REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 334 OF 2015

ANNET NALUGWA.....PLAINTIFF/RESPONDENT

-VERSUS-

MADISON INSURANCE COMPANY KENYA LIMITED.....1ST DEFENDANT/APPLICANT

JOAB GUYA NDONGA.....2ND DEFENDANT

RULING

1. The 1st defendant/applicant has brought the Notice of Motion dated 10th August, 2021 supported by the grounds set out on its face and the facts deponed in the affidavit of **Moses Mwariri**, Legal Supervisor of the applicant. The order being sought is for dismissal of the plaintiff's/respondent's suit against it 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 9th September, 2021.

3. The Motion was dispensed with through written submissions.

4. The record shows that the 2nd defendant 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**. **Rule 2(1)** cited in the respondent's submissions, 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 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 on the part of the respondent in prosecuting her suit since the same was last in court on 29th October, 2019. 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 29th October, 2019 on which date the court allowed the application filed by the respondent's erstwhile advocate to cease acting for her in the matter.

10. Since then, it is apparent there has been no action in the suit.

11. 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 to be addressed hereinbelow.

13. 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 her inaction in prosecuting her case.

14. The respondent has retorted by explaining that the delay was occasioned by the fact that she resides in Uganda which is also her country of nationality and that she was not made aware as to the withdrawal of her erstwhile advocate from acting for her in the matter.

15. The respondent also explains that while in Uganda, she became unwell upon contracting the Covid-19 virus which made her already failing health worse and that at the same time, strict measures were taken by her country which in turn restricted movement in and out.

16. It is also the respondent's assertion and submission that she has suffered and continues to suffer financial challenges which have impacted on her ability to litigate her case.

17. Upon my perusal of the record, it is apparent that the respondent was made aware of the intention by her former advocate to withdraw from acting for her in the matter. Furthermore, upon allowing the said application, the court directed the former advocate to serve upon the respondent the order to that effect. It remains unclear whether there was compliance with the directions.

18. Be that as it may, I note the documentation which was annexed to the replying affidavit and which supports the averments made by the respondent pertaining to contracting Covid-19 sometime in the year 2020.

19. I am also alive to the measures; both global, regional and local; that were taken to curb the spread of the still prevalent Covid-19 pandemic.

20. In my view therefore, the respondent has given a reasonable explanation for the delay. In the circumstances, I am inclined to find that though there has been a prolonged delay in the prosecution of the case, I do not find the delay to necessarily be intentional inexcusable in the circumstances.

21. In regards to fifth and sixth principles touching on prejudice, the applicant on the one part through the deponent Moses Mwariri, states that it stands to suffer prejudice since the evidence to be relied upon may turn out to be unavailable, while the respondent indicates that the applicant has not demonstrated the manner in which it stands to suffer grave injustice if the case is sustained.

22. 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."***

23. Upon my perusal of the record and pleadings in the suit, I am not convinced that the applicant has demonstrated by way of any credible evidence that it may experience challenges in obtaining evidence or the manner in which it will suffer substantial prejudice in the circumstances.

24. From my study of the pleadings, I have established that the respondent's cause of action against the applicant and the 2nd defendant is in the nature of breach of contract and for which she 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 her day in court which may likely impede her right to substantive justice.

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

26. Nevertheless, I turn to 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."***

27. 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.

28. The upshot therefore is that the Motion dated 10th August, 2021 is hereby dismissed with costs abiding the outcome of this suit.

Dated, signed and delivered online via Microsoft Teams at Nairobi this 17th day of December, 2021.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff/Respondent

..... for the 1st Defendant/Applicant

..... for the 2nd Defendant