



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 2338 OF 1988

OIBOO OLE KUDATE & ANOTHER PLAINTIFFS

VERSUS

NGETHE KARUGA DEFENDANT

R U L I N G

The application dated 26th March, 2001 and filed in court on the same day seeks the following orders; namely:-

- (ii) The applicant (1st plaintiff) be granted leave to file a notice of change of advocates and the notice attached herein be deemed to be properly filed.
- (iii) There be a temporary stay of the orders of dismissal granted by this honourable court on 14th April, 2000 pending the hearing and determination of this application.
- (iv) The honourable court be pleased to set aside dismissal orders issued on 14th April, 2000.
- (v) The honourable court be pleased to review the dismissal orders made and refer this matter to the Land Disputes Tribunal Kajiado for arbitration and determination.

The application was based upon the grounds stipulated on the body thereof namely:-

- (i) The applicant was unaware of the hearing of the application for dismissal.
- (ii) The applicant was not given an opportunity to be heard.
- (iii) The respondent/defendant failed to make full disclosure that the 2nd plaintiff had died on 15th day of April, 1999.
- (iv) The applicant has a good case.
- (v) The subject matter in issue is substantial and the applicant stands to lose irreparably.
- (vi) The immediate jurisdiction of this dispute lies within the Land Dispute Tribunal.

There was also a supporting affidavit to the application deposed to by the first plaintiff. In it, the deponent stated that neither he nor his co-plaintiff was ever served with the application dated 17th December, 1999, that the last time he attended court was sometime in 1998 when his former advocate told him that another date would be taken, that he had gone to check on his said advocate but found he had moved out of his former offices and that since then he had received no further communication from his said former advocates and so forth.

A replying affidavit filed herein on 15th May, 2001 and deponed to by the respondent opposed the application and specifically referred to this court's orders of 22.9.97 when this court gave the applicants 30 days from that date to take steps to prosecute the case but that the said applicant took no such steps hence the application for dismissal which was granted on 3rd April, 2000.

Counsel for both parties appeared in court on 16th July, 2001 to either present or oppose this application. Both repeated what was contained either in the supporting or replying affidavits. Counsel for the applicant pleaded that his client should not be left to suffer due to omission of his previous counsel.

Counsel for the respondent said that he applied for dismissal of the suit for the second time when the plaintiff's failed to utilize the 30 days period from 22.9.97 to take steps to prosecute the case.

The suit subject to this application was filed in court on 16th June, 1988 and a defence thereto filed on 5th August, 1988.

Thereafter an application was filed in court on 24.7.89 seeking to strike out the case but the same was dismissed on 29.9.89.

There was even an attempt to have this matter referred to arbitration but this attempt was too dismissed by the court on 9th November, 1990.

It would appear thereafter, no step was taken thereafter to prosecute this case and on 26th June, 1996 counsel for the defendant applied to this court that the same be dismissed for want of prosecution.

The application was placed before this court on 22nd October, 1997 for hearing when the applicant was given 30 days to take steps to prosecute the case.

Apparently one attempt was made to fix the case for hearing on 7th July, 1998 but there is no order on the file to show what happened on that date.

Then from 7th July, 1998 no action was taken until 17th December, 1999 when Counsel for the defendant made the second application for dismissal of the suit for want of prosecution.

It was heard by Honourable Justice Rawal, then Commissioner of Assize.

From the record of the proceedings on 16th March, 2000, counsel for the applicant herein had been served for the hearing of that application but he did not show up; hence the present application.

Counsel for the applicant came to this court on 16th March, 2000 for an order in terms of prayer (ii) on ex parte basis which he got. But that order – going by the prayer, only gave him leave to file notice of change of advocate.

Apparently this is in conformity with Order III rule 9A of the Civil Procedure Rules.

But this is not what the rules says. There is no provision for leave of the court to be sought for filing notice of change of advocates. This is what this rule says.

“When there is a change of advocate or when a party decides to act in person having previously engaged an advocate, after judgement and decree have been passed, such change or intention to act in person shall not be effected without an order of the court upon an application with notice to the advocate on record.”

The short form of it is that after judgement and decree have been passed, no new advocate can come on record or the party decides to act in person without leave of the court.

This provision is incomplete contrast with what the applicant did apply for ex parte before the Judge

and if it is on that basis counsel for the applicant is before this court, then I am not sure I understand him at all.

Apart from that, there are prayers V and ground VIII to be considered.

In prayer V the applicant wants this dispute to be referred to the Tribunal at Kajiado while in VIII he disputes the jurisdiction of this court.

Ground VIII is self defeating because if the applicant knew that the jurisdiction of this dispute lies with Kajiado District. What he would have done would simply have been to withdraw the suit from the court and proceed to institute the same through proper machinery set by Section 3(2) of the Land Disputes Tribunal Act. And with that process properly set there is no provision under the Land Disputes Tribunal Act for the court referring such Disputes to the Tribunal.

The court only make references under Order XLV of the Civil Procedure Rules in all cases pending before it.

I also do not understand prayer III of the application because where there is an order of dismissal on the court file that is it. No proceedings have been instituted in respect thereof to require the court's intervention by way of stay.

As for setting aside the dismissal order, the applicant was given a chance to prosecute his case on 22.9.97 but did not take it.

And on the second application for dismissal, counsel for the applicant was served with it to appear for hearing on 26th December, 1999 but he did not turn up when the second order of dismissal was made.

Counsel for the applicant then has not sworn an affidavit to explain why he did not turn up to oppose the application for dismissal. But he was the applicant's agent with full instructions and authority to appear on 16th March, 2000 to oppose that application and show why the court should have exercised its discretion in his favour. He did not turn up and the applicants' argument that he was never served with the application dated 17th December, 1999 does not deserve any serious consideration.

When a client entrusts legal counsel with authority to render services and the latter deliberately fails to render them then the remedy of the client is to go to that counsel for a remedy and not trot to another counsel to come to this court to bog it with an otherwise useless application as the present.

Long standing litigations like the present one must come to an end and particularly when no good reason is shown for them to remain on such record.

I dismiss this application with no order for costs since the applicant ha suffered dismissal of his case.

Delivered this 25th day of July, 2001.

D.K.S AGANYANYA

JUDGE