Kiarie (Suing as Legal Representative/Administrator of the Estate of the Late Paul Wanyoike Kiarie - Deceased) v James (Civil Appeal 343 of 2018) [2023] KEHC 1200 (KLR) (Civ) (24 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1200 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 343 OF 2018

JK SERGON, J

FEBRUARY 24, 2023

BETWEEN

JAMES MBUTHIA KIARIE ..... APPELLANT

SUING AS LEGAL REPRESENTATIVE/ADMINISTRATOR OF THE ESTATE OF THE LATE PAUL WANYOIKE KIARIE - DECEASED

AND

PERFET EDWARDS JAMES ..... RESPONDENT

(Being an appeal against the Ruling and Order of Hon D O.Mbeja (Mr.) SRM, dated and delivered on June 26, 2018 in Milimani CMCC no 3555 of 2013)

JUDGMENT

1. This is an appeal against the dismissal of a suit in the lower court for want of prosecution. The brief facts of the suit are that the appellant filed a suit on June 21, 2013 against the respondent seeking general damages in respect of loss suffered by the estate of the deceased following a road accident which occurred on January 28, 2012 along Nairobi- Thika road.

2. The respondent filed a defence denying the appellant's claim and particulars of negligence. The respondent blamed the accident on the appellant solely.

3. The respondent thereafter applied for dismissal of the suit for want of prosecution. After hearing the parties, the court by a ruling dated June 26, 2018 dismissed the suit.

4. Being dissatisfied with the decision delivered on June 26, 2018 by the Honourable D O Mbeja Senior Resident Magistrate in Civil Suit no 3555 of 2003 sought redress by filing its Memorandum of Appeal on February 15, 2019;and put forward the following grounds:

a) That the learned magistrate erred in both law and fact in dismissing the plaintiff's suit for want of prosecution on the basis that there has been inordinate delay and a lack of vigilance by the plaintiff/appellant.

b) That the learned magistrate further erred in Law and fact in wrongly exercising judicial discretion in dismissing the plaintiff's suit for want of prosecution on the grounds that the plaintiff has been sluggish in prosecuting the case, and that the plaintiff has not been keen and willing to have the suit expeditiously heard and disposed.

c) That the learned magistrate erred in law and fact in failing to find that the plaintiff had afforded the court with reasonable and acceptable explanations/reasons to warrant the court exercise discretion in his favour.

d) That the learned magistrate erred in law and fact in holding that the plaintiff had not sworn any affidavit demonstrating interest in prosecuting the suit.

e) That the learned magistrate erred in law and fact in failing to find that the defendant's counsel acted improperly in negotiating a settlement of the suit directly with the plaintiff has an advocate on record and filling the application dated January 8, 2018 following the collapse of the negotiations.

f) That the learned magistrate erred in failing to exercise due and necessary caution thereby issuing draconian orders dismissing the suit.

g) That the learned magistrate erred in law and fact in allowing the respondent (now defendant) application dated January 8, 2018.

h) That the learned magistrate erred in law and fact in the following ways;-

   i. Failing to give reasons for the decisions;

   ii. Failing to determine that there was no inordinate delay on the part of the plaintiff/ appellant;

   iii. Failing to evaluate and/or determine that any delay on the part of the respondent was not inordinate and was indeed excusable;

   iv. Failing to take into account that the out of court negotiations for settlement of the matter contributed substantially to the purported/alleged delay.

i) That the learned magistrate erred in law in faulting the appellant /plaintiff solely on the basis that he did not file an affidavit of respondents counsel/advocate.

j) That the learned magistrate erred in law by rejecting the appellants Replying Affidavit merely because it was sworn by the plaintiff's advocate, whilst at the same time, accepting the affidavit of the defendant/respondent advocate, which is unconscionable, and a misdirection in law.

k) That the learned magistrate erred in law and fact, in failing to scrutinize and evaluate the record of the court and proceedings that shows numerous steps taken by the appellant to prosecute the suit.

l) That the learned magistrate erred in law and fact in failing to take into account that the appellant was misled by the defendant's/respondent's advocates who unprocedurally engaged the appellant in negotiations out of court for settlement without involving plaintiff advocates, thereby losing a lot of time.

m) That the learned magistrate erred in law and fact in failing to take into account that the appellant/plaintiff filed an application under certificate of urgency dated August 10, 2016 seeking judgment on admission/summary judgment and witness summons to be issued following the collapse of negotiations on the basis of the offer for settlement given by the respondent.

n) That the learned magistrate failed to consider that the defendant/respondent had not complied with the mandatory pre trial procedures order 11 and that the matter suit was not ready for hearing thereby rendering the application to be dismissed premature.

o) That the learned magistrate failed to apply the correct test in law to determine that the defendant /respondent would not be prejudiced or otherwise suffer any injustice were suit to proceed to trial.

p) That the learned magistrate erred in law by disregarding and/or totally ignoring the explanation by the plaintiff/appellant of the alleged delay which the court ought to do in the circumstances.

q) That the learned magistrate did not evaluate and/or consider the written submissions and authorities filed in by the plaintiff/respondent in opposition, thereby wrongly exercising discretion wrong principles.

r) That the learned magistrate erred in handling the matter in a casual manner, and disregarding the total circumstances of the suit, which show that there has not been prolonged delay, or deliberate inexcusable delay in prosecuting of the suit.

s) That the learned magistrate erred in law by relying on technicalities, giving undue regard to procedural technicalities thereby violating article 159(2)(d) of the *Constitution* of Kenya 2010, denying the appellant/plaintiff the right to be heard.

t) That the learned magistrate erred in failing to deliver the ruling on the scheduled dated June 25, 2018, but went to deliver the ruling on June 26, 2018 without due Notice to the parties.

