

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND COURT

ELC. CASE NO. 724 OF 2011

FREDRICK MUKABI KAMWATIPLAINTIFF

VERSUS

BERNARD MUTEMBEI BUNDI.....DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 19th August 2013 in which the Defendant/Applicant seeks for orders dismissing this suit for want of prosecution and that the costs of this Application be borne by the Plaintiff.

The Application is premised on the ground appearing on the face of it together with the Supporting Affidavit of Clement K. Chege, the Advocate acting for the Defendant in this matter, sworn on 19th August 2013 in which he averred that the Plaintiff filed this suit on 16th December 2011 contemporaneously with a Notice of Motion dated the same day under Certificate of Urgency. He further averred that the said application came up for hearing on 21st March 2012 but was adjourned to 31st May 2012. He further averred that on 31st May 2012, the matter was not listed. He stated further that since 31st May 2012 to date, the Plaintiff has not taken any steps to have either the application or the main suit set down for hearing. He stated that in the circumstances, it was quite clear that the Plaintiff was no longer interested in this suit and it should be dismissed for want of prosecution.

The Application is contested. Moses Gatitu Wangoo, the Advocate acting for the Plaintiff, filed his Replying Affidavit sworn on 21st October 2013 in which he averred that the Defendant was listed as a beneficiary of the estate of Wahinya Kinyari in **Succession Cause No. 142 of 1998** in the Chief Magistrates Court at Kiambu through a Certificate of Confirmation of Grant dated 15th February 2012. He further averred that the Principle Magistrate in that succession cause ordered the Plaintiff to release the original title documents of the suit property on 17th October 2012. He further averred that on 31st October 2012, the Plaintiff filed Summons for Revocation and Annulment of Grant in **High Court Succession Cause No. 2631 of 2012**. He added that the Plaintiff has great personal interest in this suit and that parties were negotiating out of court where the Defendant has offered Kshs. 150,000/-.

Both parties filed their written submissions which have been read and taken into account in this ruling. The main issue that emerges in this matter for determination is whether or not I should dismiss this suit for want of prosecution.

The applicable law is **Order 17 Rule 2(1)** which provides as follows:

“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.”

Order 17 Rule 2(3) provides as follows:

“Any party to the suit may apply for its dismissal as provided in sub-rule 1”

Upon perusal of this file and considering the response to this Application given by the Plaintiff, I form the overall impression that the Plaintiff has lost interest in prosecuting this suit for the reason that the arena for the dispute over the suit land has changed from this suit to the **High Court Succession Cause No. 2631 of 2012**. This is because the Defendant/Applicant appears to have acquired a half share of the suit property by way of transmission through a Confirmation of Grant over the estate of the Wavinya Kinyari. As admitted, the Plaintiff is now seeking to have that Grant annulled and revoked in the stated succession cause. This would explain the inactivity by the Plaintiff in this suit for the period from 31st May 2012 to the date when this Application was filed on 21st August 2013, over one year later. For my part, I consider the Plaintiff's inaction in this suit to be unjustified and points to the fact that the Plaintiff is no longer interested in this suit and instead is actively pursuing the succession cause. In the circumstances, I consider this suit to be ripe for dismissal for want of prosecution.

I accordingly allow this Application with costs to the Defendant.

SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF JUNE 2015.

MARY M. GITUMBI

JUDGE