Mungai & 2 others (Suing in their capacity as elected representatives of the Tenants of the defendant occupying the defendant's flats in Bombolulu Estate) v Registered Trustees of Teleposta Pension Scheme (Civil Suit 162B of 2012) [2023] KEHC 22200 (KLR) (25 May 2023) (Ruling)

Neutral citation: [2023] KEHC 22200 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT 162B OF 2012

F WANGARI, J

MAY 25, 2023

BETWEEN

DAVID MUNGAI ..... 1ST PLAINTIFF

SAUMU REHANI ..... 2ND PLAINTIFF

KENNEDY OUMA JALANG'O ..... 3RD PLAINTIFF

SUING IN THEIR CAPACITY AS ELECTED REPRESENTATIVES OF THE TENANTS OF THE DEFENDANT OCCUPYING THE DEFENDANT'S FLATS IN BOMBOLULU ESTATE

AND

REGISTERED TRUSTEES OF TELEPOSTA PENSION SCHEME .. DEFENDANT

RULING

1. There are two applications on record. The first application (hereinafter "the first application") is dated May 6, 2022. It seeks the following orders: -

    a. That the application filed herewith be certified as urgent and a priority date be allocated;

    b. That Plaintiff's suit be dismissed for want of prosecution;

    c. That the Defendant be awarded costs of the suit and of this application

2. The second application (hereinafter "the second application") is dated July 25, 2022. It seeks the following orders: -

    a. Spent;

b. That pending hearing and determination of this suit, there be an order of temporary injunction issued against the Respondents by themselves, their servants, agents or any person acting under their instructions restraining them from trespassing, entering into the demised premises and taking away the proclaimed properties of the Applicant evicting or in any other manner interfering with the Applicant's tenancy pending hearing and determination of the application;

c. That pending hearing and determination of this suit, there be an order of temporary injunction issued against the Respondents by themselves, their servants, agents or any person acting under their instructions restraining them from trespassing, entering into the demised premises and taking away the proclaimed properties of the Applicant evicting or in any other manner interfering with the Applicant's tenancy pending hearing and determination of the suit;

d. That this Honourable Court order that the Respondent do off set the arrears from the pension payable to the Plaintiffs;

e. That costs of the application be provided.

3. Both applications are opposed. In respect to the first application, the Plaintiffs responded through a replying affidavit dated June 16, 2022 and sworn by Duncan Agesa Vulimu on behalf of eighty-eight (88) other Plaintiffs. In a nutshell, the Plaintiff's averred that it was not true that they were not paying rent and that they had not taken any steps to prosecute the suit for nine (9) years. Reliance was placed on directions issued on December 21, 2015. The issue of appointment of an auditor was cited for the inaction. In totality, the Plaintiffs stated that the application was premature thus ought to be dismissed. Upon service of the replying affidavit, the Defendant through its counsel swore a supplementary affidavit dated June 27, 2022. In principle, the Defendant stated the correspondences between Counsel did not bar the Plaintiffs from setting down the suit for trial. It prayed that their application be allowed as prayed.

4. On the second application, a notice of preliminary objection dated July 28, 2022 and filed on July 29, 2022 is on record. It is premised on the provisions of section 7 of the *Civil Procedure Act*. There is also a replying affidavit dated July 24, 2022 and filed on September 1, 2022. In brief, the Defendant stated that there was an admission by the Plaintiffs that they had defaulted in rent payment and it is only one Pamela A Ongijo who is a member of the Defendant. The rest were not members. The Defendant equally noted that the application was similar to another dated September 7, 2012 that was dismissed by Honourable Justice JW Mwera (retired) on November 13, 2012. Section 36 of the *Retirements Benefit Act* was referred to in proposition that prayer of the application could not be granted. The Defendant urged that the application be dismissed.

5. Directions were taken that both applications and the notice of preliminary objection be disposed of by way of written submissions. Both parties duly complied by filing detailed submissions as well as citing various decided cases in support of their rival positions. I have duly considered the said submissions and I am grateful to Counsel for their industry and time in preparing the submissions. They are a useful guide to the court in arriving at a just determination on the issues at hand.

Analysis and Determination

6. Having considered the two (2) applications, the notice of preliminary objection, the responses, written submissions, cited authorities and the law, I propose to deal with the two applications sequentially. I shall start with the application dated May 6, 2022. In principle, it seeks for orders to have the Plaintiffs' suit dismissed for want of prosecution.

7. The Legal substratum for dismissal of suits for want of prosecution is founded on the principles that litigation must be expedited, and concluded by parties who come to court seeking for justice. Upon filing of cases parties should efficiently and effectively be seen to fast track their hearing and determination. There should be no delay at all based on legal maxim – Justice delayed is justice denied" Nonetheless, should there be any delay arising from one substantive and justifiable logistical cause or reason, the same should not be inordinate, unreasonable and inexcusable.

8. 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."

9. Further Order 17 Rule 2(3) of the *Civil Procedure Rules*, states thus: "Any party to the suit may apply for its dismissal as provided in sub-rule 1" 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. I have perused the file and I am satisfied that at the point the application dated May 6, 2022 was filed, the matter was last in court on June 29, 2017. From the proceedings of the said date, the court gave very clear directions which had specific timelines. For reconciliation on the arrears, the court had directed that both parties do appoint an accountant within thirty (30) days from June 29, 2017. A report was to be filed in court within thirty (30) days of the accountant's appointment. For avoidance of doubt, the report was to be filed by September 7, 2017.

