



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELCA CASE NO. 119 OF 2019

JANET MUTEI MUNANDI..... 1ST PLAINTIFF/RESPONDENT

SHADRACK MBUVI KILEMBWA2ND PLAINTIFF/RESPONDENT

JASTUS MUTHENGI KALU3RD PLAINTIFF/RESPONDENT

DISMUS MUTUNGA MULATYA4TH PLAINTIFF/RESPONDENT

(Suing for and on behalf of World Victorious Deliverance Ministry “The Church”

-VERSUS-

JOSEPH MUASYA alias

MBUI MUSYOKA BASIL.....1ST DEFENDANT/APPLICANT

ALEXANDER MUEMA.....2ND DEFENDANT/APPLICANT

PETER MUNYWOKI MUTIE.....3RD DEFENDANT/APPLICANT

MUTEMBEI NTWIGA4TH DEFENDANT/APPLICANT

RULING

1. By a Notice of Motion dated 13th May 2021, the 1st, 2nd and 3rd Defendants/Applicants sought for the following orders;

(a) That this Honourable court do dismiss the Plaintiffs/Respondents’ suit herein for want of prosecution.

(b) That the cost of this suit be borne by the plaintiffs/Respondents.

2. The application is anchored on grounds on its face together with the supporting affidavit of **LEONARD NZIOKA NGOLYA**, counsel for the 1st, 2nd and 3rd Defendants sworn on 13th May 2021, whereof he deposed that this matter was last in court on 19th March 2020 and since then no steps have been taken by the plaintiffs with a view to prosecuting it; that the plaintiffs’ inaction and indolence have greatly inconvenienced the Defendants; that there must be an end to litigation; that it would be in the interest of justice to have the suit dismissed as it appears that the plaintiffs have lost interest in it.

3. When the application came up for hearing on 29th July 2021, counsel for the Plaintiffs/Respondents sought for 7 days to file a replying affidavit. The matter was adjourned at the plaintiffs’ instance and fixed for 14th October 2021 to allow the plaintiffs to respond to the application, but on 14th October 2021, there was no compliance on the part of the Plaintiffs/Respondents. Again, they sought for leave to be allowed 7 days to file their response. Leave to respond was granted and the matter was listed for hearing of the application herein on 25th November 2021. Come that day, there was no response filed and therefore the application proceeded unopposed. The Plaintiffs/Respondents did not file any submissions, while the Defendants/Applicants filed their submissions dated 19th October 2021 on 25th October 2021.

1ST – 3RD APPLICANTS’/DEFENDANTS’ SUBMISSIONS

4. The 1st, 2nd and 3rd Defendants submitted that this suit was instituted on 7th November 2019, that at the time of filing suit the plaintiffs

also filed their Notice of Motion dated 7th November 2019. The 1st – 3rd Defendants contended that the parties appeared in court on 20th November 2019 and 4th February 2020 for hearing of the Plaintiffs' application dated 7th November 2019. That the said application was never prosecuted. Further that when the matter was slated for mention on 19th March 2020, the court did not sit due to the outbreak of Covid-19.

5. The 1st – 3rd Defendants further contended that the suit herein remained dormant for one year without any attempt on the part of the Plaintiffs to prosecute the matter. Counsel submitted that it is thus the indolence on the part of the plaintiffs that led the 1st – 3rd Defendants to file the instant application, which was not responded to in spite of granting the plaintiffs several opportunities to respond. The 1st – 3rd Defendants also submitted that the suit was filed for the sole purpose of exasperating the defendants and that the pendency of this suit has greatly inconvenienced the 1st – 3rd Defendants. Counsel argued that Order 17 Rule 2 of the Civil Procedure Rules, frowns upon such conduct, and that the delay to prosecute the suit is inexcusable.

6. It was further contended that the principle of a fair trial enshrined in the constitution entails a speedy trial. Counsel relied on the case of *George Gatere Kibata vs. George Mwaura & Another [2017] eKLR* for the proposition that the threshold in Order 17 Rule 2 of the Civil Procedure Rules is that a suit qualifies for dismissal, if no action has been taken by either party for at least one year before the application for dismissal of the suit is filed.

ANALYSIS AND DETERMINATION

7. I have carefully considered the application, the affidavit in support, the applicants' submissions and the court record. The issue that arises for determination is whether it will be in the interests of justice to dismiss the plaintiffs' suit for want of prosecution.

