



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 149 OF 2018

JEAN PAUL ILUNGA.....PLAINTIFF

-VERSUS-

NICHODEMUS ASUMWA.....DEFENDANT/APPLICANT

RULING

1. The defendant/applicant has brought the Notice of Motion dated 15th February, 2021 supported by the grounds set out on its face and the facts stated in his affidavit. The applicant sought an order for the dismissal of the plaintiff's suit against him for want of prosecution plus costs of both the Motion and the suit.

2. Going by the record, the Motion stands unopposed in view of the fact that, the plaintiff did not put in any response to the Motion or participate at the hearing thereof despite evidence of service by way of an affidavit of service filed in court.

3. At the hearing of the Motion, the applicant chose to proceed by way of his affidavit evidence, which I have considered together with the grounds set out in the body of the Motion.

4. A brief background of the matter is that, the plaintiff filed the suit against the applicant by way of the plaint dated 20th June, 2018 and sought various reliefs including general damages and a permanent injunction, arising out of defamatory publications allegedly made by the applicant concerning the plaintiff. The applicant filed a statement of defence in the suit.

5. The plaintiff filed the application dated 20th June, 2018 and sought for temporary injunctive orders against the applicant pending the hearing and determination of the suit, which application was opposed by the applicant. Upon hearing the parties, the court dismissed the application with costs to the applicant, in its ruling delivered on 28th March, 2019.

6. Returning to the merits of the instant Motion, 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. Rule 2(1) relates to dismissal of suits upon issuance of a notice to show cause by the court. The applicant has come under Rule 2 (3) which provides 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 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 asserts that there has been a prolonged and inordinate delay of over one (1) year in the prosecution of the suit.

9. The record shows that the parties were last in court on 28th March, 2019 when the court dismissed the plaintiff's application seeking temporary injunctive orders, as mentioned hereinabove.

10. Since then, two (2) years have passed without any action in the suit by the plaintiff. The question therefore remains: does this constitute inordinate delay?

11. In order to answer the above question, I am obliged to look into the nature and circumstances of the suit, which brings me to the second, third and fourth principles that I will address hereinbelow.

12. In his affidavit, the applicant states that the plaintiff has utterly neglected and/or failed to set the suit down for hearing, which amounts to an abuse of the court process.

13. As earlier noted, the plaintiff has given no explanation at all for the delay in prosecuting the suit, which inclines me to find that the delay in this instance is inordinate and inexcusable.

14. The fifth and sixth principles touching on prejudice were not discussed by either of the parties herein. That notwithstanding, the courts have previously held that in any application for dismissal, an applicant is expected to demonstrate in specific terms the prejudice he, she or it stands to suffer. For reference purposes, I draw from the court's analysis in the case of **Mwangi S. Kimenyi v Attorney General & another [2014] eKLR** 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."

15. In the absence of any material or arguments to that effect, I am not satisfied that the applicant has demonstrated that he will suffer substantial prejudice if the order for dismissal is denied.

16. Moreover, upon establishing that the plaintiff's cause of action is in the nature of defamation and for which he is seeking to recover various reliefs from the High Court, it follows that should his suit be dismissed prematurely at this stage, the plaintiff stands to lose his day in court which may likely impede his right to substantive justice.

17. Concerning the seventh principle, the applicant did not bring any material or evidence to show the manner in which he stands to suffer injustice should the suit be sustained.

18. From the pleadings, I am able to tell that the suit was lodged in 2018 and is therefore a fairly recent case. It is also noted that both parties have filed their pre-trial documents. In the premises, I am satisfied that justice can still be done notwithstanding the prolonged delay. Moreover, courts of law are also courts of justice and I am duty bound to do substantive justice to parties.

19. The upshot is that the Motion is hereby dismissed. However, I make the following orders:

a) The plaintiff shall prosecute his suit within 120 days from this date (subject to resumption of physical hearings), failing which the suit shall be dismissed with costs.

b) Costs of the Motion shall abide the outcome of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF MAY, 2021.

A. MBOGHOLI MSAGHA

JUDGE

In the presence of:

Mr. Wachira for the Plaintiff

Ms. Kwamboka holding brief for the Defendant