



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO.4246 OF 1989

KAMAU KUIRA..... PLAINTIFF

VERSUS

MARY NJERI GITAU..... 1ST DEFENDANT

GRACE WANJIKU GITAU..... 2ND DEFENDANT

RULING

By Chamber summons of 29.07.04 filed on 20.08.04 under Order XVI rule 5 (c) and (d), Order XXIII rule 3 (1) and (2) and rule 12 of the Civil Procedure Rules, the 1st defendant applied for the following orders:-

1. That the plaintiff's suit against her be dismissed for want of prosecution.
2. That, in the alternative, the plaintiff's suit be dismissed for having abated.
3. That the costs of this application be awarded to the applicant in any event.

The application is based on the following grounds:-

- a) That the suit was last in court on 20.07.99 when it was stood over generally and that for over five years no steps have been taken to prosecute the same.
- b) That the plaintiff died sometime on or about 21.06.01 and that it is over three years since the plaintiff died and no application for substitution by the administrator of the deceased plaintiff's estate has been filed within the period of one year from date of death.
- c) That the foregoing clearly demonstrates complete lack of interest in this matter, hence this application to bring this long outstanding suit to an end.

The 1st defendant's application is supported by her affidavit sworn on 13.08.04.

On 09.11.04 Richard M. Mutiso, an advocate practicing as such in the name and style of R. Mutiso & Co. advocates, swore a replying affidavit to the 1st defendant's above application. He deponed that the plaintiff's suit was part-heard before Omolo, J (as he then was) and that after his elevation to the Court of Appeal, he indicated his willingness to proceed with hearing of this matter to its finalization. That the matter came up for mention before other Judges on various occasions with the hope of having it fixed before Justice Omolo for finalisation and that Justice Omolo later indicated it was not possible for him to proceed with hearing of the matter, taking into consideration his new responsibilities and that the matter

has not been heard to date. That “in the midst of this confusion” the plaintiff passed away on or about 21.06.01. That after the plaintiff’s death the family fell into dispute as to how succession of his estate should be conducted and that the dispute has not been resolved, hence non-prosecution of this matter. Mr. Mutiso adds in his affidavit that the beneficiaries have indicated their interest in prosecuting the matter and that all stakeholders should be granted by the court chance to prosecute the matter. The 1st defendant’s affidavit of 13.08.04 states, inter alia, that the suit was last in court on 20.07.99 when it was stood over generally and no steps have been taken since to prosecute the same for over five years. In the same affidavit, the 1st defendant acknowledges that the plaintiff died on or about 21.06.01 and that no step has been taken for over three years to substitute anybody to take the plaintiff’s place in this suit and to prosecute the same.

At the hearing of the application on 09.03.05 the defendants/applicants were represented by learned counsel Mr. K.M. Kibuthu while the plaintiff/respondent was represented by learned counsel, Mr. R.M. Mutiso.

Order XVI rule 5 © (d) of the Civil Procedure Rules provides as under:

“5. If, within three months after –

(c) the removal of the suit from the hearing list; or

(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’s substantive prayer is for the plaintiff’s suit to be dismissed under rule 5 (c) and (d) above. On the evidence before this court, the defendants are entitled to be granted their above substantive prayer.

He defendants/applicants also rely on the alternative prayer that after the plaintiff’s death in June, 2001, if anybody wished to pursue the suit initiated by the plaintiff, such person should have taken steps to be substituted in the place of the plaintiff within one year, that this was not done; and that the plaintiff’s suit has consequently abated. The defendants/applicants relied on Order XXIII rule 3 of the Civil Procedure Rules. The rejoinder to the issue of abatement raised by the defendants/applicants seems to come from Mr. Mutiso’s replying affidavit of 09.11.04 and I understand it to be that members of the deceased plaintiff’s family were not able to resolve their dispute regarding succession to the deceased plaintiff’s estate and to arrange for substitution of the plaintiff in this suit within the period of one year prescribed by Order XXIII rule 3 (2). In the latter regard, attention is drawn to Order XXIII rule 3 (2). In the latter regard, attention is drawn to Order XXIII rule 5 which is to the effect that if the issue of who should be the legal representative of a plaintiff arises, such issue shall be determined by the court. For the court to do that, an application has to be made to it in this regard. There is no evidence before this court that such an application was filed. I am, therefore, of the humble view that the defendants/applicants are entitled to have the suit against them also dismissed on the ground that it has abated.

The upshot is that whichever way one looks at the plaintiff’s suit, it has to be dismissed on either of the two grounds advanced by the defendants/applicants, each of which ultimately amounts to non-prosecution of the suit.

The plaintiff’s suit against the defendants is hereby dismissed for want of prosecution. Since there appears to be no legal representative of the plaintiff I make no order as to costs.

Orders accordingly.

Delivered at Nairobi this 20th day of May, 2005.

B.P. KUBO

JUDGE