



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 84 OF 2016

RICHARD ODENYO.....APPELLANT

VERSUS

ETHICS & ANTI CORRUPTION COMMISSION..... RESPONDENT

RULING

1. In the Notice of Motion dated 15th October 2018, the defendant (hereinafter the applicant) seeks that the plaintiff's suit be dismissed with costs for want of prosecution.

The application is mainly anchored on grounds that since the institution of the suit by way of a plaint on 21st March 2014, the plaintiff has not taken any step towards its prosecution; that there is inordinate delay in the prosecution of the suit with the result that the suit has been hanging on the applicant's head without any indication that it will be heard to finality; that if the suit is dismissed, no prejudice will be occasioned to the plaintiff since it is clear that he has lost interest in prosecuting the same. These grounds are replicated in the depositions made on 15th October 2018 in the supporting affidavit sworn by *Ms Viola Ocharo* learned counsel for the applicant.

2. The application is opposed through a replying affidavit sworn on 2nd November 2018 by *Mr. Dennis Odero Osiemo*, learned counsel for the plaintiff/respondent. In his affidavit, learned counsel admitted that the suit had not been fixed for hearing since it was filed on 21st March 2016. He took full responsibility for the delay in prosecuting the suit. He explained that he had instructed his clerk *Mr. Cliff Ougo* to set down the suit for hearing but unknown to him, the clerk passed on in November 2016 without having executed those instructions; that the plaintiff has been eager to have the suit prosecuted and should not be punished by having the suit dismissed because of failings of his advocate; that the plaintiff should be given another chance to have his suit heard because this will not occasion any prejudice to the defendant.

3. When the application came up for hearing on 15th October 2018, both parties agreed that the application be canvassed by way of written submissions. The applicant filed its submissions on 12th November 2018 while those of the respondent were filed on 28th November 2018.

4. I have carefully considered the application, the affidavits on record, the written submissions filed by both parties and the authorities cited. I have also perused the court record.

5. The law governing dismissal of suits for want of prosecution is found in *Order 17 Rule 2* of the *Civil Procedure Rules (the Rules)* which states as follows:

“(1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.”

6. From the above provision, there is no doubt that where no action has been taken in a suit for over one year, the court has wide discretion in deciding whether or not to dismiss a suit for want of prosecution taking into account the facts and circumstances of each case. However, the court's discretion must be exercised judiciously in accordance with established legal principles and not arbitrarily or capriciously.

7. The test to be applied in applications of this nature was laid down in the case of *Ivita V Kyumbu, [1984] KLR 441* in which *Chesoni J* (as he then was) stated as follows:

“The test applied by the courts in an application for the dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and, if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff’s excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time. It is a matter in the discretion of the court.”

8. From the foregoing, it is evident that the most important consideration the court should have in mind in deciding how to exercise its discretion under *Order 17 Rule 2* of the *Rules* is whether the plaintiff has given sufficient cause for the delay and whether the delay is so inordinate as to impede the fair trial of the action. If justice can still be done to the parties despite the delay, the court should consider sustaining the suit on terms that will ensure its speedy disposal instead of dismissing it.

9. In this case, it is not disputed that since pleadings closed on or about mid May 2016, the plaintiff has not taken any step towards prosecution of the suit. The explanation given for the delay of about two years is not entirely satisfactory because even if the court were to accept *Mr. Osiemo’s* claim that the clerk to who he had assigned the duty of fixing the suit for hearing died in November 2016, no good reason has been given for the plaintiff’s inaction from November 2016 till the date the application was filed. Had the plaintiff and/or his counsel been proactive and diligent, they would have discovered in good time that *Mr. Cliff Ougo* had not set down the suit for hearing and would have taken remedial action instead of waiting to be awakened from their apparent slumber by the instant application.

10. Be that as it may, I have considered the nature of the plaintiff’s claim against the applicant and the length of the delay. It is my considered view that the wider interests of justice would be better served if the plaintiff was given another chance to prosecute his suit so that the same can be determined on merit. In making this finding, I have taken into account the fact that there is no indication from the record that the delay in question is likely to compromise the fair trial of the action or that sustaining the suit would occasion the applicant any prejudice that cannot be ameliorated by an award of costs.

11. Having weighted the competing interests of the parties and bearing in mind the constitutional imperatives that require courts to administer substantive justice to parties before them so that disputes are determined on merit and the constitutional principle of access to justice, I am minded to exercise my discretion in favour of the plaintiff by sustaining the suit on conditions that would ensure its expeditious disposal. I therefore decline to allow the application on condition that the plaintiff will prosecute the suit within 6 months from today’s date in default of which it will stand dismissed with costs to the applicant.

12. The applicant is awarded costs of the application assessed at KShs.20,000 to compensate it for any prejudice it may have suffered for the plaintiff’s long delay in prosecuting the suit.

It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI this 31st day of January, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Ms Kenduiwa holding brief for Ms Oncharo for the defendant

No appearance for the plaintiff

Mr. Salach: Court Assistant