



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 6 OF 2015

SWINSTONE WASIKE.....1ST PLAINTIFF/RESPONDENT

SAMUEL KIPKURUI2ND PLAINTIFF/RESPONDENT

- V E R S U S -

GENERAL MOTORS EAST AFRICA LTD.....1ST DEFENDANT/ APPLICANT

THE INSPECTOR GENERAL OF POLICE..2ND DEFENDANT/ RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD DEFENDANT/RESPONDENT

RULING

1) General Motors East Africa Ltd, the 1st defendant/applicant herein took out the motion dated 25/10/16, the subject matter of this ruling in which it sought for the following orders:

1. *That the plaintiffs suit against the 1st defendant be dismissed to want of prosecution.*
2. *That the costs of this application be provided for.*

2) The motion is supported by the affidavit of Anthony Musyoki. When served, with the motion, the plaintiffs/respondents filed a joint replying affidavit of Swinstone Wasike and Samuel Kipkirui as 1st and 2nd plaintiffs respectively to oppose the same. Learned Counsels appearing in this matter entered consent order to dispose of the motion by written submissions, which have been filed by both parties.

3) I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the application. I have also considered the rival submissions. The motion by the applicant on the face of it is asking for the dismissal of this suit for want of prosecution and secondly that the costs of this application be provided for.

4)The 1st applicant/defendant avers that the plaintiffs instituted this suit by way of the plaint dated 18th December 2014 and on 4th February 2015 the 1st applicant/defendant herein entered appearance vide the memorandum of appearance dated 28/10/15. Thereafter, the applicant on 18th February 2015 filed its statement of defence together with the supporting documents. The same were served upon the plaintiffs on 19th February 2015. Since then, there has been no activity in this suit by the plaintiffs, to set down the matter for hearing. The applicant avers that, this has been for a period of one year and 6 months from close of pleadings and shows conduct of negligence and indolence on the part of the plaintiffs. Therefore, it is in the best interest of justice that there must be an end to litigation.

5) The plaintiffs/respondents on the other hand aver that the applicants application is frivolous, vexatious and an abuse of the court process and is devoid of merit. That prior to this suit, there was an ongoing industrial dispute no. 294 of 2014 involving the present parties which was only concluded in their favour in February 2016. For this reason, the plaintiffs have now drawn their statement of issues and the pre-trial questionnaire under Order 1 Rule 2 of the Civil Procedure Rules. The plaintiffs avers that they have valid reasons as to why they have delayed the prosecution of the suit.

6) The power to dismiss a suit for want of prosecution is donated by Order 17 Rule 2 of the Civil Procedure Rules which allows the court on its own motion or on notice to the parties, where no action in a suit has been taken for one year; to either have the suit set down for hearing or apply to have it dismissed for want of prosecution.

7) Article 159 of the Constitution and Order 17 Rule 2(3), gives the court the discretion to dismiss the suit where; no action has been taken for one year and on application by a party, as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice, regard being to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay. This is what the case of **Ivita V Kyumba [1984] KLR 441** espoused that:

“The test applied by the courts in the application for 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 time. It is a matter of and in the discretion of the court.”

8) From the above decision, it is trite that the power to dismiss a suit or an action is a discretionary one which discretion must be exercised judiciously. In **Naftali Onyango v National Bank of Kenya [2005] eKLR**, the court reiterated the burden of proof a defendant seeking for dismissal of suit for want of prosecution must meet. Citing Salmon L.J. in **Allan V Sir Alfred MC Alphine and sons Ltd [1968] 1 ALL ER 543**, F. Azangalala J (as he then was) stated as follows:-

“The defendant must show:

i. That there had been inordinate delay. What is or is not inordinate delay, must depend on the facts of each particular case. These vary infinitely from case to case but it should not be too difficult to recognize inordinate delay when it occurs.

ii. That this inordinate delay is inexcusable. As a rule until a credible excuse is made out the natural inference would be that it is inexcusable.

iii. That the defendants are likely to be seriously prejudices by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff or between themselves and the plaintiff or between each of other or between themselves and third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule the longer the delay the greater the likelihood of prejudice at trial.”

9) The 1st defendant/applicant is saying that the delay by the plaintiffs/respondent is for a period of over 1 year and 6 months from the date of close of pleadings. Further that, the plaintiffs have unjustifiably refused and/or neglected to set down the matter for hearing. The plaintiffs/respondents on the other hand are saying that it contends that the delay is long and prolonged. However they have valid explanation for the delay which is that there was an ongoing Industrial dispute being Industrial Cause No. 294 of 2014 involving the present parties which was only concluded in their favour in February 2016. For this reason, the respondents beseech this court to allow the suit to proceed for hearing.

10) In light of the above, I am satisfied that the plaintiffs/respondents have explained to this court satisfactorily as to why this suit has not been prosecuted. This motion is therefore found to be unmeritorious. It is dismissed with costs abiding the outcome of the suit.

Dated, Signed and Delivered in open court this 18th day of August, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

.....for the Defendant