

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Case 89 of 1993

JULIUS KIILU MBUVI1ST
PLAINTIFF

JOSEPH MUTUKU MBUVI 2ND
PLAINTIFF

VERSUS

R. K. SANGHANI 1ST
DEFENDANT

WAMBUA MUNYOTU 2ND
DEFENDANT

R U L I N G

The application before the court was dated 5.4.2005. It sought dismissal of this suit for want of prosecution. Under it the plaintiff filed preliminary objections on point of law dated 28.11.2005. Mr. Kakonzi for the plaintiff stated that the application for the dismissal of the suit abovementioned dated 5.4.2005, is incompetent because a similar application was filed and dismissed for non-attendance of the defendants and therefore for non-prosecution of the same. He further argued that the plaintiff cannot just proceed to file a fresh application for dismissal and proceed to prosecute it, as such would be res judicata and would also be against Order IXB rule 4(1) and rule 7(2) of the Civil Procedure Rules. Mr. Kakonzi argued also that the course that was available to the defendant was not to file a fresh application but seek reinstatement of the dismissed application.

But Mr. Nyakweba for the applicant/defendant did not share Mr. Kakonzi's views. He submitted that dismissal of the earlier application was not a bar to the filing of a fresh application without first seeking a reinstatement. This, he argued, was because the dismissal was not based on merit, but non-attendance of the defendant. He also argued that the new application for dismissal focuses on the period between the dismissal of the earlier application and the present date.

I have carefully perused the material before the court and considered the arguments presented by both sides. There is no dispute that the defendant filed an application for dismissal of this suit and that it was dismissed on 10.4.2003 for want of prosecution. It is true also that the defendant did not file any application for reinstatement. He instead filed a fresh application for dismissal. In the application's supporting affidavit, sworn on 5.10.2005 by one Kelvin Mogeni, the latter states in paragraph 7 as follows:-

“That even after the order for reconstruction of the court file was granted, the plaintiffs have never taken any action to have the case heard.”

In my understanding of this application, the above deponement casts light to the period the applicant is focussing and supports his argument before the court that the new application before the court is the period since reconstruction of the file was done which was 4.12.2003, several months after the earlier application was dismissed on 10.4.2003. The court will therefore focus on the period after the dismissal of the earlier application on 10.4.2003.

Having come to the conclusion I have above, the issues before the court would be whether the arguments raised by the parties still validly apply. That is to say:- were the applicant defendants right to file this new application for dismissal or should they have sought reinstatement? The record shows that after the dismissal of the application the court file disappeared. Whether the disappearance was man-caused or accidental is not important presently. What is important is that the file was not recovered and that by the motion of the applicant/defendant, another one was, by order of court, reconstructed with effect from 4.12.2003. This was about eight months after the original file disappeared and after the application for dismissal for want of prosecution was also dismissed.

It is this court's view therefore that the period envisaged in the application brought earlier by the defendant/applicant is different from the period envisaged under this application before me. In those circumstances the rules of res judicata do not apply to bar the applicant from arguing his application. For those reasons the Preliminary Objections raised by Mr. Kakonzi must fail. They are dismissed with costs to the applicants. The applicants are now at liberty to fix their application dated 5.4.2005 for a hearing. Orders accordingly.

Dated and delivered at Machakos this 3rd day of March 2006.

D. A. ONYANCHA

JUDGE