



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 94 OF 2010**

**PETER KIMANI RUA (CHAIRMAN)**

**NANCY NYAMBURA (TREASURER)**

**MARTIN KANG'ETHE (SECRETARY)**

**ALL OF KIARUGATHI SELF HELP GROUP.....APPELLANTS**

**VERSUS**

**PETER KAMANDE GITHUKU.....1<sup>ST</sup> RESPONDENT**

**PETER NJUGUNA MBURU.....2<sup>ND</sup> RESPONDENT**

**JOSEPH KARANJA WAINAINA.....3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

The appellants herein filed this appeal against the ruling dated 2<sup>nd</sup> March, 2010 on the second Respondent's Notice of Motion dated the 28<sup>th</sup> day of October, 2009 by Hon. L. W. Wachira Mrs., Resident Magistrate in Thika in civil case number 861 of 2005.

In the said application, the applicant sought for the dismissal of the suit for want of prosecution plus the costs of both the application and the suit. The application was made on the grounds that, the Plaintiffs/Appellants have not bothered to set down the case for hearing for a period of one year since it was last in court on 4<sup>th</sup> November, 2008, that the delay to prosecute the suit is prejudicial to the 2<sup>nd</sup> Respondent and that the Appellant had lost interest in his case.

In the affidavit annexed to the application sworn by the 2<sup>nd</sup> respondent on 28<sup>th</sup> October, 2009, he avers that, the suit was filed on the 20<sup>th</sup> day of June, 2005 and he filed a defence on the 28<sup>th</sup> July, 2005. That the suit was set down for hearing on the 26<sup>th</sup> June, 2007 only for the appellant to apply for adjournment on the material date. He further avers that the case was fixed for hearing on 4<sup>th</sup> November, 2008 when again the appellant was not ready to proceed. That thereafter, the Appellant did not bother to prosecute the case for a period of one year since it was last in court. He avers that the appellant had lost interest in the case and the delay in prosecuting the same has prejudiced him.

The Appellants opposed the application aforesaid by way of a replying affidavit sworn by Peter Kamau Rua on 1<sup>st</sup> day of February, 2010 in which he averred that the application is a sham and an abuse of the court process in that the same had been brought prematurely as there was a similar application dated the 26<sup>th</sup> August, 2009 by the first Respondent which was withdrawn on the 13<sup>th</sup> October, 2009, when the same came up for hearing.

He deponed that three (3) months had not lapsed since the last time the matter was last in court on the 28<sup>th</sup> October, 2009 and when the application dated 28<sup>th</sup> October was filed. He averred that the 2<sup>nd</sup> Respondent had perjured himself in the supporting affidavit by stating that a period of one year had lapsed since the matter was last in court yet he and his counsel were in court on 13<sup>th</sup> October, 2009. That the 2<sup>nd</sup> Respondent has come to court with unclean hands as he has not complied with the court orders made on 18<sup>th</sup> October, 2005 where he was ordered to file another defence within 7 days after his application was heard on 4<sup>th</sup> August, 2005.

The Appellant also filed a notice of preliminary objection dated 3<sup>rd</sup> December, 2009 to the 2<sup>nd</sup> defendant's application dated the 28<sup>th</sup> day of October, 2009 in which the following grounds are raised;

1. That three (3) months had not lapsed since the matter was last in court on 13<sup>th</sup> October, 2009.
2. The 2<sup>nd</sup> Respondent's application is an abuse of the court process as the 1<sup>st</sup> Respondent had filed a similar application dated the 2<sup>nd</sup> day of August, 2009 which he later withdrew.
3. That the honourable court's diary for the year was full and no hearing date could be fixed.
4. That the 2<sup>nd</sup> Respondent had not complied with the court orders of 18<sup>th</sup> October, 2005 to file another defence within seven (7) days and judgment should be entered as per the appellant's request for judgment filed in court on the 15<sup>th</sup> November, 2007.

The 1<sup>st</sup> Defendant did not file any response to the application.

