



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 44 OF 2017

ZWIGIL MONARI..... PLAINTIFF

-VERSUS-

PLAN INTERNATIONAL INC.....DEFENDANT

RULING

Before me, is the Notice of Motion dated the 29th day of June 2016, seeking dismissal of the suit for want of prosecution and costs of both the application and the suit.

The application is premised on the grounds set out on the body of the same and its supported by the annexed affidavit sworn by David N. Njoroge on the 29th June, 2016. It is averred that the suit was instituted on the 25th August 2014. The defendant entered appearance on the 15th September 2014 and thereafter a defence was filed on the 29th September 2014.

That the matter was scheduled for pre trial directions on the 31st March, 2015 when it was not listed, and since then, the plaintiff has not taken any steps to prosecute the case. It is further averred that the pendency of the suit is causing great anxiety to the defendant and its only fair that the suit be dismissed for want off prosecution.

The application proceeded exparte as the plaintiff failed to file any response. The court has considered the application and the affidavits on record.

The application has been brought under order 17 Rule 2 of the Civil Procedure Rules which provides;

“Any party to the suit may apply for its dismissal as provided in sub – rule 1”.

And sub Rule 1 provides that;

“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 show to its satisfaction, may dismiss the suit.

The record shows that the last action in this matter was taken on 29th September 2014 when the defence was filed. It is now over three since.

The test for dismissal of a suit for want of prosecution is stated in the case of **Ivita Vs Kyumba (1984) KLR 441** as follows;

“The test is whether the delay is prolonged and inexcusable and if it is, whether justice can be done despite such delay. Justice is justice to both the plaintiff and the 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 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.

On whether the delay is prolonged and inexcusable and whether justice can still be done despite the delay, it is this court’s observation that the delay is long and the same has not been explained by the plaintiff in his failure to file a response to the application despite having been served.

The upshot of it is that, I find merits in the application and I allow the same. The defendant shall have the costs of both the suit and the application.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 30th day of January, 2018

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L. NJUGUNA

JUDGE

In the presence of:-

.....**FOR THE PLAINTIFF**

.....**FOR THE DEFENDANT**