8. I have perused the court record and noted that the plaint was filed on 7th November 2019, together with a Notice of Motion dated 7th November 2019, presented under certificate of urgency and seeking for a temporary injunction against the defendants. On 8th November 2019, the court considered the certificate of urgency together with the application dated 7th November 2019 *ex parte* and granted, interim orders for injunction to remain in force until 20th November 2019. On 20th November 2019, counsel for the plaintiffs sought for time to serve the application on the 4th defendant. On the same date, the court allowed the plaintiffs application dated 19th November 2019 which had sought for leave to serve the defendants by substituted service by advertisement, in the Daily Nation, or the East African Standard or the Star Newspapers. The matter was then adjourned to 4th February 2020, and on that date, at the instance of the plaintiffs, the matter was adjourned to 19th March 2020. It is on 21st May 2021 when the 1st – 3rd Defendants filed their application herein dated 13th May 2021, and on 25th May 2021, fixed this matter for mention on 29th July 2021. Therefore the application for dismissal was filed 14 months after the matter had last come up in court.

9. Order 17 Rule 2 of the Civil Procedure Rules provides as follows;

2. Notice to show cause why suit should not be dismissed (Order 17 Rule 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 subrule 1.

4) The court may dismiss the suit for non compliance with any direction given under this order.

5) A suit stands dismissed after two years where no step has been undertaken.

6) A party may apply to court after dismissal of the suit under this order.

10. The law expects parties to take steps to prosecute suits filed by or against them. Where no step is taken by any of the parties in a matter for one year, then the court may on its own motion issue a notice to the parties to show cause why the suit should not be dismissed for want of prosecution. Any party in a suit may apply for dismissal of a suit for want of prosecution if no step has been taken for one year.

11. In addition to the legal provisions set out in Order 17 Rule 2, principles to guide courts in determining whether or not a suit should be dismissed for want of prosecution have been settled in several authorities. In the case of *Mwangi S. Kimenyi vs. Attorney General and Another, Civil Suit Misc. No. 720 of 2009*, the court stipulated the test as follows;

“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 party in the suit; lest justice should be placed too far away from the parties.

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 the 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 give 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.”

12. In *Ivita vs. Kyumbu [1984] KLR 441*, the court held as follows;

“The test is whether the delay is prolonged and inexcusable, and if it is, can justice be done despite such delay.”

13. In *George Gatere Kibata vs. George Kuria Mwaura & Another [2017] eKLR*, paragraph 13, the court held as follows;

“The court should also carefully and critically examine and evaluate the court record, the explanation tendered by the Respondent in response to the application for dismissal, the general prevailing circumstances within the judicial system at the time of the alleged inaction, and the grounds put further by the applicant in advancing the view that he would be exposed to grave injustice if the suit were to proceed to trial.”

14. In my view, the court when determining an application for dismissal of a suit for want of prosecution, must consider among other matters, the prejudice to be suffered by the defendant due to the delay, the reasons advanced by the plaintiff for the delay, the court record, the plaintiff’s conduct and any other external factors that could have contributed to the delay, other than the parties’ conduct.

15. In the instant suit, the record shows that the last time the matter was in court was on 19th March 2020. The application for dismissal was filed on 21st May 2021, which is 14 months after the matter had been last in court. While the court is enjoined by law to ensure justice is done to all parties, parties should assist the court by complying with court directives. In this matter, the court gave the plaintiffs three opportunities on 29th July 2021, 14th October 2021 and 25th November 2021; to allow them to respond to the application for dismissal, but no response was filed. Therefore the court does not have the benefit of appreciating the reasons that occasioned the delay on the part of the plaintiffs.

16. Therefore the threshold of one year set out in Order 17 Rule 2 has been satisfied. The applicants have stated that the pendency of the suit has left them in perpetual anxiety and they do not know when the plaintiffs will prosecute their claim. There being no attempt on the part of the plaintiffs to explain why they failed to move the court to prosecute their claim, this court is satisfied that the plaintiffs’ suit ought to be dismissed for want of prosecution.

17. The upshot of the above is that the 1st, 2nd and 3rd Defendants’ application dated 13th May 2021 is allowed in the following terms;

(a) The plaintiffs’ suit herein be and is hereby dismissed for want of prosecution.

(b) That costs of this suit shall be borne by the plaintiffs.

18. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 19TH DAY OF JANUARY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Mr. Ngolya for the Applicants

No appearance for the Respondents

Ms. Josephine Misigo – Court Assistant