



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 574 OF 2012**

**HON. ENG. NICHOLAS GUMBO.....PLAINTIFF**

**VERSUS**

**THE STANDARD LIMITED.....1<sup>ST</sup> DEFENDANT**

**ISAAC ONGIRI.....2<sup>ND</sup> DEFENDANT**

**DAVID OCHAMI.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application for determination before this court is the defendants' Notice of Motion dated 27<sup>th</sup> February 2018 seeking dismissal of the plaintiff's suit for want of prosecution.
2. The application is premised on grounds stated on its face and is supported by an affidavit sworn by *Ms. Caroline Cheruiyot*, the 1<sup>st</sup> defendant's legal officer. It is the defendants' contention that the plaintiff has failed to comply with directions issued by *Hon. Mbogholi Msagha* in a ruling delivered on 6<sup>th</sup> October 2015 in which the parties were ordered to comply with pre-trial steps required to have the case listed for hearing; that two years have now lapsed and the plaintiff is yet to set down the suit for hearing; that the continued delay in the prosecution of the case is prejudicing the defendants as it will be difficult to get witnesses to give evidence after such a delay; that the plaintiff is not interested in pursuing his claim and it should be dismissed for want of prosecution.
3. The application is opposed through the replying affidavit sworn by the plaintiff's advocate *Mr. Alfred Deya* on 26<sup>th</sup> March 2018. In his affidavit, *Mr. Deya* denied that the plaintiff had lost interest in the case and deposed that the plaintiff has always been desirous of prosecuting the same; that in a bid to comply with *Justice Mbogholi's* orders of 6<sup>th</sup> October 2015, he wrote to the court's Deputy Registrar on 15<sup>th</sup> February 2016 requesting for a mention date for pre-trial directions; that though no response was received from the Deputy Registrar, he continued to follow up the matter and this is when he learnt that the court file had been misplaced at the registry; that he then wrote to the Deputy Registrar requesting for his assistance in tracing the file but the Deputy Registrar continued to be unresponsive. In his view, the application was not merited and should be dismissed with costs.
4. By consent of the parties, the application was canvassed by way of written submissions. The defendants' submissions were filed on 23<sup>rd</sup> May 2018 while those of the plaintiff were filed on 28<sup>th</sup> May 2018.
5. I have considered the application, the affidavits on record, the rival submissions and the authorities cited. I have also considered the court record.
6. The court record reveals that this case was filed on 3<sup>rd</sup> December 2012. On 28<sup>th</sup> January 2013 the defendants filed a preliminary objection challenging the court's jurisdiction to entertain the suit by virtue of *Article 34 (2) of the Constitution of Kenya 2010*. The last day the matter was in court prior to the filing of the instant application was on 6<sup>th</sup> October 2015 when a ruling on the preliminary objection was delivered by *Hon. Mbogholi J.* I therefore agree with the defendants' submission that it has been over two years since the plaintiff took any step to facilitate the hearing of the case.
7. The plaintiff has admitted this fact but has blamed the delay on failure by the Deputy Registrar to act on his advocates request to fix the case for mention for directions and the misplacement of the court file in the court registry.
8. *Order 17 Rule 2 of the Civil Procedure Rules* provides the legal framework for dismissal of suits for want of prosecution. It provides that the court may dismiss a suit for want of prosecution with notice to the parties or on application by either party if no application or step is taken in the matter for one year and no good cause is shown why the suit should not be dismissed.

9. From the above rule, it is clear that the court has wide discretion in deciding whether or not to dismiss a suit for want of prosecution. Needless to say, just like any other judicial discretion, the discretion to dismiss suits for want of prosecution should be exercised judiciously taking into account the facts and circumstances of each case. The court in *Ivita V Kyumbu, [1984] KLR 441* laid down the principles that should guide courts in the exercise of the aforesaid discretion when it expressed itself as follows:

***“The test applied by the courts in an application for the dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and, if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff’s excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time. It is a matter in the discretion of the court.”***

See also: *Mwangi S Kimenyi V Attorney General & Another, Civil Suit Misc No. 720 Of 2009.*

10. From the foregoing, it is clear that in the exercise of its discretion under *Order 17 rule 2 (1)* of the *Rules*, the court must first and foremost establish whether any step or application had been made by either party to the suit for a period of one year; the length of delay in question; whether the delay is inordinate or excusable; whether the delay impedes the fair trial of the action and whether justice can still be done despite the delay. If the court is satisfied that there is a good explanation for the delay and justice can still be done despite the delay, it should seek to sustain the suit instead of dismissing it.

11. I have considered the reasons advanced by the plaintiff for the delay in setting down the suit for hearing.

The claim that he had made efforts to fix the case for mention for directions is supported by the letter annexed to the supporting affidavit dated 15<sup>th</sup> February 2016. His further averment that there is a time that the court file was misplaced at the registry is not controverted by the defendants and it finds support in the letter addressed to the Deputy Registrar dated 9<sup>th</sup> November 2016 seeking assistance in locating the court file or directions regarding possibility of reconstructing the court file. It is however not clear when the court file became available in the court registry as this has not been disclosed by either of the parties.

12. In my view, the plaintiff has given a good and plausible explanation for the delay since he could not have fixed the suit for mention for direction or taken any other step if the court file was not available in the court registry. The misplacement of the court file which is the only explanation I have found reasonable and plausible for the delay complained about in this case was a matter which was beyond the plaintiff’s control.

13. Since the plaintiff has asserted that he is still willing and ready to prosecute his suit and the court file is now available, the interests of justice demand that he be given another chance to do so but on conditions which will ensure the expeditious disposal of the suit.

14. Consequently, I decline to dismiss the suit as prayed and grant the plaintiff a chance to prosecute his suit on condition that the suit is set down for hearing within the next 120 days from today in default of which it shall stand dismissed with costs.

Costs of the application will be costs in the cause.

It is so ordered.

**DATED, DELIVERED and SIGNED at NAIROBI this 27<sup>th</sup> day of June, 2018.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Mr Ndeya for the Plaintiff

Mr Kiptum h/b for Mr Gitonga for the Defendants

Mr Fidel Salach Court Clerk