

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 208 OF 2014

SUPERIOR HOMES (KENYA) LIMITED.....PLAINTIFF

VERSUS

ERICK ALIGULA MAGOLO.....DEFENDANT

RULING

This case was filed on 11th July, 2014. As required of the plaintiff there was the verifying affidavit, a witness statement and demand letters in compliance with Order 3 Rule 2 of the Civil Procedure Rules.

Upon service of summons to enter appearance the defendant also filed a defence with the defendant's witness statement on 21st August, 2014. There is also the defendant's list of documents numbering 19 which documents were however not attached to the defence filed.

On 3rd September, 2014 the plaintiff filed a supplementary bundle of documents dated 29th August, 2014. The document cited were not attached to the said list. On 13th July, 2015 the defendant filed an amended list of documents where several other documents were annexed, I believe in compliance with the requirement of Order 7 Rule 5 of the Civil Procedure Rules. I observe in passing that both parties were not in strict compliance with the provisions of the Civil Procedure Rules requiring all relevant documents to be filed when the plaint and the defence respectively are filed. The determination of this application shall not however turn on that observation.

There is now before me an application by the defendant by way of Notice Of Motion dated 30th and filed on 31st January 2017 seeking the dismissal of the suit for want of prosecution. The grounds relied upon appear on the face of the application alongside a supporting affidavit sworn by the advocate for the defendant. The application is opposed and there is a replying affidavit sworn by the advocate for the plaintiff. Both counsel have filed submissions to address the application.

It is now established by way of several decided cases that, in deciding whether or not a suit ought to be dismissed for want of prosecution, the party seeking such an order has a duty to show that the delay is inordinate and inexcusable, or that the defendant is likely to suffer prejudice as a result of that delay.

Annexed to the reply by the plaintiff are copies of letters addressed to the defendant's advocates inviting them to the registry to take a hearing date. That in itself is an overt act on the part of the plaintiff to have the matter determined by way of a hearing.

Going by the record in the file, there is no indication that the parties have complied with Order 11 of the Civil Procedure Rules in that the court has not certified the matter ready for hearing. That notwithstanding, it is now accepted that dismissal of a suit is a draconian step which should not be lightly made. – see **Chandaria Industries Limited Vs. Sonal Holdings (K) Limited & Another (2014)e KLR**. If there is an opportunity for the plaintiff to remedy any default alleged, that opportunity should be extended to the plaintiff.

Further, the defendant has a duty to demonstrate that any delay attributed to the plaintiff is prejudicial or likely to be prejudicial to the defendant and in that case, the burden lies upon the defendant to demonstrate the same. – see **John Harun Mwau vs. Standard Limited & 2 others (2017) e KLR**.

I am mindful of the requirement of a fair trial and that the courts should always tilt in favour of sustaining a suit rather than dismissing the same. I am also mindful of the fact that the defendant being a party to the suit has the same obligation as the plaintiff to list the matter for hearing. I am also aware of the systemic challenges of non-availability of hearing dates in the court diary which have been alleged by the plaintiff.

Having considered the authorities cited which include **Invesco Assurance Company Limited vs. Maymuna Kassim & another (2007) e KLR, East African Portland Cement Company Limited vs. Tausi Assurance Company Limited (2004) e KLR** I am persuaded that the delay is not inordinate and whatever delay that is alleged has been satisfactorily explained by the plaintiff. Above all no prejudice has been visited upon the defendant.

It is clear to me that the application is misplaced and therefore dismissed. The parties shall now comply with Order 11 of the Civil Procedure Rules to facilitate the hearing of this case.

Costs in the cause.

Dated, signed and delivered at Nairobi this 22nd day of May, 2018.

A. MBOGHOLI MSAGHA

JUDGE