



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CIVIL CASE NO. 5 OF 2006 (OS)

MOSES MWANGI KARANJA.....APPLICANT

VERSUS

SAMUEL MWANGI KARANJA.....RESPONDENT

RULING

1. The Motion dated 21st March 2014 is for the dismissal of the suit for want of prosecution. The applicants aver that the suit commenced in 2004 at the Civil Division of the High Court. It was then transferred to the Family Division in 2006 and assigned the current case number. No step has been taken to prosecute it since then. The Motion is brought at the instance of the 2nd defendant, Samuel Mwangi Karanja.
2. The application was responded to by the 3rd defendant, Ezekiel Mahugu Karanja, and the plaintiff, Moses Mwangi Karanja, vide their respective affidavits sworn 9th June 2014 respectively and 18th June 2014.
3. The 3rd defendant explains that the case has stagnated because of the death of the 1st defendant as the family is yet to designate the person who is to obtain representation to his estate and thereafter take over the case.
4. The plaintiff pleads that he is unaware of the existence of this cause, HCCC No. 5 of 2006 (OS), as he was only aware of the earlier suit HCCC No. 874 of 2004 whose file has been missing according to him. He further pleads that the 1st defendant died and has never been substituted. He further states that his advocate has been unwell, contributing further to the delay of the matter.
5. The applicant filed a further affidavit on 8th July 2014, sworn on 7th July 2014. He avers that although the plaintiff alleges that the file in HCCC No. 874 of 2004 has been missing for nine (9) years and he has been looking for it at various registries, he has not attached any documentary proof of his efforts to trace the missing file.
6. It was directed on 10th July 2014 that the application dated 21st March 2014 be disposed of by way of written submissions. Both sides filed their respective submissions.
7. The matter before me was filed on 11th August 2004 at the Civil Registry. It was assigned file number HCCC No. 874 of 2004 (OS). The file was subsequently transferred to the Family Registry and assigned number HCCC No. 5 of 2006 (OS).

8. The transfer was ordered on 7th March 2006 by Osiemo J. The minute for 7th March 2006 is recorded as follows:-

“Coram: Osiemo J.

Mr. Mwangi for plaintiff

Mr. Macharia for defendant

c.c. – Materi

Court – The issue (sic) involved in this suit are purely of succession in nature. The suit I transferred to Family Division. The file to be placed before the Presiding Judge Family Division on 29.3.2006 for directions.”

9. Since 7th March 2006 no step was taken in the matter until 9th April 2014 when the application dated 21st March 2014 was lodged at the registry. Eight (8) years have lapsed between the 7th March 2006 and 9th April 2014.

10. I have carefully considered the explanations given by the respondents for their inaction. To my mind these explanations are not convincing. The plaintiff says he was unaware of transfer of the suit, yet the order transferring the file was made in the presence of his advocate. He says the file in HCCC No. 874 of 2004 has been missing, yet he has provided no proof of his efforts to trace it. The 3rd defendant alleges that he took no action because the 1st defendant died in 2008 and the family is yet to appoint a representative to take over from him. It is now five years since the 1st defendant died, if his family were interested in the suit they would have moved to substitute him by now.

11. The application dated 21st March 2014 is well grounded. It is available for granting, and I do hereby allow the same. The applicant shall have costs of the application and the suit. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 23rd DAY OF January 2015.

W. MUSYOKA

JUDGE

In the presence of Mr. Jado for Mr. Mboha advocate for the applicant.

In the presence of Mrs. Keya advocate for the respondent.