



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 288 OF 2016

HON. JOE MUTAMBU.....PLAINTIFF/RESPONDENT

-VERSUS-

HON. KALONZO MUSYOKA.....DEFENDANT/APPLICANT

RULING

1. The defendant/applicant has brought the Notice of Motion dated 16th January, 2021 supported by the grounds set out on its face and the facts deponed in the affidavit of the applicant. The order being sought is for dismissal of the plaintiff's/ respondent's suit against him for want of prosecution plus costs of the Motion and of the suit.
2. To oppose the Motion, the respondent swore a replying affidavit on 15th July, 2021.
3. When the parties attended this court on 26th July, 2021 they were directed to put in written submissions on the Motion.
4. 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.
5. 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) 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.”

6. The guiding principles in determining an application seeking for 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** cited in the applicant's submissions 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.***

7. Under the first principle, the applicant asserts and submits that there has been a prolonged and inordinate delay of over four (4) years in the prosecution of the suit since the close of pleadings on 28th November, 2016.

8. The respondent did not refute the presence of delay in prosecuting the suit.
9. The record shows that the respondent filed the suit on 2nd November, 2016 and that the applicant filed his statement of defence on 25th November, 2016 followed by the respondent's reply to defence on 23rd January, 2017.
10. Since then, it is apparent there has been no action in the suit. The record however reflects that a notice to show cause was issued by the court on 22nd September, 2020 but it remains unclear whether the same was ever served upon the parties or heard.
11. That notwithstanding, the question remains: does this constitute inordinate delay? The case of **Mwangi S. Kimenyi v Attorney General & another [2014] eKLR** 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.”

12. 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 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 that I will address hereinbelow.
13. On his part, the respondent explained that the delay was caused by the fact that he and the applicant were engaged in negotiations with a view to settling the matter out of court and hence the delay was not deliberate.
14. On his part, the applicant is of the view that the respondent has not offered any proper explanation for the delay and that the respondent has not brought any evidence to demonstrate that the parties were engaged in negotiations for an out-of-court settlement.
15. Upon my perusal of the record, I did not come across any credible evidence to support the averments of the respondent that the parties were engaged in out-of-court negotiations. The letter dated 4th May, 2021 annexed to the replying affidavit and addressed to the Deputy Registrar-Civil Division by the respondent's advocate, requesting that the matter be marked bears no indication that it was received by the court or served upon the respondent.
16. In my view therefore, the respondent has not given sufficient explanation for the delay or shown that the same was unintentional or caused by circumstances beyond his control. In the circumstances, I am inclined to find the delay of over four (4) years in this instance to be inordinate and inexcusable.
17. In regards to fifth and sixth principles touching on prejudice, the applicant on the one part did not set out in his replying affidavit the manner in which he stands to be prejudiced if the respondent is permitted to prosecute his suit, while the respondent indicated that he stands to be denied substantive justice and the right to pursue his case should the same be dismissed at this stage.
18. 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 he, she or it stands to suffer. 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.”

19. Upon my perusal of the record and pleadings in the suit, I am not convinced that the applicant has demonstrated the manner in which he will suffer substantial prejudice in the circumstances.
20. Further to the foregoing, from my study of the pleadings, I established that the respondent's cause of action against the applicant is in the nature of defamation and for which he is seeking to recover various reliefs from this court. It therefore follows that should his suit be dismissed prematurely at this stage, the respondent will lose his day in court which may likely impede his right to substantive justice.
21. Concerning the seventh principle on whether justice can still be done irrespective of the delay in question, the applicant submits that the pendency of the suit has not been justified and yet it infringes on his right to a fair hearing. He has cited *inter alia*, the case of **Nzoia Sugar Company Limited v West Kenya Sugar Limited [2020] eKLR** where the court rendered itself thus on the subject:

“Balancing the positions of the two parties, I take the view that delay of two years in prosecuting a matter is inordinate and unreasonable. The plaintiff has not explained it. The mere fact that the defendant has not demonstrated prejudice is not sufficient to sustain a suit that the plaintiff has shown no interest in prosecuting for the two years before the application for dismissal was made...”

22. The respondent on his part has urged this court to do substantive justice by allowing him to prosecute his suit on merits.

23. I rely upon the case of **Ivita v Kyumbu [1984] KLR 441** referenced in both the submissions by the applicant and respondent, 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. From my perusal of the record, pleadings and rival arguments, I

have not come across any credible evidence or circumstances to show that justice will not be done to the applicant in order for this court to exercise its discretion in his favour. I am therefore convinced from the circumstances of the case that substantive justice can still be done notwithstanding the prolonged delay.

25. The upshot is that the Motion dated 16th January, 2021 is for dismissal. Consequently, the motion is dismissed thus giving rise to issuance of the following orders:

- a) The plaintiff/respondent shall take the necessary steps to have the suit ready for hearing within a period of 60 days from the date hereof.**
- b) The plaintiff/respondent shall then prosecute his suit within 90 days from the date on which pre-trial directions are taken, failing which the suit shall stand automatically dismissed with costs.**
- c) Costs of the Motion to abide the outcome of the suit.**

Dated, signed and delivered online via Microsoft Teams at Nairobi this 22nd day of October, 2021.

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J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff/Respondent

.....for the Defendant/Applicant