

REPUBLIC OF KENYA

High Court at Nakuru

Civil Appeal 34 of 2008

JUMA MUCHEMI APPELLANT

VERSUS

MARGARET WAIRIMU GITUKIA RESPONDENT

JUDGMENT

This is an appeal by the appellant (defendant in the lower court), Juma Muchemi, challenging the ruling dated 5/03/2008 by the learned Resident Magistrate in the Nakuru Chief Magistrate Court; Civil Case No. 691 of 2000. The appellant had filed an application dated 3/12/2007, seeking the dismissal of the suit for want of prosecution. The application was opposed. The trial magistrate, Mr. Atiang dismissed the application on 5/3/2008, for reasons that there had been ongoing negotiations.

The memorandum of appeal was filed on 1/04/2008. The grounds of appeal are that the magistrate erred in fact and law in holding that negotiations were going on in the absence of conclusive evidence; the court disregarded the fact that there was no correspondence from the appellant offering to negotiate; the matter had not been prosecuted since 3/12/2003 and that it had been more than 16 years since the occurrence of the accident which forms the subject matter and the long inaction would make it impossible for the appellant to get a fair trial. It is the appellant's contention that the respondent has no valid reason for the long inaction and that the appellant's rights have been prejudiced. He therefore prays that the appeal be allowed and the suit, Civil Case no. 691 of 2001, be dismissed for want of prosecution and costs for both the appeal and lower court.

Mr. Mahida, counsel for the appellant submitted that the matter was last in court on 3/12/2003, when it was stood over generally. At the time of the adjournment, the appellant had filed an application dated 24/7/2000 at the High Court which he later withdrew when the case was transferred to the lower court. He urged that there are no valid reasons for the long inaction on the part of the respondent and therefore it is in the interest of justice that litigation must come to an end

This matter came up for directions on 11/7/2011 before Emukule J. He ordered counsel to fix the matter for hearing at the court registry. Mr. Nyaribo, counsel for the respondent, was present in court when the directions were taken. On 31/1/2012, the appellant invited the respondent's representative for fixing a hearing date but they never turned up and therefore the appellant took a date *ex parte*. Despite being served with a hearing notice, the respondent's counsel did not attend the hearing of this appeal nor did he file a reply to the appeal.

In the end, do agree with the appellant's counsel that the respondent has not been keen to prosecute this matter since 2003. In holding that the negotiations were ongoing, the learned magistrate relied on the evidence of the letters drawn by counsel for the respondent. I however find this not to be conclusive for two reasons. Firstly, the evidence was comprised of letters drawn by one party to another, there is no evidence of reply to those letters and therefore inconclusive whether negotiations were ongoing. I would have expected a series of letters from both parties with an element of progress in the negotiations. Secondly, the duration between the correspondences is very long and does not show a desire to conclude the negotiations. The first letter is dated 5/12/2005 by the respondent which referred the appellant's counsel to their last communication dated 25.5.2000. It is then followed up by two other letters dated 6/6/2006 and 9/2/2007. This shows that the respondent's counsel did the bare minimum in dealing with the matter, clear sign that the respondent has been indolent in prosecuting this case. This court also takes

into account the fact that the respondent has not even taken interest to defend this appeal.

For these reasons, I would allow the appeal, I order that Nakuru Chief Magistrate's Court Civil Case No. 691 of 2001 is hereby dismissed for want of prosecution. I award costs of the appeal and the lower court to the appellant.

DATED and DELIVERED this 6th day of October, 2012.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Nyambane for the appellant

Mr. Lawrence Mwangi for the respondent

Kennedy – Court Clerk