

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO 174 OF 2015

ANWAR SIDI & 34 OTHERS.....PLAINTIFFS

VERSUS

JEDIDA NDUMBU & 8 OTHERS.....DEFENDANTS

RULING

1. The Defendants' Notice of Motion application dated 14th August 2019 and filed on 22nd August 2019 sought the dismissal of the Plaintiffs' suit for want of prosecution and the award of costs of the said application and the entire suit. It was supported by the Affidavit of their advocate, Moses Ngaywa, which was sworn on 14th August 2019.

2. Through their said advocate, the Defendants averred that despite the Plaintiffs having been directed to take a date for their Notice of Motion application dated 28th April 2015 that had been filed under certificate of urgency together with the Plaintiff herein, they had failed to fix the same for mention to confirm filing of Written Submissions. They also pointed out that the Plaintiffs failed to appear in court several times whereupon Seron J dismissed the said application in their favour.

3. They averred that the matter was subsequently fixed for Pre-trial directions but the Plaintiffs failed to do so and that since 25th June 2018, the Plaintiffs had failed to take any material step to prosecute their suit. They contended that failure to take those steps within a year amounted to abuse of the court process and that the continued existence of the suit was prejudicial to them. It was their assertion that it was only fair, just and expedient that their application be allowed as prayed.

4. Notably, on 6th October 2015, Seron J had observed that the Plaintiffs appeared to have lost interest in their Notice of Motion application dated 28th April 2015. Despite this court having given them an opportunity to respond to the present application and file written submissions, as at the time of reserving the Ruling herein, they had not filed the same. The present application was therefore unopposed.

5. Dismissal of a suit is not something a plaintiff who is keen on pursuing a cause of action can ignore. However, the Plaintiffs herein had chosen to do exactly that. In view of the fact that they did not even attend court when the court reserved its Ruling herein despite having been duly with a Mention Notice as was evidenced in the Affidavit of Service that was filed on 31st January 2020, it was clear to this court that they had lost interest in the entire suit.

6. While a court should exercise caution and restrain itself from dismissing a case, this court fully associated itself with the cases of **Naftali Onyango vs National Bank of Kenya Limited [2005] eKLR** and **Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium vs M.D. Popat & Others [2016] eKLR** amongst others that were relied upon by the Defendants herein that a suit will be dismissed where there had been inordinate and inexcusable delay that prejudiced or had potential to prejudice a defendant.

7. The Plaintiffs failed to comply with the court directions relating to the preparation of the suit for trial and also to oppose the present application. There was therefore inordinate and inexcusable delay on their part in the prosecution of the suit herein. The same had caused and continued to cause prejudice to the Defendants. Indeed, the suit herein was filed in 2015. Five (5) years had since passed and there were therefore high chances of witnesses forgetting what exactly transpired more than five (5) years ago.

8. A case belongs to a plaintiff. It is his responsibility to progress his matter to ensure that the same is concluded expeditiously as is contemplated in Section 1A, 1B and 3A of the Civil Procedure Rules and Article 159 (2) (b) of the Constitution of Kenya. A plaintiff cannot move at the pace of a defendant. The onus therefore lies with a plaintiff to comply with courts' directions in respect of progressing a matter for hearing.

9. Litigation has to come to a close to prevent the abuse of court process and this was one suitable case where the court was called upon to act decisively to avoid the Sword of Damocles hanging over the Defendants' heads indefinitely.

DISPOSITION

10. For the foregoing reasons, the upshot of this court's decision was that the Defendants' Notice of Motion application dated 14th August 2019 and filed on 22nd August 2019 was merited and the same is hereby allowed as prayed.

11. It is so ordered.

DATED and DELIVERED at NAIROBI this 30th day of April 2020.

J. KAMAU

JUDGE