10. There was no activity until May 19, 2022 when the Defendant filed the application for dismissal of suit for want of prosecution. Therefore, I am satisfied that there had been an inaction for more than five (5) years which in my view is inordinate.

11. To overcome the application, the Plaintiff ought to show that the delay was excusable. In responding to the delay, the Plaintiffs aver that the delay was occasioned by the Defendant's failure to confirm the appointment of an accountant called Osoro and Associates as evidence by their letter dated June 19, 2019. The powers of court in such an application are discretionary and just like any other discretion, it must be exercised judicially and fairly. In *Ivita v Kyumbu* [1984] KLR 441, the Court laid down principles for issuance of an order of dismissal of suit for want of prosecution. It stated:-

> " ...The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time..."

12. Based on the reasons advanced and the dictates of article 50 and 159 of the *Constitution*, it will be a grave injustice to drive away a party from the seat of justice. Though there was an inordinate delay, it would be a travesty to condemn the Plaintiffs unheard. Based on the foregoing, I disallow the application dated May 6, 2023 with no orders as to costs. I shall issue further directions based on the decision on the second application.

13. On the second application, it is seeking for orders of injunction pending the hearing and determination of the suit. However, a preliminary objection was raised against the second application. It is based on the provisions of section 7 of the *Civil Procedure Act*. I will therefore first determine the notice of preliminary objection for the reasons that if I allow the objection, it will dispose off the second application.

14. The parameters of consideration of a preliminary objection are now well settled. A preliminary objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd* [1969] EA 696. At page 700, Law , JA stated: -

> " A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

15. At page 701, Sir Charles Newbold, P added: -

> " A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion..."

16. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit or application.

17. The basis of the Defendant's objection is section 7 of the *Civil Procedure Act*. This is what is called res judicata. To fall on the four corners of a preliminary objection, it would be imperative to decide whether a plea of res judicata is a point of law. In *George W M Omondi & another v National Bank of Kenya Ltd & 2 others* [2001] eKLR, the court had the following to say: -

> " ...Bearing that definition in mind, I agree with counsels for the defendants that both the objection as to the legal competence of the plaintiffs to sue and the plea of res judicata are pure points of law which if determined in their favour would conclude the litigation and they are accordingly well taken as preliminary objections..."

18. Therefore I come to the inescapable conclusion that the Defendant's preliminary objection is well taken. Section 7 of the *Civil Procedure Act* provides as follows: -

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court"

19. In order therefore to decide as to whether an issue in a subsequent application is res judicata, a court of law should always look at the decision claimed to have settled the issues in question and the entire application and the instant application to ascertain; -

    a. What issues were really determined in the previous application;

    b. Whether they are the same in the subsequent application and were covered by the decision;

    c. Whether the parties are the same or are litigating under the same title and that the previous application was determined by a court of competent jurisdiction.

20. Having settled on the parameters, I now proceed to interrogate the application dated September 7, 2012 vis a vis the application dated July 25, 2022. The application dated September 7, 2012 was precipitated by the Defendant's actions of sending auctioneers to the Plaintiffs to levy distress for rent on account of some disputed rent balance. Therefore the threat was said to be unlawful. The court dismissed the said application in a ruling delivered on November 13, 2012. From the ruling, I discern that the issue was about the Defendant's action of sending auctioneers to the Plaintiffs.

21. What is the issue in the application dated July 25, 2022? This can be discerned from the certificate of urgency. It is manifestly clear that the contested rent is still the theme. The Defendant has once again sent an auctioneer to proclaim the Plaintiffs goods. Therefore I have no doubt that the issues in the present application are the same as those that were covered in the decision of Mwera, J (as he then was) in his ruling delivered on November 13, 2012. There is equally sufficient evidence that the parties in the application dated September 7, 2012 are the same Applicants in the application dated July 25, 2022. It is therefore my finding that the preliminary objection is merited.

22. In *Njangu v Wambugu & Another*, Nairobi HCCC No 2340 of 1991 (unreported), Kuloba, J (as he then was) held as follows: -

> " If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata..."

23. I hold a similar view. I note the Plaintiffs had equally filed another similar application dated December 15, 2015 where PJO. Otieno, J issued several orders among them that of status quo. I note the orders made on December 21, 2015 was in the absence of the Defendant.

24. Having found that the preliminary objection dated July 28, 2022 has merit, it would serve no practical purpose to consider the application dated July 25, 2022.

25. As to the issue of costs, the same follows the event. That is what section 27 of the *Civil Procedure Act*. However, this court has the discretion to direction otherwise. Though the application dated May 6,

2022 lacks merit, awarding costs to the Plaintiffs would be tantamount to encouraging parties to delay prosecuting their cases. Therefore, I make no order as to costs. As to the application dated July 25, 2022, the Plaintiffs were well aware of other previous similar applications but went ahead to institute the said application nonetheless. Therefore, I award the Defendant the cost of the application.

26. Flowing from the foregoing, I proceed to make the following orders: -

a. The application dated May 6, 2022 is not merited and the same is dismissed with no order as to costs.

b. The application dated July 25, 2022 lacks merit and it is hereby struck out with costs to the Defendant.

c. The Plaintiffs to set down the suit for hearing within the next thirty (30) days.

d. In default of (c) above, the suit shall stand dismissed for want of prosecution.

Orders accordingly

DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 25TH DAY OF MAY, 2023.

.....

F. WANGARI

JUDGE

In the presence of:

N/A by Plaintiff/ Applicant

N/A by Defendant/ Respondent

Guyo, Court Assistant