



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KERUGOYA

ELC CASE NO. 257 OF 2013

NJIRU KABUI.....PLAINTIFF

VERSUS

KAMBURI MUBUTA.....1ST DEFENDANT

EDITH WATORO.....2ND DEFENDANT

TABITHA WANJIKUMBOGO.....3RD DEFENDANT

BENSON NJOKA KAMURI.....4TH DEFENDANT

JOHN WACHIRA KARIITHI.....5TH DEFENDANT

PATRICK MUCHIRI GICHOBIL.....6TH DEFENDANT

THE DISTRICT LAND REGISTRAR KIRINYAGA...7TH DEFENDANT

RULING

Order 17 Rule 2 of the Civil Procedure Rules provides as follows:

2 (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 course is shown to the satisfaction of the Court, it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.

(4) The Court may dismiss the suit for non-compliance with any direction given under this order".

Citing the provisions of **Order 17 Rule 2 (1) and (3) of the Civil Procedure Rules**, the 2nd, 3rd and 4th defendants filed a Notice of Motion dated 19th May 2017 seeking the following orders:

1. That the suit against the 2nd, 3rd and 4th defendants be dismissed with costs for want of prosecution.

2. Costs of the application be provided for.

The application is based on the grounds set out therein and is also supported by the affidavit of **MR. MAINA KAGIO** advocate. The gravamen of the application is that this suit was last in Court on 14th March 2016 when the Court was informed that the 1st defendant was deceased and since then, the plaintiff has not taken any steps towards setting the suit down for hearing or mention.

The application is opposed and the plaintiff **ELIZABETH WAKARII NJIRU** has filed a replying affidavit in which she confirms that indeed the suit was last in Court on 14th March 2016 when she learnt that the 1st defendant was deceased.

Thereafter, her advocate sent a letter to the other counsels to have the matter mentioned on 16th October 2016 and she is keen in pursuing her claim.

Her counsel **MS WAIRIMU MUBARI** similarly filed a further affidavit indicating that indeed she had served all the counsel involved in this suit for mention on 16th October 2016 but the Court was not sitting and the plaintiff has since commenced the process of seeking out the legal representative of the deceased whose Estate is yet to be distributed. That they were served with this application while in the process of searching out the beneficiaries. That the plaintiff is diligent in prosecuting this suit.

The application was canvassed by way of written submissions which have been filed both by **MR. MAINA KAGIO ADVOCATE** for the 2nd, 3rd and 4th defendants and **MS WAIRIMU MUBARI ADVOCATE** for the plaintiff.

I have considered the application, the rival affidavits and submissions by counsel.

It is common ground that until 19th May 2017 when the application seeking the dismissal of the suit against the 2nd, 3rd and 4th defendants was filed, this suit was last in Court on 14th March 2016 when the Court was informed that the 1st defendant was deceased. The Court put off the suit to enable the plaintiff pursue the substitution of the deceased 1st defendant. Counsel for the plaintiff in her submissions urges this Court not to dismiss the suit as the plaintiff was still in the process of identifying the deceased 1st defendant's legal representative and even wrote a letter to the other counsels inviting them for a mention on 6th October 2016 when the Court was not sitting. However, there is no evidence of what steps, if any, the plaintiff took after 6th October 2016 to have this suit prosecuted and in that regard, I agree with counsel for the 2nd, 3rd and 4th defendants in his submissions that the plaintiff must have been aware as far back as 2012 when she was served with the defence that the 1st defendant had died in September 2009 since that information was contained in the 4th defendant's statement. It cannot therefore be correct, as deponed in paragraph four (4) of the plaintiff's supporting affidavit, that she only learnt about the death of the 1st defendant on 14th March 2016 and therefore **"sought time to verify the same"**. Clearly, the fact of 1st defendant being deceased was brought to the attention of the plaintiff over five (5) years ago when she was served with the 2nd, 3rd and 4th defendant's defence herein. It is the duty of the plaintiff to pursue her case and thereby assist the Court in ensuring the expeditious disposal of cases which is an overriding objective of the Court as rightly submitted by counsel for the 2nd, 3rd and 4th defendants.

Having said so, however, I am guided by the criteria set out in **IVITA VS KYUMBU 1984 K.L.R 441** that in determining whether or not a suit should be dismissed for want of prosecution, the test is whether the delay is long and inexcusable and if it is, can justice be done despite the delay. Further, the use of the word **"may dismiss the suit"** in **Order 17 Rule 2 of the Civil Procedure Rules** connotes that dismissal is not mandatory but is a discretionary power. Other than the delay, which the plaintiff has not satisfactorily

explained, the 2nd, 3rd and 4th defendants have not on their part told this Court what prejudice they will suffer if the suit is not dismissed. In the *IVUTI* case (supra), the Court further stated that:

“Justice is justice to both the plaintiff and the defendant so both parties to the suit must be considered and the position of the Judge too, because it is no easy task for 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 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 ……”

Exercising my discretion in the circumstances of this case, it is clear that the plaintiff became aware about the 1st defendant being deceased way back in 2012 when the 2nd, 3rd and 4th defendants filed their defence and statements indicating that the 1st defendant died in September 2009. It cannot be true therefore that the plaintiff only became aware about that fact on 14th March 2016 and even if she was doubtful, she had more than sufficient time to investigate and confirm. The plaintiff was therefore less than candid on that issue and should not be deserving of the exercise of this Court’s discretion in her favour. This case was first filed in 2011 at the High Court in Embu and is therefore six (6) years old. ***Article 159 (2) (b) of the Constitution*** requires that justice shall not be delayed. Equally, ***Section 3 of the Environment and Land Court Act*** echoes the requirements of the ***Civil Procedure Rules*** with regard to the expeditious disposal of cases. The question that I need to grapple with is whether justice can still be done notwithstanding the lapse on the part of the plaintiff. I take cognizance of the fact that the original plaintiff had to be substituted in 2013.

In light of the above, I make the following orders in respect to the 2nd, 3rd and 4th defendants’ Notice of Motion dated 19th May 2017:

- 1. The Notice of Motion dated 19th May 2017 seeking the dismissal of the plaintiff’s suit is dismissed.***
- 2. The plaintiff shall within three (3) months of this ruling file and prosecute an application to substitute the 1st defendant and fix a date for pre-trial before the Deputy Registrar.***
- 3. The plaintiff shall also pay to the 2nd, 3rd and 4th defendants costs of this application assessed at Ksh. 10,000 within 30 days of this ruling.***
- 4. In default of any of the above, this suit shall stand dismissed with costs to the 2nd, 3rd and 4th defendants.***

B.N. OLAO

JUDGE

20TH DECEMBER, 2017

Ruling dated, delivered and signed in open Court at Kerugoya this 20th day of December 2017

Ms Kiragu for 5th and 6th Defendants present

Mr. Chomba for Mr. Kagio for 2nd, 3rd and 4th Defendants present

Mr. Rugaita for Plaintiff absent.

B. N. OLAO

JUDGE

20TH DECEMBER, 2017