



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS APPLICATION NO. 795 OF 2011

IN THE MATTER OF : THE ESTATE OF JUMA OMAR ISMAIL (DECEASED)

MOHAMED HUSSEIN ABDULKADER APPLICANT

V E R S U S

AHMED JUMA OMAR ISMAIL RESPONDENT

RULING

1. ***Mohamed Hussein Abdulkader*** filed this Miscellaneous action seeking an order that Ahmed Juma Omar Ismael be cited for contempt of Court for disobeying the order of Kadhi in Succession Cause No. 105 of 2011, which order was made on 24th May 2011. This action was initiated by the application dated and filed on 16th August, 2011.
2. That application was placed before the Vacation Judge on 17th August 2011 who certified the matter as urgent and ordered that it be heard inter partes on 1st September, 2011.
3. On 1st September, 2011 the matter was not listed and the learned Counsel for the Applicant made no further attempts to fix it for hearing. Indeed the learned Counsel for the Applicant next step in this matter was to file Chamber Summons dated 3rd April 2012 where he sought to cease to act for the Applicant. The last action by the said Counsel was on 21st February, 2013 when his representative attended the Court registry to fix that Chamber Summons of 3rd April 2012 for hearing.
4. The Court is presently considering an application by the Respondent dated 2nd April, 2013 for the dismissal of this suit for want of prosecution.
5. That application was served upon the Applicant's learned Counsel but on the day of hearing, that is 17th February 2014 the Applicant did not attend nor were any documents filed in opposition to the application.
6. Order 17 Rule 2 of the Civil Procedure Rules provides:-

“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 cause 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.”

By making the application for dismissal of this suit the Respondent has essentially invoked Order 17 Rule 2(3) above.

7. One of the limbs of the overriding objective of the Civil Procedure Act Cap 21, in Section 1A is that Civil action should be disposed off expeditiously. Similarly under Article 159(1)(b) of the Constitution of Kenya it is provided-

“Justice shall not be delayed.”

8. There is no doubt that the Applicant has breached the overriding objective and has unnecessarily and without excuse delayed the conclusion of this case.

9. The Court in the case **AGIP (KENYA) LIMITED –VS- HIGHLANDS TYRES LTD (2001) KLR 630** set out the principles that should guide the Court in considering an application for dismissal for want of prosecution. Those principles are:-

“a) the delay is inordinate.

b) the inordinate delay is inexcusable; or

c) the defendant is likely to be prejudiced by the delay.

4. **Delay is a matter of fact to be decided on the circumstances of each case. Where a reason for the delay is offered, the Court should be lenient and allow the plaintiff an opportunity to have his case determined on merit. The Court must also consider whether the defendant has been prejudiced by the delay.”**

10. The Applicant without excuse has inordinately delayed the conclusion of this case. Accordingly this case is hereby dismissed for want of prosecution with costs being awarded to the Respondent.

DATED and DELIVERED at MOMBASA this 20TH day of MARCH, 2014.

MARY KASANGO

JUDGE