



REPUBLIC OF KENYA
HIGH COURT OF KENYA AT MOMBASA
CIVIL SUIT NO. 473 OF 1998

MBARUK KHAMIS MOHAMED

ZIREDI MBARUK MOHAMED.....PLAINTIFFS

-versus-

AMIR KHAN SARDAR KHAN & 13 OTHERS.....DEFENDANTS

RULING

1. The application for the court's consideration is the Notice of Motion dated 22nd May 2014 filed by the firm of C.B Gor & Gor for the 1st and 2nd Defendants. The application seeks an order that this suit be dismissed for want of prosecution.
2. This case was filed in 1998 against the 1st and 2nd Defendants. However, the Plaintiffs amended the original Plaintiff on 7th September 2000 to bring in the 3rd Defendant into the proceedings. The Plaintiffs further amended the Plaintiff on 29th January 2001 to introduce 11 more Defendants to the suit, bringing the total number of Defendants to 14. The Plaintiffs and the 10th and 11th Defendants filed issues for the court's determination on 25th October 2002.
3. The 10th and 11th Defendants filed an application dated 7th October 2003 seeking the dismissal of the suit as against them for want of prosecution. They, however, withdrew the said application on 20th November 2003. That was the last time the Plaintiffs took active action in this matter. On 12th February 2010, the firm of Khatib & Company Advocates ceased to act for the Plaintiffs after their application dated 14th December 2009 for leave to cease acting was allowed. The Plaintiffs are presently represented by the firm of Paul O. Buti Advocates.
4. By a Notice of Motion application dated 1st September 2011, the 3rd and 7th Defendants sought dismissal of this suit as against them for want of prosecution. That application was allowed by this court vide its ruling delivered on 6th September 2013 in which the court rendered itself as follows:

“The Plaintiff is always under obligation to ensure that a case is prosecuted without delay. This was stated in the case of Mukisa Biscuit Co. vs West End Distributors [1969] E.A. 696. The Court in that case also stated:

“The 2nd matter relates to the undoubted delay in the hearing by the High Court of this case. It is the duty of the Plaintiff to bring his suit to early trial, and he cannot absolve himself of this primary duty by saying that the Defendant consented to the position.”

As stated above the Plaintiffs having delayed in the prosecution of this suit that delay as deponed in the Defendants' affidavit is causing the 3rd and 7th Defendants prejudice. The court in the case (of) Agip (Kenya) Ltd -vs- Highland Tyres Ltd [2001] KLR 630 set out the principles that should guide the Court when considering an application for dismissal for want of prosecution. The principles are as follows:

“ (a) The delay is inordinate;

(b) The inordinate delay is inexcusable; or

(c) The Defendant is likely to be prejudiced by the delay.

4. Delay is a matter of fact to be decided on the circumstances of each case”

Although the Plaintiffs' counsel was served with the present application he did not attend Court on the date set for hearing. The Plaintiffs did not also file any affidavits or any other documents in opposition to the application. It is therefore my finding that the Plaintiffs have lost interest in this very old case and it is just that it be dismissed.

The Plaintiffs' suit against the 3rd and 7th Defendants is hereby dismissed for want of prosecution...”

5. The 3rd and 7th Defendants subsequently filed a Notice of Motion application dated 16th September 2013 in which they sought the review of the order of 6th September 2013 so that the suit could be dismissed as against all the Defendants and not just the 3rd and 7th Defendants only. The court, through its ruling of 20th March 2014, declined to review its order on the basis that it was only the parties who had sought dismissal of the suit (3rd and 7th Defendants) who were aggrieved by the non-prosecution of the case and that an order for dismissal of the suit could not be granted against a Defendant who had not sought such dismissal. I think it is against that backdrop that the 1st and 2nd Defendants have now filed the present application so that the suit may be dismissed as against them.
6. I wish to adopt the above-quoted holding of this court in its ruling of 6th September 2013 and apply the same to the instant application. The circumstances obtaining as at the date of that ruling regarding this case have not changed. If anything, the delay by the Plaintiff has become even more inordinate and inexcusable. It is clear that the Plaintiffs are still not interested in prosecuting this case. The Plaintiffs' advocates did not respond to the application despite being served. They also did not come to court on the date the application was fixed for hearing.

Conclusion

7. The application is therefore allowed and the suit as against the 1st and 2nd Defendants is hereby dismissed with costs.
8. The 1st and 2nd Defendants are awarded costs of the Notice of Motion dated 22nd May 2014.

Dated and delivered at Mombasa this 9th day of July 2015.

MARY KASANGO

JUDGE

9.7.2015

Coram

Before Justice Kasango

C/Assistant – Kavuku

For Plaintiffs:

For 1st and 2nd Defendants:

Court

Ruling delivered in their presence/absence in open court.

MARY KASANGO

JUDGE