iii. Whether the application is merited.
- iv. Costs.

9. The Plaintiff dated 12/10/2005 filed on the 12/10/2005. The verifying affidavit is sworn by Adam Said Jumbe, the 1st Plaintiff who has since passed on.

Order 24 Rule 1 of the Civil Procedure Rules, 2010 provides that,

“The death of a Plaintiff or Defendant shall not cause the suit to abate if the cause of action survives or continues.”

Rule 2 provides that,

“Where there are one or more Plaintiffs or Defendants than one, and anyone of them dies and where the cause of action, survives or continues to the surviving Plaintiff or Plaintiffs alone or against the surviving Defendant or Defendants alone the court shall cause an entry to that effect to be made on record and the suit shall proceed at the instance of the surviving Plaintiff or Plaintiffs or against the Defendants or Defendants.”

10. The Plaintiffs herein have sued the Defendant. They claim this is ancestral land. The title deed shows that it was registered in favour of the Defendant on 7/7/1982 and a title deed issued on 10/8/2004.

The verifying affidavit is sworn by the 1st Plaintiff. He has since passed on.

I find that the cause of action survives the death of the 1st Plaintiff.

11. I will now go into the merits of the application dated 9/10/2013. The *ex parte* judgement sought to be set aside was entered on 3/4/2008.

Order 12 Rule 7 of the Civil Procedure Rules 2010 provides that,

“Where under this Order judgement has been entered or the suit has been dismissed the court on application, may set aside or vary the judgement or Order such terms as may be just.”

12. Havelock J. held in the case of *Yamko Yadpaz Industries Limited –versus- Kalka Flowers Limited Nairobi HCCC No 591 of 2012.*

“That there are no limits or restriction on the Judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice.

Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, in advertence or excusable mistake or error, but it is not designed to assist the person who has deliberately sought whether be evasion or otherwise to obstruct or delay the course of justice. *Shah versus Mbogo (1967) EA 116* at page 123b, *Shabir Din –versus- Ram Perakash Anand (1955) 22 EACA 45.*”

13. I have considered the reasons advanced by the Plaintiff and find that they are not plausible.

I also find that the application was brought on 9/10/2013 when the *ex parte* judgment was entered on 3/4/2008.

I find that the delay in bringing this application is inexcusable. The delay has not been explained. I rely on the case of *Allen –versus- Alfred McAlshine & Sons (1965) All ER.* Where a delay of fourteen (14) years was considered inordinate and inexcusable.

Agip (Kenya) Limited –versus- Highland Tyres Limited (2001) KLR 630 where a delay of eight (8) months was considered to be inordinate.

14. The Plaintiff failed to attach a draft defence to the Defendants counterclaim.

I agree with the Defendant's counsel that there is nothing for the court to look at to determine whether the Plaintiff has a good defence to the counterclaim.

15. I have considered the circumstances of this case. The Defendant is the registered proprietor of the suit property.

I find that he will be prejudiced with the continued pendency of this suit.

16. I find no merit in this application and the same is dismissed with costs to the Defendant.

It is so ordered.

Dated, signed and delivered at *Mombasa* on the *1st* day of *November 2017*.

L. KOMINGOI

JUDGE

1/11/2017