



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL CASE NO. 27 OF 2015

THE MONARCH INSURANCE COMPANY LTD.....PLAINTIFF/RESPONDENT

VERSUS

JOSEPH NJENGA MAINA.....DEFENDANT/APPLICANT

RULING

1. Before me is a Notice of Motion dated **29th November, 2017**. It was filed by the firm of **Eboso & Company Advocates** on behalf of the Defendant for the dismissal of this suit for want of prosecution pursuant to **Section 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, Order 17 Rule 2(1) and (3), and Order 51 Rule 1 of the Civil Procedure Rules 2010**, on the grounds that the suit was filed on **28 May 2015** and since **29 November, 2016** when the matter was fixed for mention for purposes of taking directions, the Plaintiff has not taken any step to prosecute their case. It was thus posited by the Defendant that the plaintiff has lost interest in prosecuting the suit.
2. The application was supported by the affidavit of **Joseph Njenga Maina** annexed thereto, sworn on **29th November, 2017**, in which it was averred that the Plaintiff instituted this suit against the Defendant on **28th May, 2015**; and that subsequent thereto, the plaintiff's advocates fixed the suit for mention on **29th November 2016** subsequent to which it has not taken any steps to prosecute to date. It was further averred by **Mr. Njenga** that, since plaintiff has failed to make any step in this suit for more than one year, the application ought to be allowed.
3. The application was opposed by the Plaintiff, who relied on the Replying Affidavit of its claims and legal services manager, **Philomena Theuri**, sworn on **5th June 2018** together with the annexures thereto. It was the averment of **Ms Philomena** that a suit, **Machakos HCCC 5 of 2015** was filed by the estate of the deceased plaintiff and the defendants are unknown to the plaintiff hence an application to stay the suit was filed whereupon the court directed that the file be brought to court for directions but however the same was not done and that it would be prejudicial if the suit were to be dismissed as prayed for by the Defendant in the prevailing circumstances.
4. It was further averred that the suit raises triable issues and it is in the interest of justice that the same proceeds for hearing of the substantive case.
5. The application was canvassed by way of written submissions. The Plaintiff's written submissions were filed herein on **4th December, 2018** while the Defendant's written submissions were filed on **14th November 2018**. In their written submissions, the Defendants relied on the case of **Ivita vs. Kyumbu [1984] KLR** for the proposition that there is no order for consolidation of the suits as no such order has been annexed to the replying affidavit. Further there is no indication of any efforts made by the plaintiff to locate the file and there is no indication that the court file was missing. Counsel submitted that no cause has been tendered to show why the suit should not be dismissed.
6. The Defence Counsel urged the Court to dismiss the suit with costs for the unexplained delay is prejudicial to the defendant.
7. The Plaintiffs, in their written submissions dated **4th December, 2018**, were of the position that the defendant is well aware that the file could not be traced and therefore the application for dismissal ought to be dismissed with costs. Their Counsel relied on and reiterated the averments set out in the Replying Affidavit and cited the case of **Azhr Mohammed Sheikh & 8 Others v Velji Narshi Shah & Another (2017) eKLR**.
8. I have given due consideration to the application, the grounds relied on as set out on the face of the Notice of Motion itself and the affidavits filed in respect thereof, as well as the written submissions filed herein. It is undisputed that that this suit was filed on **28th May, 2015** and that it was precipitated by a dispute between the Plaintiffs, who is the insurer of the Defendant.

9. It was the contention of the Plaintiff that pursuant to the cover for Third Party Risks, the plaintiff is not liable to indemnify the defendant for death and or injury to passengers and yet the defendant vide Civil Suit 5 of 2015 sought compensation to injury occasioned to a passenger, that the plaintiff refused to honour. Being aggrieved by the Defendant's said conduct, the Plaintiff commenced the instant suit. The record further shows that there is no action in this suit. The sole issue for my determination is whether this suit ought to be dismissed for **want of prosecution**.

10. On whether or not this suit ought to be dismissed for want of prosecution, **Order 17 Rule 2 of the Civil Procedure Rules**, states that:

"(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);

(4) The Court may dismiss the suit for non-compliance with any direction given under this order."

11. The defendant has taken a step to move the Court for dismissal of the suit where no step has been taken by the plaintiff for one year. The court record is silent on steps taken since filing the instant suit and therefore for purposes of **Order 17 Rule 1(1) and (3) of the Civil Procedure Rules**, the suit is ripe for dismissal for want of prosecution as sought by the Defendant. Nevertheless, it is now trite that even where delay is proved, the Court can still excuse the same if the interest of justice so dictates. This was poignantly expressed by the Court of Appeal in **Ivita vs. Kyumbu [1975] eKLR** thus:

"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."

12. The Defendant has demonstrated that over 12 months have elapsed since the suit was filed by the Plaintiff. The question to pose is whether that delay is prolonged; and whether there is a reasonable justification for the delay. No doubt the delay is prolonged, for it goes beyond the one year that is provided for in **Order 17 Rule 2(1) of the Civil Procedure Rules**. It is noteworthy that in the Plaintiff's Replying Affidavit, no effort was put into explaining the delay.

13. In the premises, I am not satisfied that a plausible explanation has been given by the Plaintiff for the delay, which was largely challenged by the defendant. Moreover, there was no indication of what prejudice would be visited on the plaintiff.

14. In **Agip (Kenya) Limited-v-Highlands Tyres Limited [2001] KLR 630**, court stated that:

"Where a reason for the delay is offered, the court should be lenient and allow the Plaintiff an opportunity to have his case determined on merit. The court must also consider whether the Defendant has been prejudiced by the delay."

15. From the Replying Affidavit of the Plaintiff it has transpired that there is in existence a Civil Suit namely **Machakos High Civil Case No. 5 of 2015** where the claimants are seeking damages arising from a road traffic accident involving motor vehicle registration **No. KAM 997 Z** allegedly insured by the present Plaintiff. The present Plaintiff through its advocates had sought to stay that particular suit pending the determination of the present suit. It seems that particular application is still pending. The gist of the Plaintiff's case herein seems to be that it wants to obtain a declaratory order to the effect that it is not bound to compensate persons who are alleged to have suffered damage as a result of accidents involving motor vehicle Registration **No. KAM 997Z** said to belong to the Defendant. Hence the Defendant's present application appears intended to steal the thunder from under the Plaintiff and thereafter obliterate its opportunity to repudiate liability in terms of the insurance policy with the defendant. Even though the Plaintiff has not offered a satisfactory explanation for the delay in prosecuting the suit, I am inclined to exercise my discretion and give it a chance to prosecute the case to conclusion so that each party is accorded an opportunity to ventilate their cases. The Defendant's application might become counter productive in the sense that a determination of this suit might help to unlock the issues in **Machakos HCC No. 5 of 2015** regarding the question of who is to compensate the accident victims as between the Plaintiff and the Defendant. Hence sustaining the plaintiff's suit is the best course of action and that the Plaintiff will be given timelines within which to set down the suit for hearing.

16. In view of the foregoing observations, I find the Defendant's application dated 29/11/2017 lacks merit. The same is dismissed with no order as to costs. The Plaintiff is hereby ordered to ensure that it sets down the suit for hearing within the next sixty (60) days failing which the suit stands dismissed for want of prosecution.

It is so ordered.

Dated and Delivered at Machakos this 30th day of May, 2019.

D. K. KEMEI

JUDGE