The Learned Magistrate heard both the preliminary objection and the application and dismissed both on 22<sup>nd</sup> day of December, 2009 and 2<sup>nd</sup> day of March, 2010 respectively. The appeal herein is against the ruling dated 2<sup>nd</sup> March, 2010 to the application and therefore the court shall confine itself to the same. In their submissions in support and in opposition to the application, counsels for the respective parties substantially reiterated the contents of their affidavits which this court has already set out in the introductory part of this judgment.

In her ruling the Learned Magistrate in dismissing the application argued that the date of 13<sup>th</sup> October, 2009 was taken by the 1<sup>st</sup> Respondent for their application to dismiss the suit for want of prosecution and not by the Appellants and the matter was not coming up for main hearing on the said date and therefore, that date cannot be said to be the date when the suit was last in court.

Secondly, the Learned Magistrate dismissed the Appellant's argument that the 2<sup>nd</sup> Respondent ought to have objected to the withdrawal of the 1<sup>st</sup> Respondent's application or filed his own application to be heard together with that of the 1<sup>st</sup> Respondent reasoning that, each party has been sued individually and therefore at liberty to defend their respective claims against them in the manner they think best.

On the application itself, she observed that the suit was in court for hearing on the 26<sup>th</sup> June, 2007 and not even on 4<sup>th</sup> November, 2008 as stated by the 2<sup>nd</sup> Respondent, which was almost a period of three (3) years and the Appellant had not bothered to fix it for hearing and no explanation had been given for the delay.

She allowed the application and dismissed the appellant's suit as against the 2<sup>nd</sup> Respondent for want of prosecution.

The ruling is the subject of the appeal herein, which appeal was filed by the Appellant on the following grounds;

1. That the Learned Magistrate erred in law in proceeding to dismiss the Appellant's suit for want of prosecution taking into account that three (3) months had not lapsed since suit was last in court
2. The Learned Magistrate erred in law in allowing the 2<sup>nd</sup> Respondent's application dated 28<sup>th</sup> October, 2009 to dismiss the suit for want of prosecution taking into account that there was a similar application by the 1<sup>st</sup> respondent dated 26<sup>th</sup> August 2009 which had been withdrawn barely fifteen(15) days earlier.
3. That the learned Magistrate erred in law and in fact in failing to appreciate the fact that the first respondent's application was an abuse of the process of court.

When the appeal came up for hearing, parties agreed to canvass the same by way of written submissions, which the court has duly considered alongside the grounds of appeal.

I propose to consider the three grounds of appeal together. The appeal herein is against a ruling delivered on the Notice of Motion dated the 28<sup>th</sup> October, 2009, which sought orders for dismissal of the suit for want of prosecution. The said application was brought under Order XVI Rule 5 of the Civil Procedure Rules (now repealed) and Section 3A of the Civil Procedure Act.

The same was based on the ground that the Appellant had not bothered to set down the suit for hearing for a period of one year since it was last in court on the 4<sup>th</sup> November, 2008 which delay is prejudicial to the 2<sup>nd</sup> Respondent.

The Appellant has argued that the Learned Magistrate erred in allowing the application whose resultant effect was to dismiss the suit for want of prosecution, for the reason that the matter was in court on the 13<sup>th</sup> October, 2009 and the application by the 2<sup>nd</sup> Defendant seeking to dismiss the suit was filed on the 29<sup>th</sup> October, 2009. The Appellants contend that the 2<sup>nd</sup> Respondent perjured by stating that one year had lapsed since the matter was last in court yet he and his advocate were in court on 13<sup>th</sup> October, 2009.

The Appellants' other argument is that the Learned Magistrate erred in allowing the application dated 28<sup>th</sup> October, 2009 taking into account that there was a similar application by the 1<sup>st</sup> Respondent dated 26<sup>th</sup> August, 2009 which had been withdrawn barely fifteen(15) days earlier. They contended that the 2<sup>nd</sup> Respondent did not object to the withdrawal of the 1<sup>st</sup> Respondent's application and therefore the Learned Magistrate failed to appreciate the fact that the first Respondent's application was an abuse of the court process.

