



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

MISC. CIVIL APP. NO 412 OF 2014

JOSEPH THUO MUYA.....APPLICANT

VERSUS

**1. MESELLING ENTERPRISES LIMITED
2. CHRISTINE JUMA OKELLO.....RESPONDENTS**

RULING

The Miscellaneous application herein is for contempt of court for disobedience of orders issued on **18th December 2013** in **PMCC 369 OF 2013**. Now the Respondents have filed a **Notice of Motion dated 25th May 2015** seeking an order for dismissal of the Plaintiff's suit for want of prosecution. Within that application is this notice of motion, brought under **section 3A** of the **Civil Procedure Act; Order 51, Rule 4** of the **Civil Procedure Rules, 2010** (the **Rules**).

The grounds for the application appearing on the face thereof are –

- (i) That more than 'two (1) year' has lapsed without the Plaintiff setting down the suit for hearing.
- (ii) That the Plaintiff has depicted by his indolence a lack of willingness to prosecute the suit.
- (iii) That litigation must come to an end.
- (iv) That dismissal of the suit will not occasion prejudice to the Plaintiffs.

There is a supporting affidavit sworn by the Respondent's Advocate, **Eunice Lumallas**. It gives a history of the contempt application.

The Applicant has opposed the application by **replying affidavit sworn by his Counsel and filed on 10th June 2015**. Grounds of opposition emerging therefrom include –

- (i) That it is not true that one year has lapsed without the matter being set down for hearing.
- (ii) That the matter was set for hearing on 30th September 2014 but could not take off as it was removed from the hearing list.

- (iii) That he wrote a letter to the Respondents' advocates inviting them to fix a hearing date but no date could be allocated as the following year's diary was closed.
- (iv) That the application by the Respondents therefore has no merit and they want to get away with blatant disregard of a valid court order with impunity.
- (v) That an early date for hearing should be set instead of allowing this application.

I have considered the oral submissions of the learned counsels appearing. No authorities were cited. The law in applications for dismissal for want of prosecution is now well settled. The guiding principle is that even where there is inordinate delay without satisfactory explanation, unless the plaintiff has willfully disobeyed a court order made to propel the case towards trial, if the court is still satisfied that a trial of the action will still be possible without further delay, it will not dismiss the case.

In the present case I note that the matter was last in court on 30th September 2014. The record shows that the Applicant's Advocate was present but was at pains to explain whether he had served the contempt application or not. He sought a hearing date in order to file an affidavit of service and was directed to obtain a new hearing date at the registry. The present application for dismissal was filed on 4th June 2015.

The delay of about 8 (eight) months in taking any action towards hearing of the application is not inordinate. In any case there is no complaint in the supporting affidavit that a fair trial of the action will no longer be possible.

However, the matter at hand that is a contempt of court proceeding, which by its very nature is urgent. Once instituted, it ought to have been prosecuted expeditiously and without undue delay as it is intended to enforce authority and dignity of the court.

Still, in the circumstances of this case it will not be just to dismiss this matter for want of prosecution. I will hereby the notice of motion dated 25th May 2015 and dismiss the same. The applicant is hereby condemned to pay costs hereby assessed at Kshs. 5,000/- payable within 14 days from the date of this ruling. If the matter is not prosecuted in 30 days from the date of this ruling it shall stand dismissed without any necessity for further application. Those will be the orders of the court.

Dated and delivered at Nairobi this 22nd Day of October, 2015.

A.MBOGHOLI MSAGHA

JUDGE