



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO 2065 OF 2001

BENSON JAMES ANYANGO AMADI.....PLAINTIFF

VERSUS

1. HENRY MUTHEE KATHURIMA

2. SARAH MWAKA KATHURIMA.....DEFENDANTS

RULING

This is an application by the Defendants (notice of motion dated 26th July 2013) under Section 3A of the Civil Procedure Act (the Act); Order 17, rule 2(3) of the Civil Procedure Rules, 2010 (the Rules) seeking dismissal of the Plaintiff's suit for want of prosecution.

The grounds for the application appearing on the face thereof include;

- (i) That the Plaintiff has not taken any step at all towards the prosecution of the suit for more than three (3) years.
- (ii) That litigation must come to an end.
- (iii) That it will be in the interest of justice that this matter be dismissed.

There is a supporting affidavit sworn by the 1st Defendant, Henry Muthee Kathurima.

The Plaintiff has opposed the application by replying affidavit dated 22nd October 2013 sworn by him. He has explained the delay in prosecuting his case as follows--;

- (i) That his advocates have on several occasions fixed the matter for hearing which have to a large extent been adjourned at the behest of the Defendants.
- (ii) That as recently as July 2013, the Defendants' Advocates filed an application to cease acting citing lack of instructions which was later withdrawn.
- (iii) That while he has substantially complied with 'some of the new rules', the Defendants have not filed their list and bundle of documents to date.
- (iv) That the congestion of Court diaries especially in 2012 and 2013 has

contributed to the apparent delay.

(v) That it is in the interests of justice that the suit be determined on its merits.

A supplementary affidavit filed on 11th December 2013 by the 1st Defendant, clarifies that the application to cease acting filed by his advocates was withdrawn; claims there was no letter received by his advocates to fix a date for hearing as alleged by the Plaintiff, in any case it bears no registry stamp; no hearing notice was ever served on his advocates; his advocates should not take blame for failure to prosecute the matter; the Plaintiff has not complied with pre-trial requirements; congestion in the court diary cannot be an excuse not to prosecute a matter for all those years.

The Plaintiff's advocate, Ghana Elijah Owino Oluoch has sworn a further affidavit on 18th July 2014 in which he reiterates the contents of his replying affidavit and adds that the reason the matter did not proceed for all these years was due to Defendants' advocates lack of instructions.

The Application was prosecuted by way of written submissions. Those on behalf of the Defendants were filed on 16th September 2014 while those of the Plaintiff on 28th October 2014.

There is no satisfactory explanation for the inactivity of the Plaintiff from 26th October 2007 when the matter was taken out of the hearing list of the day to 12th February 2010 when a hearing date was taken by consent. A year passed before a hearing date was again fixed by the Plaintiff on 9th February 2011 to be heard on 17th September 2011. Since then, there has been no action on the part of the Plaintiff up to the time the present application was filed. That is a delay of more than two years, which is inordinate considering the previous delays mentioned above.

But even without satisfactory explanation for delay, the court will not dismiss a suit if it is satisfied that a fair trial of the action will still be possible. Dismissal of a suit unheard is a drastic remedy; the court's inclination should be to preserve the suit for a hearing on the merits, if that is still possible without undue prejudice to the Defendant. In the present case a fair trial of the action is still possible. The application must therefore be refused. But the following conditions must be imposed;-

- (i) The Plaintiff must take demonstrable steps within thirty (30) days of delivery of this ruling towards prosecution of the suit.
- (ii) The Plaintiff shall pay the Defendants' costs of this application before the hearing of the main suit.

Orders accordingly.

Dated, Signed and Delivered at Nairobi this 17th Day of March, 2015.

A. MBOGHOLI MSAGHA

JUDGE