



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 34 OF 2009**

**JAMES B. KARUGU..... PLAINTIFF**

**-VERSUS-**

**AGA KHAN HEALTH SERVICES KENYA.....DEFENDANT**

**RULING**

Before me is a Notice of Motion Application dated 17<sup>th</sup> September, 2015 filed by the Defendant under the provisions of Order 17 Rule 2 (l) of the Civil Procedure Rules and section 3A of the Civil Procedure Act. The application seeks to have the suit filed by the Plaintiff dismissed for want of prosecution, costs of the application and costs of the suit be awarded to the Defendant.

The Application is based on the grounds on the face of the Application and the Supporting Affidavit of **S.J SAENYI** an advocate in conduct of the matter which grounds are that the suit has never been set down for hearing for more than three years. The Defendant avers that the matter was last in court on 24<sup>th</sup> October, 2012 and since then the Plaintiff has taken no step to fix the suit for hearing. It is the Defendant's contention that the Plaintiff has shown total lack of interest in prosecuting the suit.

In response to the application, the Respondent filed a Replying Affidavit sworn by **JAMES KARUGU**, the Plaintiff herein. The Plaintiff states that he instructed the firm of Muri Mwaniki & Wamiti Advocates to institute a suit against the Defendant for occupier's liability and medical negligence, which suit was filed on 23<sup>rd</sup> January, 2009. That the Defendant filed their Defence and raised a Preliminary Objection dated 19<sup>th</sup> February, 2010 which was dismissed on 24<sup>th</sup> June, 2010 and further that the Defendant applied to amend their defence via a Chamber Summons application dated 26<sup>th</sup> March, 2010 which application was allowed. The Plaintiff changed his Advocates to Muthoga Gaturu & Co. Advocates in October, 2012 who wrote to the Deputy Registrar on 11<sup>th</sup> April, 2014 requesting the matter to be listed down for directions. The matter was fixed for directions on 23<sup>rd</sup> October, 2014 and the Plaintiff states that his Advocate did not advise him on what transpired in Court on that date. The Plaintiff later appointed the firm of Kimani Richu & Associates Advocates to represent him.

Finally, the Plaintiff avers that the matter could not be certified ready for hearing before the court disposed off the Defendant's Preliminary Objection and the application to amend the Defence. That the last time the matter was in Court was on 23<sup>rd</sup> October, 2014 and the instant application was filed on 21<sup>st</sup> September, 2015 which difference in timelines falls short of the requisite one (1) year period for dismissal of a suit

The application was canvassed by way of oral submissions in court on 12<sup>th</sup> July, 2017 which I have considered together with the Affidavits of both parties. Dismissal of Suits for want of prosecution is

governed by **Order 17 Rule 2(1)** of the Civil Procedure Rules which 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 shown to its satisfaction, may dismiss the suit.”***

My perusal of the Court’s record reveals that the matter was listed for directions on 23<sup>rd</sup> October 2014 and on that date there was no appearance by either party and the Court adjourned with directions that the parties take a date at the registry. It is the Plaintiff who had requested for the matter to be listed down for directions via a letter dated 11<sup>th</sup> April, 2014 but on the date for the directions, the Plaintiff did not turn up in court neither did he thereafter take another date for the directions as advised.

I find that the allegation by the Plaintiff that his Advocate did not advise him of what transpired in court on that day as a mere excuse which does not hold water. It should be remembered that the suit belongs to the plaintiff and not the Advocate. The Plaintiff has failed to explain which steps he took to follow up the matter after the date it was last in court. In the case of **Habo Agencies Limited -vs- Wilfred Odhiambo Musingo [2015] eKLR** the Court of Appeal stated that it is not enough for a party in litigation to simply blame the advocate on record for all manner of transgressions in the conduct of litigation. Courts have always emphasized that the parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.

The allegations by the Plaintiff that the matter could not be certified ready for hearing as there was a pending Preliminary Objection and an application for amendment of Defence is baseless since the applications, as per the Plaintiffs Affidavit, had been dispensed with in the year 2010 and the matter was set for directions in the year 2014.

The test for dismissal of a suit for want of prosecution is stated in the case of **Ivita -v- Kyumba (1984) KLR 441**. The test was expressed as follows:

***“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 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.”***

Justice is justice to both the Plaintiff and the defendant and I find that the test in the case of **Ivita (supra)** as most suitable and applicable in this case. On whether the delay was prolonged and inexcusable and whether justice can still be done despite the delay, it is my observation that, even though the Plaintiff does not give a satisfaction explanation for the delay, the delay herein is not unreasonable. The fact that the Plaintiff wrote to the Deputy Registrar on 11<sup>th</sup> April, 2014 requesting for a date for directions shows that he is desirous in prosecuting the matter even though there was no appearance on the date the matter was listed for directions. The period between when the matter was last in court and when the present application was filed is less than an year.

I am alive to the principles of substantive justice as enshrined in the Constitution, and the circumstances of this case deserve a lenient exercise of discretion by the court in favour of sustaining rather than dismissing the suit. I find the delay herein was not inordinate or inexcusable and it is not such that it makes the suit incapable of being heard without causing prejudice to the Defendants.

Accordingly, I make the following orders: The Plaintiff should prosecute the suit within 6 months from today failing which the suit shall stand dismissed without the necessity of any party applying in that regard. The upshot is that the application dated 17<sup>th</sup> September, 2015 is hereby dismissed. Costs shall be in the cause.

It is so ordered

Dated, Signed and Delivered at Nairobi this **29<sup>th</sup>** Day of **September, 2017**.

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**L. NJUGUNA**

**JUDGE**

**In the Presence of**

..... for the Appellant

..... for the Respondent