



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 522 OF 2015

WINNIE WANJIKU MWAI.....PETITIONER

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

LEONARD LUTTA.....2ND RESPONDENT

JAMES MWANGI GITAU.....3RD RESPONDENT

ANTHONY MAINA.....4TH RESPONDENT

RULING

1. The motion before me seeks the striking out of the original applicant's Originating Summons dated 30 October 2001. The motion was filed by the 3rd and 4th Respondents.

2. The affidavit in support of the motion sworn by Stephen Mwanza Gachie is short and crisp. It simply states that the original applicant did not prosecute her suit within a reasonable time and that the Criminal Case No. 1777 of 2001 which constituted the substratum of the Originating Summons has since been concluded. Mr. Gachie proceeds to depone that the Originating Summons consequently has no merit as nothing remains of the Criminal Case No. 1777 of 2001 which the original applicant had sought to stay. Additionally, it is stated that no remedy is likely to be obtained by the original applicant.

3. At the hearing of the motion, Mr. Wachira, who appeared for the 3rd and 4th Respondents, reiterated the fact that there had been too much delay in prosecuting the Originating Summons as between July 2007 and July 2016 there had been no effort to prosecute the Originating Summons. Counsel stated that the period of eight years was inordinate and not explained. Counsel additionally stated that the delay had prejudiced the Respondents. Counsel then referred to the case of **Argan Wekesa Okumu vs. Dima College Ltd & 2 Others [2015]eKLR** for proposition that the burden of expeditious prosecution of a suit lies with a claimant, not a respondent and that delay in prosecution of claims operates to the prejudice of respondents. Mr. Wachira added that litigation must always be brought to an end.

4. Mr. Gitonga Muranga for the 1st and 2nd Respondents supported the Motion while urging the court to note that the delay had not been explained.

5. In response to the motion, Dr. Kamau Kuria contended that the application had been brought out of mischief and in bad faith. Dr. Kuria further contended that the amended Originating Summons was not frivolous and obviously hopeless to warrant a striking out order. Urging that the motion was devoid of any merit, Dr. Kuria referred to the case of **D.T.Dobie & Company Ltd vs. Muchina [1982] KLR 1** for the proposition that the summary procedure ought to be exercised with caution and the court should always seek to sustain rather than terminate claims. Dr. Kuria further stated that the delay in the instant case was explicable as the court file had been mislaid in the court registry for over two years, after July 2007.

6. I have no doubt that inordinate or unreasonable delay in prosecuting any action may constitute an abuse of court process and in certain defined circumstances will justify dismissal of action.

7. In constitutional litigation, the power to dismiss a suit for want of prosecution is not expressly conferred. There is no equivalent of Order 17 of the Civil Procedure Rules, in the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (“**the Mutunga Rules**”).

8. The High Court however has the inherent power, both at common law and under the relevant rules to protect and regulate its own process while taking into account the interests of justice. This includes the right to prevent an abuse of its own process: see generally Rule 3 of the Mutunga Rules.

9. Even though Article 50(1) of the Constitution provides that everyone has the right to have a dispute that can be resolved by the application of law decided in a fair and public hearing before a court or tribunal, an inordinate or unreasonable delay in prosecuting an action may *per se* constitute an abuse of process and indeed warrant the dismissal of an action. Abuse of process of the court is itself a barrier and where appropriate the court must act to ensure that such barriers to the process of administration of justice are rid of.

10. With regard to dismissal for want of prosecution, there are indeed no hard and fast rules as to the manner in which the inherent power and discretion to dismiss an action for want of prosecution is to be exercised. It is however generally accepted that dismissal will be invited if there should be a delay in the prosecution of the action and the respondent is prejudiced by the delay with attention also being paid to the reasons for the inactivity.

11. Several local cases have reflected and applied the above principles: see for example **Nilan vs. Pater [1969] EA 341**, **Ivita vs. Kyumbu [1984] KLR 44**, **Agip (K) Ltd vs. Highlands Tyres Ltd [2001] KLR 630**, **Ivita vs. Kyumbu [1984] KLR 44**. These cases, among others, further postulated the following principles and approach.

12. Firstly, there should be inordinate delay. In this regard, there is no laid down tariff as to what is inordinate and the period will depend on the facts and circumstances of each case. Secondly, the inordinate delay ought to be inexcusable. Where there is no credible excuse the inference is that the delay is inexcusable. Thirdly, it must be evident that the trial of issues between the parties will be seriously prejudiced. The longer the delay, the more likelihood of prejudice.

13. Finally, the power to dismiss an action for want of prosecution will ordinarily be exercised upon application by the respondent and consequently the respondent’s conduct is material in all respects. The respondent cannot obviously run away from his conduct.

14. The 3rd and 4th Respondents herein claim that there was inordinate in prosecuting the claim. The 3rd and 4th Respondents herein further claim that they will be prejudiced. The Respondents do not however state how they will be specifically prejudiced.

15. I note that the claim was first filed in 2001. The Originating Summons was subsequently amended on 31 January 2002. The summons sought various declaratory orders besides damages for alleged tortious acts of sexual harassment and contravention of Sections 73 and 74 of the retired Constitution. Directions

were then given by the court. That was in 2007. The hearing however never took off. It is to be noted that the skeletal submissions were filed pursuant to the court's directions of 28 May 2007. The lull then commenced and the parties would then only resume active prosecution of the claim in 2015, after the claim was transferred from the Civil Division of this court. Once again directions were given on 7 March 2016 by the court and the claim set down for hearing on 13 June 2016. The 3rd and 4th Respondents however then filed the instant motion.

16. There was evidently delay in the prosecution of the claim. The claim though was always alive and could not be terminated by the termination or conclusion of the criminal proceedings in Criminal Case No. 1777 of 2001.

17. Secondly, and more critically, the Respondents conduct is crucial.

18. Even after the original applicant delayed unreasonably in prosecuting her claim, in my view, the Respondents so conducted themselves as to induce the claimant to incur further costs in the reasonable belief that the Respondents intended to exercise their right to proceed to trial notwithstanding the claimant's delay. This was evident in the fact that the Respondents never made any application to have the claim dismissed for want of prosecution. It was also evident in the fact that, without any protest, the Respondents participated in the court proceedings of 7th March 2016 and also agreed to fix the case for hearing on 13th June 2016, only to thereafter file the current motion.

19. In my view, and I so hold, the Respondents cannot obtain a dismissal of the action unless the claimant is guilty of further unreasonable delay. The cumulative effect of the previous unreasonable delay will then be relevant to determine whether there may be any prejudice fetched upon the Respondents and whether a fair trial of the issues in litigation will not be possible. For now the previous delay is certainly not pertinent.

20. I come to the conclusion that the motion dated 31st March 2016 lacks the requisite merit. It is dismissed but with no orders as to costs.

Dated, signed and delivered at Nairobi this 19th day of December, 2016.

J.L.ONGUTO

JUDGE

Dr G. Kamau Kuria for the Original Applicant.

Mr. Gitonga Muranga instructed by the office of Director of Public Prosecutions for the 1st and 2nd Respondents.

Mr. S. M. Gachie for the 3rd and 4th Respondents.