



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT GARISSA

ELC CASE NO. 7 OF 2018

FATUMA FARAH HASSAN.....PLAINTIFF/RESPONDENT

VERSUS

ISSACK MAHAT GABOW.....1ST DEFENDANT/APPLICANT

ALI KASSIM QANSOI.....2ND DEFENDANT/APPLICANT

MANDERA COUNTY GOVERNMENT.....3RD DEFENDANT/APPLICANT

RULING

1. **Isaack Mahat Gabow** (the 1st Defendant/Applicant herein) filed an application dated 12th July 2021 seeking this Court to dismiss this suit for want of prosecution. The application is supported by the sworn affidavit of **Peter Odhiambo**, the Applicant's advocate who averred that the suit herein was last prosecuted on 31/1/2020 when the court ruled on the plaintiff's application dated 18/6/2019. The plaintiff/Respondent has failed to prosecute the matter for the last one year.

2. The application has been opposed by the Plaintiff/Respondent through a Replying Affidavit dated 19th December 2021 sworn by **Badhir Farah Hassan**, the plaintiff's attorney pursuant to a special power of attorney registered on 30th April 2018. He averred that they served an invitation to have a hearing date on 10th February 2020. On the said date, they sent their representative to take a hearing date which was fixed on 27th March 2020. That on the date fixed for hearing, the matter did proceed due to the closure of the courts as a result of the Covid-19 pandemic. That they were later served an invitation to fix a hearing date by the defendant. They proceeded to court on the date of the invitation i.e. 23rd November 2020 but no dates were issued due to the Covid-19 pandemic.

3. The parties sought to rely on the affidavit evidence as filed.

Analysis and Determination

4. I have considered the affidavits sworn by the parties herein and the court record. The Record shows that the matter has since proceeded for hearing. Two witnesses have since testified. The court delivered a Ruling on 31st January 2020 dismissing the plaintiff's notice of motion dated 18th June 2019. The plaintiff wrote an invitation for fixing a hearing dated on 10th February 2020. The same was however received on 27th February 2020. The record does not indicate whether a date was fixed for hearing on 27th March 2020. There is no indication of what transpired on that date. There is also no indication whether the invitation dated 16/11/2020 was received by the court or whether directions were issued on the same.

5. After the court issued its Ruling dated 31/1/2020. the next directions were in relation to this application.

6. The legal framework on dismissal of suits for want of prosecution is spelt out in **Order 17 Rule 2 of the Civil Procedure Rules** which provides as follows:

“2 (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 should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

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

(4) The court may dismiss the suit for non-compliance with any direction given under this Order.”

7. In **Mwangi Nedangi S. Kimenyi V Attorney General & Another**, the Court discussed the principles for dismissal of suits as follows;

“1. When the delay is prolonged and inexcusable such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties – the plaintiff, the defendant and any other third or interested part in the suit, lest justice should be placed too far away from the parties.

2. Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues:

1) whether the delay has been intentional and contumelious;

2) whether the delay or conduct of the plaintiff amounts to an abuse of the court;

3) whether the delay is inordinate and inexcusable;

4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the defendant; and

5) what prejudice will the dismissal cause to the plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.”

8. I have considered the affidavit evidence of the parties. I have also taken judicial notice of the advent of the Covid-19 pandemic and its effect to the dispensation of justice. Upon reporting of the first infection on 13th March 2020, Judiciary in conjunction with both the County and National Government undertook a series of actions to help control the spread of the disease through courts and to support continuity of service delivery. Gazette Notice No. 3137 of 2020 limited physical access to the court premises. On 1st July 2020 the Chief Justice launched the electronic filing of cases that heightened the use of technology during the pandemic. On 8th June 2020 the Chief Justice issued a statement for the resumption of open court sessions. The resumption was to commence from 15th June 2020 going forward.

9. With the brief history it is clear that the Court could not have proceeded through open court session on 27th March 2020. Court sessions resumed on 15th June 2020. The defendant allegedly sought to move the court through invitation dated 16th November 2020 but failed to do so. Was the delay therefore intentional and contumelious? In this case I think not. There had been attempts to set down the matter for hearing even with the advent of the Covid 19 pandemic.

10. The next test is whether the delay is one that gives rise to a substantial risk to fair trial likely to cause prejudice to the defendant. I have considered the actions of the plaintiff prior to the filing of the application. He was quick to set down the matter for hearing and had presented two witnesses who have since testified. The actions of the plaintiff are testament of his efforts in prosecuting the suit. The defendant has not highlighted the prejudice he has since faced with the delay. The court is intent to hearing parties on the merits of the case and only in exceptional cases would it dismiss a case without considering the merits. It would be draconian to therefore dismiss the suit at this stage.

11. The upshot of this court’s determination is that the Defendant’s notice of Motion dated 12th July 2021 lacks merit and the same is hereby dismissed with no Orders as to costs.

12. Parties are directed to fix the matter for Hearing on Priority basis.

13. It is so Ordered.

READ, DELIVERED AND SIGNED IN THE OPEN COURT AT GARISSA THIS 28TH JANUARY, 2022

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HON. E.C.CHERONO

ELC JUDGE

In the presence of:

1. Mr. Odhiambo

2. Respondent/Advocate: Absent

3. Ijabo: Court Assistant