



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

Civil Suit 18 of 2005

GRAHAM FRANCIS HAMILTON VETCH. PLAINTIFF

VERSUS

GORDON MICHAEL HEWITT SKINNER

STEWART DONALD GRENVILLE VETCH DEFENDANTS

KAPLAN & STRATTON, ADVOCATES (A FIRM)

R U L I N G

The application before the court is the Chamber Summons dated 12th September, 2006. It seeks for the dismissal for want of prosecution this suit which was filed on 31st October, 2005 by the originating Summons dated the same date. It was filed by the Defendant.

Thereafter another Chamber Summons dated 9th January, 2007 was filed on 11th January, 2007 by the Plaintiff herein. The application sought that this Honourable court do direct that the Originating Summons dated 31st October, 2005 do proceed to hearing by way of affidavit evidence. The applicant therein who is also the Plaintiff sought that the court do authorize the Defendant to file a replying affidavit and the Plaintiff do file a supplementary affidavit respectively, if need arose.

The record shows that both parties were on 24th February, 2009 granted leave to file and serve written submission for and against either of the above applications, as the case may be. There was also an agreement that the two applications be argued on the same date on the basis that they had been consolidated.

I have carefully perused the material in support of and in opposition to each of the two applications. In my view, however, the two applications', while they can be argued on the same day, cannot be successfully consolidated. This is because one seeks termination of the main suit, the Originating Summons for want of prosecution, while the other seeks the continuation of the proceedings of the same through the court giving directions as to how a hearing should be proceeded with.

On the other hand, if the applications seeking dismissal is granted, the other for continuation of the hearing of the suit will be superfluous as the suit would have been extinguished.

In the above circumstances, the court will first hear the application which was earlier filed i.e. the Chamber Summons dated 12th September, 2006 and filed by the Defendant seeking dismissal of the main

suit for want of prosecution.

It was the 3rd Defendant's case that the suit was filed on 31st October, 2005. That by then the 1st and 2nd Defendants who were joint Executors had instructed and authorized the 3rd Defendant to sell a property at Kilifi. The property had been bequeathed to the plaintiff who despite agreeing to have the property sold, had not signed the sale agreement. Later the property was transferred to a Purchaser with the concurrence of the Plaintiff on condition.

The 3rd defendant's case was that no positive action had been taken by the Plaintiff on the main suit since 17th November, 2005 when the Defendants served a memorandum of appearance upon the Plaintiff, a period of 9 months. The Defendants thus argued that in not taking any necessary steps to prosecute the suit, the Plaintiff's conduct was prejudicing the Defendants and should cause the suit to be dismissed, more so because the conduct confirmed that the plaintiff was not interested in or keen to prosecute the suit.

The Plaintiff/Respondent made a reply. He said that the facts revealed by the Defendant/Applicant do not tell the whole story. He said that what made him file the suit was a sum of ₱20,000.00 demanded by the 1st and 2nd Defendants from the Plaintiff as a sum owing to the estate of the deceased. The Plaintiff had all along denied the claim and that on that basis had filed this suit to prove that the property at Kilifi belonged to him entirely and that he owed nothing to the estate. The Plaintiff also stated that it was only when he filed the suit that the 1st and 2nd Defendants as executors, dropped the claim of the ₱20,000.00 thereby enabling him to sign the transfer of the Kilifi property to a purchaser.

The Plaintiff further stated that it was the 1st and 2nd Defendants – the executors who instructed the 3rd Defendant to sell the property at an agreed purchase price of Kshs.8,500,000/-. Furthermore, that the 3rd Defendant, a firm of advocates, was acting for both the sellers and purchaser. The Plaintiff accordingly had feared that if the 3rd Defendant received the purchase price, it might exact the ₱20,000.00 from the purchase price without his consent. Hence to seek protection on this issue, Plaintiff argued, he had filed this suit to seek a declaration that he owed the estate nothing and that the Defendants had obligation to turn in to the Plaintiff the whole purchase price sum.

It is Plaintiff's further evidence that it was after the suit was filed that the 1st and 2nd Defendant dropped the claim for ₱20000/- aforementioned. At the time he argued further, costs of the suit had obviously been incurred. The Plaintiff in the circumstances believed that while he could compromise the main suit, which he did, he was nevertheless entitled to costs for which he wanted hearing directions in the 2nd application referred to above. Plaintiff pointed to some correspondences between the two counsels for the two parties, and stated that he never had lost interest in the suit.

I have carefully considered the submissions from both counsel. It is not denied that 1st and 2nd Defendants dropped their claim as executors for ₱20,000.00 only when the suit had been filed by the Plaintiff. Nor is it denied, which alternatively is my finding, that they caused the case to be filed in so far as they did not drop their claim before the suit was filed. While thereafter they withdrew the said claim, they did so without obtaining from the Plaintiff an agreement not to seek costs of the suit.

In so far as delay is concerned, it is the view of the court that a delay of 9 months on the party of the Plaintiff was not so inordinate as to deny the Plaintiff a legal right to claim costs in the suit. While this court at this stage cannot decide on whether or not the Plaintiff is entitled per se to costs of the suit, it is not prepared to deny him opportunity to prove the said right, if any.

In addition, the Defendants had themselves under the applicable legal principle, an obligation to fix the main suit for directions or hearing if they felt the Plaintiff was not dragging his feet. They did not do so. To deny a party his right to present his case as fully as he would wish, is a right which can only be taken away on the clearest of circumstances leading the court to conclude that such party has lost interest in the case and that the delay is shown to be inordinate. This is not in my view, one of such cases.

In the circumstances of this case accordingly I will exercise the court's wide discretion in favour of the Plaintiff. I find no merit in the application dated 12th September, 2006 which I hereby dismiss with costs to the Plaintiff/Respondent.

In view of this result, the application dated 9th January, 2007 to take directions is hereby salvaged. The Plaintiff should immediately fix the same at the registry. Orders accordingly.

Dated and delivered at Nairobi this 9th day of July, 2009.

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D A ONYANCHA

JUDGE