



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CIVIL APPEAL NO. 69 OF 1993

GEOFFREY KIBANGA APPELLANT

- V E R S U S -

MAJOR SILAS MWITIRESPONDENT

RULING

1. The respondent/applicant through a notice of motion dated 28th October 2014 under Order 17 Rule 1 (3) of the Civil Procedure Code (I believe the applicant meant Civil Procedure Rules) and Section 3,3A,1A,1B of Civil Procedure Act prays for the orders that:-

- (a) That this Honourable Court be pleased to dismiss this suit/appeal for want of prosecution.**
- (b) That costs herein be awarded to the applicant respondent**
- (c) Any other relief the court may deem necessary.**

2. The application is based on the grounds on the face of the application interalia; the litigation must come to an end, that the respondent has lost interest in the case and that in all fairness the parties themselves have been in court since 1993 to date.

3. The applicant further relies on his supportive affidavit dated 28th October 2014 in which it is deponed that; the appeal itself has been heard and determined; that what is pending is an application dated 12th November 1997 allegedly for assessment of damages; the application is part-heard by way of oral evidence; that the last time the case was before court was on 1st February 2013 when this case was adjourned at the instance of the respondent; that the applicants counsel has taken the pain to invite the respondents but in vain as per annexures “MM-01” – that this case has been pending for more than 20 years since 1993 to date; that the applicant has lost interest in the application dated 12th November, 1997; that applicant wrote a letter to the Resident Judge wondering why the matter was pending a copy of the said letter annexed marked MM-02; that his letter demonstrated his anxiety to have the case heard and determined.

4. The applicant on his part filed grounds of opposition dated 20th February 2015 stating as follows:-

- (i) That the application is frivolous and abuse of the court process as its intention to hijack and kill the application for assessment of damages-despite the fact that application is partly hard.**

(ii) The affidavit in support of this application is scandalous and despicable which should not be entertained by this honourable court.

(iii) The respondent will pray for its dismissal with heavy costs.

5. I have very carefully considered the pleadings and counsels respective oral submission in support and in opposition of the application dated 28th October 2014. The issue for consideration is whether the application has met the conditions for dismissing of the suit/appeal for want of prosecution?

6. The counsel for applicant Mr. Ondari learned advocate submitted that what is pending in this court is a "Notice of Motion" dated 12th November 1997. He further submitted that he had looked at the definition of a "suit" and urged that it included a notice of motion. He submitted that the notice of motion has been pending for a period of 20 years. He relied on the applicant's supportive affidavit in demonstrating that the application has been pending without prosecution for a long period. He added that the appellant has lost interest in this matter. He pointed out the appeal has been determined and all that is remaining is an application for assessment of damages and prayed the same be dismissed for want of prosecution.

7. Mr. Kioga learned counsel of the respondent responded by submitting that there is no valid application before court relying on the grounds of opposition. He urged the appeal was determined and applicant condemned to pay damages for illegal attachment, however the court did not assess the damages. Consequently the respondent filed an application dated 12th November 1997 for court to assess damages arising out of a judgment dated 14th March 1997. He urged that there was an appeal which was determined on 17th August, 2007. He added that the application is part-heard. He termed the application as scandalous and an attempt to defeat court's judgment. He concluded by stating that the term "suit" does not include applications. He further submitted a part heard matter cannot be dismissed for want of prosecution adding that **Article 159 (2) (d) of the Constitution of Kenya 2010** allows court to hear matters substantially.

8. The application sought to be dismissed for want of prosecution is brought pursuant to Section 34 of the Civil Procedure Act and Orders L Rule 1 and 2 of the Civil Procedure Rules. The Court record reveal that this matter has been active up to 27th February 2013. That the matter has been partly heard by the court. That from the said date to the time of filing the application for dismissal of the suit/appeal is 1 year or thereabouts.

9. **Order 17 Rule 1(3) of the Civil Procedure Rules** relied upon by the applicant provides:-

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

10. **Section 2 of the Civil Procedure Act** defines a "suit" to mean as follows "suit" ***"means all Civil Proceedings commenced in any manner prescribed"***. **Order 3 (1) (1) of Civil Procedure Rules** provides how a suit can be commenced. It provides:-

"1. (1) Every suit shall be instituted by presenting a plaint to the court, or in such other manner as maybe prescribed."

11. A suit must therefore be commenced by way of plaint under Order 3 (1) (i)) ; or by way of counterclaim under Order 7 (3) and/or by way of originating summons under Order 37 (i) of Civil Procedure Rules or by way of a petition. A notice of motion is not commenced under any of the above prescribed manner under Civil Procedure Rules. The applications such as a notice of motion or chamber summon are therefore in my view not suits nor are they appeals. The notice of motion therefore being not a suit or an appeal cannot be dismissed for want of prosecution as suggested by the applicant. Secondly the matter is part-heard by the court and cannot in my view be dismissed for want of prosecution but by court proceeding to analyse the evidence before making a ruling or judgment on damages sought. The applicant should have set the application down for hearing and served the respondent in default of

attendance the applicant should move the court to have application determined on merits.

12. I note that notwithstanding that the pending notice of motion by the respondent has been pending for over 18 years since the last time the matter was prosecuted.

13. In view of the foregoing and what I have stated herein above the application dated 28th February 2014 seeking the notice of motion dated 12th November 1997 be dismissed for want of prosecution is dismissed. The respondent is herein given 30 days from today to set the application down for hearing in default the applicant is at liberty to set the notice of motion for hearing as this is an old matter. Costs shall be in the cause.

DATED at Meru this 25th day of June 2015.

J. A. MAKAU

JUDGE

25.6.2015

Delivered in open court in the presence of:

Mr. Ondari for applicant

Mr. Kioga for respondent

Court clerks- Penina/Mwanda

J.A. MAKAU

JUDGE

25.6.2015