The court has perused the provision under which the application was brought, Order XVI Rule 5 which provides;

If within three months after

**a. The close of pleadings; or**

**b. ....**

**c. The removal of the suit from the hearing list; or**

**d. The adjournment of the suit generally, the plaintiff, or the court on its own motion on notice to the parties does not set down the suit for hearing, the defendant may either set the suit down for hearing or apply for its dismissal.**

The Appellant has submitted that three months had not lapsed since the matter was last in court. The court has perused the record of proceedings and has taken note of the fact that the matter was in court on 13<sup>th</sup> October, 2009 for the hearing of an application dated the 26<sup>th</sup> August, 2009 during which date, the said application was withdrawn by the first Respondent.

Subsequently, the 2<sup>nd</sup> Respondent filed the application dated 28<sup>th</sup> October, 2009 which came up for hearing on 8<sup>th</sup> December, 2009. According to the appellant’s counsel, the matter was last in court on 13/10/2009 and therefore, three months had not lapsed by the time the 2<sup>nd</sup> Respondent brought his application dated 28<sup>th</sup> October, 2009. Looking at the wordings of Order XVI Rule 5 it talks about removal of the suit from the hearing list. The court notes that on the 13/10/2009 the suit had not come up for hearing of the main suit but for the first Defendant’s application seeking to dismiss the suit. It cannot therefore be said that it was in court for hearing contrary to the submissions by counsel for the appellant. In any event, the court had been moved by the first Defendant with an application to dismiss the suit and not by the Appellant.

The record will also show that before 13/10/2009, the suit was last in court for hearing on the 26<sup>th</sup> day of June, 2007 when it was stood over generally which was almost two years to 13/10/2009.

On whether the Learned Magistrate erred in allowing the application without taking into account that there was a similar application filed by the 1<sup>st</sup> Defendant but which was withdrawn barely 15 days earlier, I concur with the Learned Magistrate’s position that each party has been sued individually and have filed separate defences and therefore, each is at liberty to defend the claim against them in the manner they think best. It was therefore in order for the 2<sup>nd</sup> Respondent to proceed in the manner that they did and their application cannot be said to have been an abuse of the court process. As rightly concluded by the Learned Magistrate, the Appellant appears to have lost interest in the suit.

The principles that should guide the court in considering an application to dismiss the suit for want of prosecution have been espoused in various decisions. In the case of *Agip (Kenya) Limited Vs. Highlands Tyres Limited (2001)KLR 630* the court outlined three principles as being;

**Delay must be inordinate, the inordinate delay is inexcusable and prejudice that the defendant is likely to suffer.**

The court has keenly perused through the affidavit in support of the application and I have not seen any plausible explanation for the delay in prosecuting the suit. The Appellants in an attempt to explain the delay have blamed the 2<sup>nd</sup> Defendant for failure to file another defence pursuant to the court order made on the 18<sup>th</sup> October, 2005. In my view, there was no justification on the part of the Appellants for their failure to move the court if they felt that the 2<sup>nd</sup> Respondent was not complying with the court order. In any event, the 2<sup>nd</sup> Respondent had been given 7 days within which to comply. The Appellants ought to have applied for interlocutory judgment and not to sit and do nothing about it for close to four years.

In any event, a further perusal of the record shows that the appeal was dismissed on 16<sup>th</sup> June, 2010 by the court on its own motion for want of prosecution. Though the Appellants filed an application dated the 25<sup>th</sup> day of August, 2016 seeking to set aside the dismissal orders made on the said date, that application was not prosecuted and it remains on record. As it stands now, there is no appeal on record, the same having been dismissed on the 16<sup>th</sup> June, 2010.

The court finds that the appeal has no merits and the same is dismissed with costs to the Respondents.

**Dated, Signed and Delivered at NAIROBI this 25<sup>TH</sup> Day of JULY, 2019.**

.....

**L. NJUGUNA**

**JUDGE**

**In the Presence of**

..... For the Applicants

..... For the Respondents