



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL CASE NO. 551OF 2010**

**KENNEDY OMORO MOSOTI.....PLAINTIFF/RESPONDENT**

**VERSUS**

**MOHAN GALOT.....DEFENDANT/APPLICANT**

**RULING**

1. The application dated 30<sup>th</sup> August, 2017 seeks orders that the Plaintiff's suit be dismissed for want of prosecution.
2. It is stated in the grounds and the affidavit in support of the application that the Plaintiff has not taken any steps to prosecute this suit for over six years. It is pointed out that on 6<sup>th</sup> February, 2015, a part heard application for dismissal of suit was withdrawn by the Defendant after the Plaintiff in his response stated that the court file had gone missing. That despite the court file having been traced, the Plaintiff did not take any action in the matter
3. The application is opposed. It is stated in the replying affidavit that the Plaintiff fell ill in the year 2015 and has had prolonged and several visits in and out of hospital. It is further stated that the Plaintiff has gradually healed and is interested in prosecuting his case. Order 17 rule 2 Civil Procedure Rules provides 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 dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.**

**(2) .....**

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

4. The principles governing dismissal of a suit for want of prosecution are that delay must be inordinate, the inordinate delay is inexcusable and the Defendant is likely to be prejudiced. Chesoni, J. (as he then was) applied these principles in the case of **Ivita v. Kyumbu [1984] KLR, 441**. He stated as follows in the said case:-

**“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. 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 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.”**

5. The delay in the case at hand is inordinate. No steps have been taken by the Plaintiff to prosecute the same. The medical chit exhibited by the Plaintiff reflects that he has been attending a medical facility since the year 2015. It is not clear from the said document whether the Plaintiff was unable to attend to other matters. Be as it may, this court is inclined to give the Plaintiff a chance to prosecute his case.
6. The upshot is that the application is dismissed. With costs to the Defendant. The suit to be listed for directions within 30 days from the date hereof in default the suit to stand dismissed

Dated, signed and delivered at Nairobi this 28<sup>th</sup> day of June, 2018

**B.THURANIRA JADEN**

**JUDGE**