Kithuka v Invesco Assurance Co Limited; Tumbo t/a Enterprises Auctioneers & another (Interested Parties) (Civil Suit 80 of 2019) [2022] KEHC 15836 (KLR) (Civ) (29 November 2022) (Ruling)

Neutral citation: [2022] KEHC 15836 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 80 OF 2019

JK SERGON, J

NOVEMBER 29, 2022

BETWEEN

BERNARD MULI KITHUKA ..... PLAINTIFF

AND

INVESCO ASSURANCE CO LIMITED ..... DEFENDANT

AND

DM TUMBO T/A ENTERPRISES AUCTIONEERS ..... INTERESTED PARTY

JM MUINDE T/A KANDE AUCTIONEERS ..... INTERESTED PARTY

RULING

1. The defendant/applicant has brought the Notice of Motion dated September 13, 2021 supported by the grounds set out on its face and the facts stated in the affidavit of advocate Herman Omiti. The order being sought is for dismissal of the plaintiff's/respondent's suit against for want of prosecution plus costs of the Motion and of the suit.

2. To oppose the Motion, the respondent put in the replying affidavit sworn by advocate Morris Muli Nzavi on February 18, 2022.

3. The Motion was dispensed with through written submissions.

4. The record shows that the interested parties did not put in any documents in respect to the instant Motion or participate at the hearing thereof.

5. I have considered the grounds set out in the body of the Motion, the affidavits supporting and resisting the Motion, and the rival submissions and authorities relied upon by the respective parties.

6. The applicable provision touching on the dismissal of suits for want of prosecution is Order 17, Rule 2 (1) and (3) of the *Civil Procedure Rules* cited in the applicant's submissions. Rule 2(1) concerns itself with the dismissal of suits upon issuance of a notice to show cause by the court. The applicant has come under the proviso of Rule 2 (3) which expresses that:

> " Any party to the suit may apply for its dismissal as provided in sub-rule 1."

7. The guiding principles in determining an application seeking the dismissal of a suit for want of prosecution were discussed by the court in the case of *Moses Mwangi Kimari v Shammi Kanjirapparambil Thomas & 2 others* [2014] eKLR and are reaffirmed by the court in the case of *Argan Wekesa Okumu v Dima College Limited & 2 others* [2015] eKLR cited in the submissions by the applicant, as follows:

   i. Whether there has been inordinate delay in the prosecution of the suit by the plaintiff;

   ii. Whether the delay is intentional and thus inexcusable;

   iii. Whether the plaintiff has offered a reasonable explanation for the delay;

   iv. Whether the delay is an abuse of the court process;

   v. Whether the delay prejudices the defendant(s);

   vi. The prejudice that will be visited upon the plaintiff; and

   vii. Whether justice can still be done notwithstanding the delay.

8. Under the first principle, the applicant is of the view that there has been an inordinate delay of over two (2) years on the part of the respondent in prosecuting his suit. The respondent did not touch on this principle.

9. The record shows that prior to the filing of the instant Motion, the matter was last in court on November 5, 2019 for pre-trial directions. Since then, it is apparent there has been no action in the suit.

10. The question remains: does this constitute inordinate delay? The case of *Mwangi S. Kimenyi v Attorney General & another* [2014] eKLR cited by both the applicant and the respondent in their respective submissions, brings perspective into what may be considered to be inordinate delay in the following manner:

> " There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable...Therefore, inordinate delay for purposes of dismissal for want of prosecution should be one which is beyond acceptable limits in the prosecution of cases."

11. From my reading and understanding of the above analysis, I am obliged to look into the nature and circumstances of the suit as well as the reasons given by the respondent for the delay, in order to determine whether there has been inordinate delay and whether such delay is excusable, which brings me to the second, third and fourth principles to be addressed hereinbelow.

12. The applicant on the one hand states and submits that the delay is inexcusable since the respondent has not brought any sufficient reasons to explain his inaction in prosecuting his case.

13. The respondent on the other hand submits that the delay was occasioned by the applicant who has to date not complied with pretrial directions despite being directed to do so by the court on the abovementioned 5th November, 2019 and hence the suit has not been certified ready for hearing.

14. The respondent also submits that he is ready and willing to prosecute the suit.

15. Upon my perusal of the record, it is apparent that the same confirms the submissions made by the respondent regarding the non-compliance by the applicant, though the applicant on its part states and submits that it was unable to file its pretrial documents due to the delay occasioned by the respondent in availing legible documents.

16. The respondent however indicates his willingness to provide the applicant with clear pre-trial documents.

17. In my view therefore, it is apparent that both the applicant and the respondent have in one way or another contributed to the delay. In the circumstances, I am of the view that though there has been a prolonged delay in the prosecution of the case, I do not find the delay to necessarily be intentional and inexcusable in the circumstances.

18. In regards to the fifth and sixth principles touching on prejudice, the applicant on the one part submits that it has all along demonstrated its willingness to participate in the suit but that the respondent has hindered the progress thereof, whereas the respondent argues that the applicant does not stand to suffer any prejudice if the suit proceeds, but that if the suit is dismissed, the respondent will be locked out of the seat of justice.

19. The courts have previously held that in an application for dismissal such as the one presently before this court, an applicant is expected to demonstrate in specific terms the prejudice likely to be suffered. For reference purposes, I draw from the court's analysis in the case of *Mwangi S. Kimenyi* (*supra*) thus:

> "...the defendant must show he suffered some additional prejudice which is substantial and results to 1) impending fair trial; 2) aggravated costs; or 3) specific hardships to the defendant. It must also be shown that the delay has worsened the defendant's position in the suit. It will not, therefore, be sufficient to just make a general assertion that you will suffer prejudice without showing the particular prejudice as spelt out herein above."

20. Upon my perusal of the record and pleadings in the suit, I am of the view that the applicant has not demonstrated by way of any credible evidence the manner in which it will suffer substantial prejudice in the circumstances.

21. From my study of the pleadings, I have established that the respondent's cause of action against the applicant is in the nature of a declaratory suit where the respondent is seeking inter alia, an order directing the applicant to satisfy the decretal sum awarded in the primary suit involving a road traffic accident.

22. I note that the seventh principle touching on whether justice can still be done irrespective of the delay in question was not specifically addressed by the parties.

23. Nevertheless, I turn to the case of *Ivita v Kyumbu* [1984] KLR 441 where the court held as follows:

> " 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 he 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."

24. Upon my perusal of the material on record, I did not come across any credible evidence or circumstances to show that justice will not be done to the applicant so as to warrant the exercise of judicial discretion in its favour at this stage. I am therefore convinced from the circumstances of the case that substantive justice can still be done notwithstanding the prolonged delay.

25. The upshot therefore is that the Notice of Motion dated September 13, 2021 is hereby dismissed with no order on costs.

26. The suit should be prosecuted within 120 days failure to which the same shall stand automatically dismissed for want of prosecution.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 29TH DAY OF NOVEMBER, 2022.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff/Respondent

..... for the Defendant/Applicant

..... for the 1st Interested Party

..... for the 2nd Interested Party