
REPUBLIC OF KENYA
IN THE SENIOR RESIDENT KADHI'S COURT AT MOYALE
SUCCESSION CASE NO. 37 OF 2019

ADAN GUYO SODE
.....PETITIONER/RESPONDENT.
-VERSUS-
SHAME GUYO SODE.....
RESPONDENT/APPLICANT.

RULING

1 The applicant/respondent's Notice of motion application dated 12th Aug 2020 and filed on 14th Aug 2020 under sections 3 and 3A of civil procedure Act order 51 rule 15 civil procedure rules 2010. it sought the following orders: -

a) **That** this honorable court be pleased to set aside its ruling and subsequent orders granted on 30th Day of October 2019 and reinstate the respondent/applicant's preliminary objection.

b) **That** the cost of this application be provided for.

2. The application is supported by grounds set out hereunder and annexed affidavit of John Behailu Aila.

a) **That** the Respondent/Applicant herein filed his preliminary objection on 3rd September 2019.

b) **That** no ground of opposition was filed by the petitioner in opposition to the preliminary objection.

c) **That** notice to show cause was never issued by court for

the application herein to provide reasons as to why the preliminary objection should not be dismissed.

d) **That** the preliminary objection raises fundamental point of law which if not substantially executed might render the entire proceeding null and void.

e) **That** the Respondent/Applicant is desirous of having the matter executed to its substantial conclusion in accordance with the principles of substantial justice.

f) **That** it is in the interest of justice to have this matter heard to its logical conclusion.

3. On 4th September the petitioner/respondent filed replying affidavit stated that; -

a) **That** the Application as can be deduced has not only filed belatedly but also meant to forestall the expeditious disposal of the matter.

b) **That** the failure to file grounds of opposition to the preliminary objection is immaterial, the preliminary objection has no basis being opposed in the manner the Respondent/Applicant has proposed filing of grounds of opposition.

c) **That** the Applicant cannot sit and be indolent in taking action and belatedly recommence the application to set

aside a sound ruling of this court.

d) **That** the applicant has not demonstrated what error this court made in dismissing the applicant's preliminary objection by an indolent party.

e) **That** there was fairness in the court adjudicating on the matter and it exercised discretion reasonably, in accordance with the attendant facts and circumstances.

f) **That** the application is incurably defective and fatally drawn to invite the court to make any determination in the applicant's favors is frivolous, vexatious and an abuse of court process it should be dismissed.

4. The respondent filed an application dated 12/8/2020 seeking reinstatement of a dismissed preliminary objection, the same is supported by affidavit sworn by the respondent/applicant on the same day.

5. The petitioner/respondent opposed the application by way of a replying affidavit, the petitioner commenced this suit by filing a petition on 1/08/2019.

6. The respondent replied on 28/8/2019 and subsequently filed a preliminary objection on the same matter on 3/09/2019 challenging the jurisdiction of the court to hear and determined the matter.

7. On 9/10/2019 matter was fixed for mention, but

respondent requested for more time to hear preliminary objection by way of written submissions which both parties agreed on, the court on request of the respondent directed the respondent to file his written submission within 14 days.

8. The respondent/applicant derailed the matter without filing the submission until on 17/02/2020, when petitioner persuaded the court to dismiss the preliminary objection by the respondent for lack of prosecution.

9. The preliminary objection was dismissed on 17/02/2020 on ground of lack prosecution and hearing date on main suit was given.

10. The court scaled down due to the outbreak of **COVID-19** pandemic until 28th day of May 2020 when the matter further pushed to be mentioned on 27/07/2020.

11. All parties were in court on this date mentioned above and respondent advocate requested to be given an opportunity to file review application on the dismissed preliminary objection which was granted with strict time frame of one week to file and serve.

12. The court attention is drawn to sections 1A,1B,3 and 3A of civil procedure act where the court ought to dispose of suits expeditiously, proportionately and in the interest of

justice to all parties.

13. The applicant/ respondent's assertion that it's not over a year since the objection was filed to warrant dismissal is irrelevant, the court agrees with petitioner/respondent's advocate that the quest for justice is not a panacea(remedy) of delays.

14. The court was also persuaded by the case of Maina karanja (2014) e KLR, and particularly paragraph 4 thereof justice onguto while dismissing this case for want of prosecution stated that, it is all about the court's discretion which is exercised on the basis that it is in public interest that once action is commenced in court ought to be brought to trial and concluded as soon as possible. he further went to state in paragraph 9 of his ruling in this case that, the power to dismiss suits and for that matter the counterclaims are derived from inherent powers of court. unless the defendant shows that it had attempted to prosecute the counterclaim for example by preparing documents for trail.

15. Notably the applicant/respondent after court directed him to file the written submission of his preliminary objection has not shown any such attempt, there has been

inordinate delay by the respondent/applicant in his case.

16. The court should only dismiss a matter where all the three (3) ingredients to wit, inordinate, inexcusable delay and prejudice to an opposing party exist, therefore I find in the dismissal of preliminary objection on 17/02/2020 all the ingredients were present and the applicant had not been diligent in disposing off his application.

17. The applicant/respondent by requesting reinstatement of the preliminary objection have not explained in his supporting affidavit of the application lackadaisical behavior of failure to prosecute his application, nor convincing the court to exercise its discretion in his favor.

18. In the instant case I hold the view that it would be an erroneous exercise of discretion if the application for reinstatement of preliminary objection is not dismissed, therefore notice of motion dated **12th Aug 2020** and filed on **14th Aug 2020** not merited and is hereby dismissed, consequently the main suit marked for mention 2/11/2020.

Dated and delivered at MOYALE this 21st day of October 2020

HON. A. D WAKO

SENIOR RESIDENT KADHI
MOYALE LAW COURTS