



**Mboe Sambu Resources Limited v Paino & another (Civil Case
23 of 2018) [2022] KEHC 14308 (KLR) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14308 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL CASE 23 OF 2018
F GIKONYO, J
OCTOBER 27, 2022**

BETWEEN

MBOE SAMBU RESOURCES LIMITED PLAINTIFF

AND

STEPHEN SAMUEL PAINO 1ST DEFENDANT

FRANCIS STRANGE 2ND DEFENDANT

RULING

1. The significant order sought in the 2nd defendant/applicant's application dated February 9, 2021 is that this suit be dismissed for want of prosecution with costs to the defendant.
2. The application is expressed to be brought under order 17 rule 2(1), (2), (3) and (4) and order 51 rule 1 of the *Civil Procedure Rules*, sections 1A, 1B, and 3A, of the *Civil Procedure Act*, articles 48,50(1) and 159(2) (b) of the *Constitution*,2010.
3. The application is based on the grounds that; after the plaintiff filed this suit in court on November 8, 2018, and entry of appearance by the defendant on June 20, 2019, the suit was last in court on October 15, 2020. It is now over three years since this matter was filed in court and no action has been taken by the plaintiff to progress the same. The defendant accused the plaintiff of not taking any steps to prosecute this suit. In addition, the defendant lamented that no explanation has been given for the delay. The 2nd defendant stated that he has never been served with a hearing notice or even an invite to take a hearing date for the past three years. he claims that it is the primary duty of the plaintiff to take steps to prosecute its case. The plaintiff's inertia runs contrary to the overriding objective of the court stipulated in sections 1A, 1B and 3A of the *Civil Procedure Act* which envisages an expeditious, just and affordable disposal of suit. That on October 15, 2020 the court granted the plaintiff more time to activate its case but since then no step has been taken by the plaintiff to kick start hearing thereof. The plaintiff's delay in fixing this matter for hearing is inexcusable. The delay and lack



of commitment is intentional, contumelious, prolonged, inordinate and inexcusable on the part of the plaintiff in prosecuting the case and amounts to an abuse of court process. The plaintiff is not desirous of pursuing this matter and has completely lost interest in the case. Accordingly, he concluded that the delay herein is detrimental to the 2nd defendant herein who continues to incur huge legal fees and mental distress due to the pending case in court.

4. The application is supported by an affidavit sworn by Francis Strange on February 9, 2021 reiterating the grounds set out in the application. He added that on February 13, 2020 he filed an application for dismissal of the plaintiff/respondent's suit for want of prosecution but the honourable court through its ruling delivered on October 15, 2020 granted the plaintiff/respondent more time to progress its case.
5. The respondents did not file any response to the application herein.

Analysis And Determination

Issue

6. One issue arises here; -

Whether the plaintiff's suit should be dismissed for want of prosecution with costs to the 2nd defendant.

7. Order 17 rule 2(1), 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.”

8. Further order 17 rule 2(3) states thus:

“Any party to the suit may apply for its dismissal as provided in sub-rule 1”

9. The discretion on whether to dismiss a suit for want of prosecution must turn: -

“... 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 (*Nilesh Premchand Mulji Shah & another t/a Ketan Emporium v M.D Popat and others* [2016] eKLR,)

10. See also *Ivita v Kyumba* [1984] KLR 441 that:

“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. Whereas the *Constitution* insists on substantive justice rather than summary dismissal of cases, it also entrenches as a principle of justice that; justice shall be administered without delay. Thus, giving the overriding objective of the law, proper constitutional anchoring in article 159 of the *Constitution-*



and parties and their legal counsel bear statutory obligations to assist the court inter alia to achieve expeditious disposal of cases.

12. What are the circumstances in this case?

Applying The Test

13. The 2nd defendant stated that the plaintiff has not taken steps to prosecute the case for about three years now. I do note that this suit was spared the hang-man's noose *vide* the ruling delivered on October 15, 2010 by Bwonwong'a J.- more time was allowed for the plaintiff to prosecute its case. However, a considerable time has passed by since the indulgence given to, without the plaintiff taking any step to progress suit towards hearing. The plaintiff does not even seem to have been awakened by this application for dismissal which was made 1 year 4 months after delivery of the ruling granting the plaintiff more time to further its case. I do note that, other than Ms Kiongothi on May 11, 2022 stating that they have applied to join more parties- and I see not any such application in the court file- no explanation has been provided for not taking steps to prosecute this suit. The delay is prolonged, prejudicial to the defendants, has not explained, and therefore inexcusable. I do not think that in the circumstances of this case, the plaintiff is keen on prosecuting the suit. Perforce, even if dismissal is quite unpleasant, it is the only appropriate order to make so as to avert further prejudice upon the defendants from a suit which the plaintiff simply temporizes in court.

Conclusions And Order

14. In the upshot, since much time has elapsed without the plaintiff taking steps to prosecute this case; and no reasonable explanation has been given by the plaintiff for the overt inertia, sustaining this suit can only be to the prejudice of the defendants. Accordingly, I dismiss this suit under order 17 rule 2 of the CPR. I order the plaintiff to pay costs to the 2nd defendant. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 27TH DAY OF OCTOBER, 2022.

F. GIKONYO M.

JUDGE

In the presence of:

1. Kago for the Plaintiff
2. Mr. Kasaso – CA
3. Anyona for the Defendant - absent

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