5. Directions were given that the appeal be canvassed by way of written submissions but the appellant indicated that he would rely on trial court submissions.

6. After hearing the oral submissions of the parties and upon reading their respective written submissions this court has framed the following issue for determination;

a) Whether the plaintiff's suit should be dismissed for want of prosecution.

7. Order 17 rule 2(1) of the *Civil Procedure Rules*, which governs dismissal of suits for want of prosecution, provides as follows:

> " In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit."
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> Further Order 17 Rule 2(3) of the Civil Procedure Rules, states thus:
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> "Any party to the suit may apply for its dismissal as provided in sub-rule 1"

8. Clearly, the statutory threshold set out under order 17 rule 2 of the Civil Procedure Rules is that a suit qualifies to be dismissed for want of prosecution: if no application has been made or no step has

been taken in the suit by either party for at least one year preceding the presentation of the application seeking dismissal of the suit.

9. In *Argan Wekesa Okumu v Dima College Limited & 2 others* [2015] eKLR the court considered the principles for dismissal of a suit for want of prosecution and stated as follows:-

> " The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the defendant is likely to be prejudiced by such delay. As such the 3rd defendant in this case must meet the burden of proof in seeking the dismissal of the plaintiff's case for want of prosecution see the case of *Ivita –vs-Kyumbu* (1984) KLR 441. Further to this, the decision of whether or not to dismiss a suit is discretionary and this court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same."

10. Whether to exercise the power of dismissal for want of prosecution under order 17 is, however, a matter that is within the discretion of the court. In its decision in *Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v M D Popat and others & another* [2016] eKLR, the court stated as follows:

> " 11. Nonetheless, Article 159 of the *Constitution* and order 17 rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay. This is what the case of *Ivita v Kyumba* [1984] KLR 441 espoused that:
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> > "The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court."

11. In *Naftali Opondo Onyango v National Bank of Kenya Ltd* [2005] eKLR, the court noted that a court should be slow to dismiss a suit for want of prosecution if it is satisfied that the suit can proceed without further delay. The court stated as follows:-

> " However, in deciding whether or not to dismiss a suit under rule 6 it is my view that a Court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay, that the Defendant will suffer no hardship and that there has been no flagrant and culpable inactivity on the part of the Plaintiff."

... Now applying the principles enunciated in the authorities, I have found that, the delay of under one year in this case may be long but it is not inordinate." (Emphasis added)

12. In their supporting affidavit to their motion challenging the dismissal for want of prosecution, the respondent stated that it has been one year since this matter was last in court and within all that period the appellant had not taken any step to set the suit down for hearing and it is clear that the appellant had lost interest in the suit.

13. In his submissions in the lower court, counsel for the appellant argued that the respondent had come to court with unclean hands as their advocates had been negotiating settlement of the matter out of court directly with the appellant's without involving the appellant's advocate.

14. The appellant further submitted that it was mischievous of the respondent's counsel to engage in negotiations for settlement of the matter directly with the appellant and then turn around and apply a suit for dismissal, therefore the appellant urges the court to take into account that this case is a fatal accident and the respondent caused the death of the deceased through his recklessness and negligence.

15. In response, the respondent submitted that the court exercised its discretion rightfully when arriving at its order to dismiss the suit since the appellant was guilty of inordinate and inexcusable delay as the last time the matter was in court was one and half years ago .

16. In *Mwangi S Kimenyi v Attorney General and Another*, Misc. Civil Suit NO 720 of 2009, the court restated the test as follows:

> " 1. When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.
>
> 2. Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the Plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and 5) what prejudice will the dismissal cause to the Plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties."

17. Ultimately, taking the law and the facts into account, it is clear to me that this matter which commenced in 2013, has taken a long journey the in-expedition of which must be laid straight on the plaintiff's laps; it emanates from the indolence of the appellant. This indolence, disclosed in the analysis of the record of proceedings, shows a casual, disinterested and laid back approach of the appellant/plaintiff. To prosecuting the claim. For this conduct, it is only fair that the plaintiff/ appellant should be fully responsible for all the costs incurred by the respondent in this matter on appeal.

18. It is also clear that has been several efforts and steps taken by the appellant/plaintiff to prosecute the suit as there has been evidence of numerous applications to court to fix hearing dates, negotiations

with the respondent/defendants advocates directly to settle the matter and the appellant also had filed for judgment on admission.

19. The nature of the main suit has been taken into consideration; the delay or inconvenience occasioned to the respondent can be compensated by costs; but the most important factor to be considered is only as a last resort a party should never be denied a chance to have his case heard and its merits determined;

20. Having taken into consideration the material factors and circumstances prior to and leading to the suit being dismissed and which forms the basis of this appeal this court is satisfied for the foregoing reasons that it would be just and reasonable to set aside this ruling made on the June 26, 2018.

21. In the light of the foregoing reasons this court makes the following findings and determinations;

    i. The appeal succeeds and the trial court's decision is hereby set aside and the suit is reinstated.

    ii. The suit should be prosecuted within a period of 120 days from the date hereof.

    iii. The reinstated suit shall stand dismissed if it is not prosecuted within the period stated in (ii) hereinabove.

    iv. The respondent shall have costs of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2023.

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J K SERGON

JUDGE

In the presence of:

..... for the appellant

..... for the respondent