



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL SUIT NO. 209 OF 2011

TITUS KYALO MUSYOKA (*Suing on his own behalf and on behalf of the
Estate of JANE KOLA MWITINGI*)PLAINTIFF/RESPONDENT

VERSUS

MUATHE KIMANZI1ST DEFENDANT/APPLICANT

JONATHAN GITAHI NDEGWA2ND DEFENDANT /APPLICANT

MWITI EVANS.....3RD DEFENDANT/APPLICANT

RULING OF THE COURT

1. The Notice of Motion application before the court is dated **18th April, 2013** filed by the 1st and 2nd defendants praying for orders as follows;

i. That the court be pleased to dismiss the plaintiff's suit herein with costs for want of prosecution.

ii. That the costs of this application and the entire suit be borne by the plaintiff/respondent.

2. The application is premised on the grounds set out therein. The applicant's case is that the suit herein was commenced by the plaintiff/respondent vide a plaint dated **9th August, 2011** and filed on **12th September, 2011**. The 1st and 2nd defendant/applicants entered appearances through the firm of M/s Kantai & Company advocates vide a Memorandum of Appearance dated **6th October, 2011**. On 7th October, 2011 the said advocates filed a Defence on behalf of the 1st and 2nd defendants on 7th October, 2011. The pleadings have since closed. Since the matter was filed there has been no application and/or action before this court with regard to the matter. Since filing of this suit no documents and/or application have been filed in court nor has any step been taken with the aim of prosecuting the matter to its final determination. The applicant's case is that the plaintiff/respondent herein has slept on his rights by failing to prosecute the matter for an inordinately long time, and has lost interest in the matter and is only keen on dragging the 1st and 2nd defendants/applicants through a tedious court process. The actions of the plaintiff/respondent are tantamount to holding the sword of Damocles over the 1st and 2nd defendants/applicants with no justifiable or legal reason thereof. The same should not be allowed to stand as the plaintiff/respondent has not demonstrated willingness to prosecute the matter. It is a well established doctrine of equity that equity does not favour the indolent, and it is cardinal principle of the law that litigation should not be allowed to continue *ad infinitum!* The applicant submitted that it is only fair and just that the plaintiff/respondent's suit against the 1st and 2nd defendants/applicants is dismissed

with costs.

3. The application is opposed by the plaintiff/respondent vide Replying Affidavit sworn on **23rd September, 2014**. The respondent states that it is true that the respondent filed this suit on **12th September, 2011** wherein the respondent is seeking damages on behalf of the estate of his deceased wife who died on 11th July, 2010 as a result of a Road Traffic accident along Thika –Matuu road. It is true and correct that the 1st and 2nd defendants entered appearance on 6th October, 2011 through the firm of M/S Kantai & company advocates. However, unfortunately and shortly thereafter, the said firm relocated to an unknown destination. Indeed even as at present the plaintiff states that the said firm is untraceable. Subsequently, the respondent's former advocates M/S Musyoka Wambua & Katiku were unable to fix the matter for hearing since the 1st and 2nd defendants advocates could not be traced for purposes of being served with invitation notices. That notwithstanding, the defendants have commenced negotiations with the plaintiff on the matter.

4. Parties filed submissions, which I have considered. The only issue I raise for determination is whether or not the court should exercise its discretion to dismiss the suit. Dismissal of a suit is not a light issue, and if the same is based on want of prosecution, or loss of interest by the plaintiff, these elements must come out clearly on the application so that the court does not unwillingly dismiss a suit whose proponent is still interested in its prosecution.

5. From the replying affidavit and the submission of the parties it is clear that the plaintiff had logistical challenges which, however, he has now overcome, and he is now ready to prosecute the suit. The court should not dismiss a suit where there is clear intent to prosecute the same, and even where there is undue delay, the court, with the intent to do justice can allow the plaintiff limited time to prosecute the suit. **Article 159(2) (d)** states that ***“justice shall be administered without undue regard to procedural technicalities”***. In ***Fanuel Amimo v. Tamasha Corporation Limited [2008] eKLR***, Judge Lesit J, in dismissing an application similar to the one before this court, agreed with counsel for the plaintiff/respondent in quoting the much celebrated case of ***Ivita vs. Kyumbi [1984] KLR 441***, ***“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 order that it be set down for hearing at the earliest time. It is a matter in the discretion of the court”***

6. In the upshot, I think, this is a clear case to allow the plaintiff to prosecute the suit despite the delay.

7. The application is dismissed, with costs in the cause. However, the plaintiff shall list the matter for hearing within sixty (60) days from the date of this ruling.

DATED AND DELIVERED AT MACHAKOS THIS 24TH DAY OF NOVEMBER, 2016.

E. OGOLA

JUDGE

In the presence of:

Absent – for plaintiff

Absent – for defendant

Court Assistant – Mr. Munyao