



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 84 OF 2011

AWADH SALEH SAI

SAID SALEH SAID.....PLAINTIFFS

VERSUS

OMAR SALEH SAID.....DEFENDANT

RULING

1. In this matter, the defendant has by an application dated 6/8/2004 sought the courts discretions to dismiss the suit for want of prosecution.
2. The facts leading to the application are briefly that, the plaintiff having filed the suit on the 10/6/2011, the defendant by a application dated 28/10/2011 sought to have th suit struck out for disclosing no cause of action on the basis that there was no privity of contract between the plaintiffs and the defendant.
3. That application was heard by Judge Mwera as he then was, and a ruling was delivered on 25/4/2012 disallowed the application and ordering that the matter be prepared for hearing by parties amending the pleadings and exchanging the documents and witness statements. It is apparent from the ruling of Judge Mwera that the court considers that this was a family matter being litigated before the divisions of this court in that other than this suit there is a succession cause No. 145 of 1998 in which a grant was ordered to be issued to subject to accounts being rendered by a former administrator.
4. The defendant has placed premium on the ruling to say that the plaintiff has not moved an inch to comply with the directions by that court and that a period of 28 months had lapsed since without any steps being take by the plaintiff thus inviting the application of order 17 Rule 2 (i) which provides.

“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.”

5. I have perused the entire file and the judges ruling. It is indeed true that no step has been taken by either sides since the ruling was delivered. It is also true that the ruling by the court placed on both sides the obligation to prepare the matter for hearing.

6. Despite the fact that both sides had filed documents and witness statements, the judge ordered that parties file and exchange paginated documents and witness statements and issues for determination.
7. Before me, it was argued on behalf of the plaintiff that the accounts ordered to be rendered by the former administrator in the succession cause have not been rendered hence the succession matter cannot proceed. This fact was not and has not been controverted.
8. Whether or not to dismiss a suit is a matter of judicial discretion. That discretion should be aimed first and foremost to do justice to the parties. To achieve justice to the parties court should strive to sustain suit and give the parties every opportunity deserving to be heard.
9. The pleading herein reveal that this is indeed a family matter in that the plaintiff who claim to be entitled as beneficiaries of the states of Mohamed Swaleh Said and Hussein Swale Said claim from the defendant the sum of Kshs.15,179,100 allegedly collected and diverted by the defendant from the rental income from a property of the deceased person.
- 10.As framed it is not very explicit whether this suit is brought in the plaintiffs capacity as administrators or just as beneficiaries. It is also not clear what relationship exist between the parties. From their names however they would be family members. If indeed they are members of a family and therefore necessary parties to the family dispute in the family division then to dismiss this matter without a determination on merits will not have assisted the parties. To that extent the court shall have failed on its obligation of dispute resolution.
- 11.I have perused the record and established that the parties have never complied with the orders granted by Mwera J on the 25/4/2012 as far as the preparation of the suit for trial is concerned. That order is as it stands dictate that no date for hearing would have been set prior to compliance by both sides.
- 12.In my view, this matter ought to be heard and disposed off on the merits as directed by Mwera J. I will thus seek to further the order of 25/4/2012 and impose timelines as follows:
 - I. The Plaintiffs shall within 21 days from the date of this ruling compile and serve a bundle of paginated documents as well as witness statement.
 - ii. Upon service the defendant shall also file and serve a bundle of paginated documents and witness statements within 21 days from the date of service.
 - iii. Upon service by the defendant, parties shall settle the issues and file a statement of agreed issues within 30 days from the date of service by the defendant.
 - iv. Should the plaintiff fail to comply with order 1 above, this suit shall stand dismissed on the 22nd day after the date delivery of this ruling.
 - v. If however it is the defendant who shall fail to comply then it shall be deemed not to rely on any documents nor shall it be at liberty to call a witness at trial.
 - vi. If however the parties shall fail to serve and file agreed issues for determination the court shall at trial, frame the same.
- 13.The costs of this application shall be costs in the cause.

Dated, signed and delivered at Mombasa this 4th day of December 2015.

In the presence of:

Mr.Njenga for the Plaintiff/Respondent.

Mohamed for the Defendant/Applicant .

P.J.O.OTIENO

JUDGE