



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 28 of 2002 (O.S)

IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY

AND

IN THE MATTER OF SECTION 17 OF THE MATRIMONIAL PROPERTY ACT, 1882

GRACE MWANIKI KABUTHIA..... APPLICANT

VERSUS

CHARLES KABUTHIA MWANU..... RESPONDENT

RULING

By notice of motion dated 31.07.06 and filed on 17.08.06 stated to be brought under Order XVI rule 5 (b) (sic) of the Civil Procedure Rules, the respondent applied for the following orders:-

1. That the respondent's/applicant's suit commenced by way of originating summons be and is hereby dismissed for want of prosecution.
2. That the costs of this application be provided/awarded to the applicant herein in any event.

The grounds upon which the notice of motion application is based are:-

- a) That the cause of action hereof is said to have occurred on or about July, 2001, a period of over five (5) years ago.
- b) That this suit was first and last in court on 28.11.02 when this court gave directions on the way forward.
- c) That since then the respondent/applicant has taken no steps in prosecution of her case whatsoever.

The application is supported by the affidavit of Kairu Timothy Waweru, Advocate for the applicant/respondent.

The applicant Charles Kabuthia Mwanu was represented at the hearing of the application on 14.12.06 by learned counsel, Mr. K.T. Waweru while there was no appearance for the respondent Grace Mwaniki Kabuthia. Applicant's counsel confirmed to the court that the respondent was duly served.

I have duly considered the application.

The court record shows that the notice of motion application dated 31.07.06 was filed on 17.08.06.

On 28.11.02 the matter went before Aluoch, J whereat counsel for the applicant Grace Mwaniki Kabuthia sought leave to file a further affidavit, and leave was duly granted. The Judge also gave directions that hearing of the originating summons was to be by way of submissions on affidavits; and that if need arose, the deponents of the affidavits might be cross-examined on the contents of the affidavits.

On 24.08.06 a Mr. Maina holding brief for M/s B. Mbai and Associates Advocates for respondent in the originating summons who is the applicant in the current notice of motion fixed the case for hearing on 16.11.06.

On 16.11.06 one Paul holding brief for M/s Mbai & Associates Advocates took an unspecified further hearing date for the originating summons.

The next entry in the series of fixtures is on 14.12.06 when the matter came up before me for the hearing of the present notice of motion application for dismissal of the suit for want of prosecution.

An affidavit of service by Moses Balusi, process server deposes that on 27.11.06 he served hearing notice for 14.12.06 upon Caroline Ogeng'o Advocates of Federation of Women Lawyers (FIDA), for the respondent herein. As indicated earlier, at the hearing of the application for dismissal of this suit for want of prosecution, the applicant Charles Kabuthia Mwanu was represented by learned counsel, Mr K.T. Waweru while there was no appearance for the respondent Grace Mwaniki Kabuthia.

The above chronology of events clearly shows that apart from filing the originating summons on 11.06.02 and applying and obtaining leave on 28.11.02 to file a further affidavit, the applicant Grace Mwaniki Kabuthia did not pursue her originating summons. On the contrary, it is the respondent to the originating summons, Charles Kabuthia Mwanu who has been urging that the suit be heard and determined, but his efforts never stirred the respondent/applicant Grace Mwaniki Kabuthia into action. In the circumstances, the conclusion is inescapable that the respondent/applicant Grace Mwaniki Kabuthia is not keen and/or interested in having this suit prosecuted and thus brought to an end'. The suit was filed on 11.06.02 and the last action taken by the initiator, Grace Mwaniki Kabuthia in this matter was on 28.11.02 when she applied through her counsel for leave, which she obtained, to file a further affidavit. Thereafter she seems to have gone into a long, deep slumber for nearly 5 years. Under Order XVI rule 5, if the type of inactivity involved in this case lasts 3 months, that is enough to warrant dismissal of the suit.

There must be an end to litigation and since the initiator of the litigation herein does not seem keen to bring it to an end, the court will bring it to an end instead. Accordingly, the suit herein commenced by way of originating summons dated 27.05.02 and filed on 11.06.02 is hereby dismissed for want of prosecution, with costs.

Orders accordingly.

Delivered at Nairobi this 28th day of March, 2007.

B.P. KUBO

JUDGE