



REPUBLIC OF KENYA

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

Civil Suit 2911 of 1996

JOHN SAMUEL GACHUMA MBUGUA.....1ST PLAINTIFF/RESPONDENT

ZACHARIA MAINA..... 2ND
PLAINTIFF/RESPONDENT

VERSUS

MARY RUGURU NJOROGE DEFENDANT/APPLICANT

RULING

On 03.03.06 the defendant herein filed notice of motion dated 20.12.05 applying for the following orders:-

1. That this suit be dismissed for want of prosecution.
2. That the costs of this application be borne by the plaintiffs/respondents in any event.

The grounds upon which the application is based are essentially that the plaintiffs/respondents have failed to take any meaningful steps with a view to presenting the suit for more than 3 (three) years; that the defendant/applicant and her family members continue to suffer great prejudice owing to the pendency of this suit as her late husband's estate remains undistributed and held in abeyance thereby exposing it to great waste and loss; that the pendency of this suit amounts to harassment of the defendant in addition to being an abuse of the court process; and that it is just and expedient that the orders sought herein be granted.

The application is supported by the defendant's/applicant's affidavit sworn on 20.12.05.

When the case first came up for hearing before me on 31.05.06, the defendant/applicant was represented by learned counsel, Mr L.W. Kamau while the plaintiffs/defendants were represented by learned counsel, Miss J.W. Munene. For various reasons, hearing was concluded on 29.06.06 and, again, for various reasons Ruling could not be delivered until today.

Counsel for the parties advanced arguments and counter arguments in support of their respective clients' cases. In the course of those arguments, counsel for plaintiffs/respondents drew attention to a replying affidavit sworn on 02.05.06 by Rumba Kinuthia acting for the plaintiffs/respondents in this case. This affidavit is the plaintiffs'/respondents' substantive response to the present application for dismissal of the suit for want of prosecution. The following paragraphs deserve specific mention and are reproduced below:

'3, That due to an oversight and/or inadvertent mistake on the part of both the advocates on record the order dated 25th October 2002 made by Hon. Justice Khamoni was not duly noted. We have all therefore been trying to trace the file in the Civil Registry.

4. That indeed the advocates for the defendant/applicant attempted to have this matter set down for hearing but the same was impossible as the file could not be traced at the Central (Civil Registry) hereto attached and marked "RK 1" are copies of the defendant's invitations to have this matter fixed for hearing).

5. That due to the aforesaid misunderstanding it became impossible to proceed in any way or at all until the aforesaid file could be traced.

6. That due to inadvertent mistake stated above it became impossible for us to prosecute this matter as the said court file could not be traced which position was noted by the defendant's/applicant's advocates.

8. That this application is brought forth in bad faith as the defendant's advocates on record have all along had knowledge on the impasse derailing this matter due to the missing court file.

9. That the inadvertent error on our part as to where the court file could be traced should not be visited upon the plaintiffs justice in this instant claim as they have a good claim.

11. That it is my prayer that this instant suit should be allowed to proceed to full trial and therefore urge this court to dismiss the defendant's/application as it is brought in bad faith.'

The court record shows, *inter alia*, that when the case went before Rimita, J (as he then was) on 29.07.02, the learned Judge directed as under:

'This suit will be fixed for hearing within the next 3 months otherwise the same will stand dismissed with costs.'

Later the same year, on 25.10.02, the case went before Khamoni, J who directed as follows:

'Since H.C. Civil Case No. 2911/96 has been filed in accordance with the provisions of Rule 41 (3) and (4) of the Probate and Administration Rules as read with Order XXX VI of the Civil Procedure Rules, it is not necessary and may not be proper for this civil suit to be consolidated with Succession Cause No.1213/94 which has caused the Civil Suit to be filed. I do therefore direct that the two cases be heard separately and that they may both be conveniently heard in the Family Division in accordance with Judge Kuloba's directions dated 22.10.02, the Succession Cause being stayed to await final Judgment/Ruling/Order in the Civil Suit so that final Judgment/Ruling/Order may be used in the Succession Cause in accordance with Rule 41 of the Probate and Administration Rules. The parties may take a date for the hearing of H.C. Civil Case No.2911/96 at the Family Division Registry.'

The court record shows that no steps were taken after Khamoni, J's above directions of 25.10.02 until the notice of motion dated 20.12.05 was filed by the applicant herein on 03.03.06 seeking dismissal of the suit when the plaintiffs/respondents appear to have been jolted into activity and they responded vide their Advocate Rumba Kinuthia's replying affidavit sworn on 02.05.06 and filed on 09.05.06 as noted above. The overall purpose of the response vide Rumba Kinuthia's aforesaid affidavit is to show that the plaintiffs/respondents did not prosecute the suit because the court file went missing. The essence of the rejoinder by the defendant's/applicant's counsel is that if absence of the court file was indeed the plaintiffs'/respondents' genuine dilemma, the plaintiffs/respondents should have addressed correspondence to the Deputy Registrar complaining about such file's absence, yet there is not a single letter of such complaint. This criticism by defendant/applicant of the plaintiffs'/respondents' conduct was not answered by the latter, at all or satisfactorily.

Khamoni, J's directions of 25.10.02 are clear that High Court Succession Cause No.1213 of 1994 was stayed to await final judgment/ruling/order in this civil suit, which judgment/ruling/order may be used in the succession cause in accordance with rule 41 of the Probate and Administration Rules. The learned Judge directed on 25.10.02 that the parties may take a date at the Family Division Registry for the hearing of this case, i.e. High Court Civil Suit No.2911 of 1996. No steps were taken to set this suit down for hearing for over 3 (three) years, and on 03.03.06 the defendant/applicant filed the present application for dismissal of the suit for want of prosecution.

Order XVI rule 5 provides, *inter alia*, as follows:

'5. If, within three months after –

(d) the adjournment of the suit generally,

the plaintiff, or the court of its own motion on notice to the parties, does not set down the suit for hearing, the defendant may either set the suit down for hearing or apply for its dismissal.'

The defendant herein has taken the option of applying for dismissal of the suit after the plaintiffs failed to set it down for hearing, not after expiry of 3 (three) months since it was last adjourned generally on 25.10.02 but after 3 (three) years of inactivity on the part of the plaintiffs.

I find the reason given by the plaintiffs that they did not prosecute their suit because the court file was missing a lame excuse. If they were serious about pursuing the case, they would have complained to the court about the file said to have gone missing and sought orders for its reconstruction. They did nothing of the sort. The laxity and long delay are inexcusable. It was the plaintiffs' responsibility to pressurise their counsel to pursue the case vigorously. There is no evidence that they did so and they must face the natural consequences of their neglect and/or that of their counsel.

The application succeeds and the suit herein is hereby dismissed for want of prosecution. The plaintiffs/respondents shall meet the defendant's/applicant's costs of the present application as prayed by her.

Orders accordingly.

Delivered at Nairobi this 25th day of September, 2006.

B.P. KUBO

JUDGE