



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 1063 OF 2014

MIRIAM WANGARI WAITARAPLAINTIFF

VERSUS

SAMUEL GITONGA WANJEMA.....1ST DEFENDANT

BRIDGE INTERNATIONAL ACADEMIES.....2ND DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 11th September 2015 brought under **Order 17 Rule 2 (3) and Order 51 Rule 1** of the **Civil Procedure Rules, 2010 and section 3A of the Civil Procedure Act** seeking for orders that this court be pleased to dismiss this suit for want of prosecution or in the alternative dismiss the entire suit for being frivolous, vexatious and a gross abuse of the court process.

This Application is premised on the grounds appearing on its face together with the Supporting Affidavit of Antony W. Mugodo, the Senior Legal officer of the 2nd Defendant/Applicant, sworn on 11th September 2015. He averred that the 2nd Defendant/Applicant instructed an advocate to come on record on its behalf on 15th September 2014. He further averred that the said advocate filed a statement of defence, list of witnesses, a list and bundle of documents and a Replying Affidavit to this Application on the same day and served the same on the Plaintiff and 1st Defendant on 19th September 2014. He further averred that since then, there has been no action whatsoever from the Plaintiff as no reply to the statement of defence has been filed nor any action taken in this suit by the Plaintiff since 29th October 2014. He added that the Plaintiff has not taken any steps whatsoever to set this suit down for hearing despite pleadings having closed on or about 29th October 2014. He averred that in the circumstances, it is therefore clear that the Plaintiff was not keen, eager or diligent enough to have the matter heard or determined. He further averred that the Plaintiff is guilty of laches, a situation that continues to cause the 2nd Defendant/Applicant undue hardship and loss in terms of time and legal fees. He asserted that in the circumstances, it would only be fair and just that this suit be dismissed since litigation cannot continue *ad infinitum*. He also averred that this suit is frivolous as it lacks substance, is without grounds and is fanciful. On those grounds, he sought the dismissal of this suit.

This Application is unopposed. The 1st Defendant indicated in court that he supported this Application. The Plaintiff did not file any response to this Application. I have perused the court file and note that her

advocate on record M/s Njau Ngigi & Co. Advocates were served this Application on 15th October 2015.

The 2nd Defendant/Applicant filed written submissions which the court has taken consideration when making this determination.

*The issue arising for determination is whether or not to dismiss this suit for want of prosecution. The applicable law when considering such an application is **Order 17 Rule 2(1)** of the **Civil Procedure Rules, 2010** 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.”

Further, **Order 17 Rule 2(3)** provides that,

“Any party to the suit may apply for its dismissal as provided in sub-rule 1.”

There have been authorities that provide the principles applied in such cases. The most celebrated case is the Court of Appeal case of **IVATA –vs. - KYUMBU (1984) KLR, 441** where **Chesoni, J. (as he then was)** held that,

“The test applied by the courts in an 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 in the discretion of the court.”

Further in **E. T. Monks and Co Ltd v Evans (1985) KL R 584**, the court stated as follows,

“The court when pondering over an application to dismiss a suit for want of prosecution should among other things ask whether the delay was lengthy, has it made a fair trial impossible and was it inexcusable. Whether or not the application should be allowed is a matter for the discretion of the judge who must exercise it, of course, judicially. Each turns on its own facts and circumstances..... If the plaintiff has caused or consented to the delay which led to its suit being dismissed for want of prosecution then it must blame itself..... It is the duty of the plaintiff to bring his suit to early trial, and he cannot absolve himself of this duty by saying that the defendant consented to the position.”

Whether or not this Application should be allowed is a matter for the discretion of the judge who will be guided by the reasons advanced by the Plaintiff as to why they did not set the suit down for hearing. In this particular case, the Plaintiff/Respondent did not file any response to this Application despite the fact that they were served with the same. In fact, since filing this suit, the Plaintiff/Respondent has never attended court on 18th November 2015 and on 27th January 2016 despite having been served with the relevant notices by the 2nd Defendant/Applicant. It is quite clear from the court record that after filing this suit on 6th August 2014, the Plaintiff/Respondent appears to have abandoned this suit, leaving it to the Defendants to move it forward. The Plaintiff/Respondent has not offered any excuse as to why they have abandoned this suit. To my mind, this inactivity of the Plaintiff/Respondent is a clear indicator that they have lost interest in prosecuting this suit, leaving the Defendants to continue incurring expenses and expending time on this suit. I therefore find no difficulty in arriving at the conclusion that the Plaintiff/Respondent is no longer interested in prosecuting this suit. In the circumstances, I hereby allow this Application with costs to the 2nd Defendant/Applicant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF AUGUST 2016.

MARY M. GITUMBI

JUDGE