REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Suit 90 of 1987

JULIUS MUCHIRA NGUU …….…..…… PLAINTIFF

Versus

ELIZABETH MUTHONI & 2 OTHERS ……..… DEFENDANT

RULING

On 29th June 2001 this case was dismissed under Order XVI Rule 6 of the Civil procedure Rules. That dismissal was on court's own motion for want of prosecution. This ruling now relates to notice of motion dated 25th may 2006. That notice of motion seeks an order from this court to review and set aside the order of dismissal of 29th June 2001. The applicant in his affidavit in support outlined the action that had been taken in this matter. The matter was referred for arbitration on 17th March 1987. The applicant instructed his advocate to apply to set aside the award of that arbitration and the same was allowed on 4th November 1983. On 16th June 1995 this court allowed the applicant to amend the plaint. Thereafter he stated that he continually instructed his advocate to fix the suit for hearing. All this while the registry was informing his advocates that there were no dates for land matters. It is however pertinent to note that the letters annexed to the application for invitation to fix the case for hearing range from the year 2003 to 2005. The application was opposed. The defendant James Maina stated that no explanation had been given by the plaintiff for the period between 1993 and the year 2001. That the application was in any way brought after unreasonable delay that is 5 years after the suit was dismissed. That as a consequence of the 21 years delay in this suit parties had died. Further the respondent faulted the application for failing to attach a copy of the extracted order the subject of review. I have considered the argument brought before me and I find that I am in agreement that the plaintiff has failed to give satisfactory explanation for the delay in prosecuting this suit and in seeking its reinstatement. The plaint in this case was filed on 17th March 1987. Apart from the initial stage when the matter was referred to the tribunal and when the tribunal's award was set aside the plaintiff slept on his rights. The High Court in the case of IVITA vs KYUMBU had this to say on consideration of an application for dismissal of suit for want of prosecution:-

"***The test applied by the courts in an application for the dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time. It is a matter in the discretion of the court."***

It is clear that the defendant is likely to suffer prejudice if this case is reinstated since parties have died. The respondent was also correct in stating that the plaintiff should have annexed an extracted order to the application. That is clear from the case of **JIVANJI vs JIVANJI & ANO (1929-30)12 KLR 44.** In that case the Court of Appeal in East Africa held:-

"……***.. the question emerges as to the precise character of the grievance which must be experienced by a person applying for a review under Order XLIV. A person applying for a review under that order must be 'aggrieved by a decree or order.' The words 'decree' and 'order' are here used in the sense set out in the definitions in section 2 of the civil Procedure Act. Each decree***

necessarily follows the judgement upon which it is grounded and if a person is aggrieved at the decree his application should be for a review of the judgement upon which it is based. But ….. however aggrieved a person may be at the various expression contained in a judgment or even at various rulings embodied therein, unless the person is aggrieved at the formal decree or the formal order based upon judgment as a whole, that person cannot under order XLIV appear before the judge who passed the judgment and argue whether this or that passage in the judgment is tenable or untenable. The ratio decidendi expresses in a judgment cannot be called in question in review unless the resultant decree is a source of legitimate grievance to a party to a suit. In these proceedings no resultant decree on the 29th August, 1930, has yet come into existence. It is the duty of a party who wishes to appeal against, or apply for a review of a decree or order to move the court to draw up and issue the formal decree or order."

As can be clearly seen from that passage it was imperative for the applicant to extract the Order or Decree from which the review was sought. Having failed to do so makes the application for review to be fatally defective.

In the end the plaintiff application is found to have no merit and the same is dismissed with cost to **JAMES MAINA.**

DATED AND DELIVERED THIS 22ND DAY OF OCTOBER 2008

MARY KASANGO

JUDGE