



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO.1142 OF 2002

STEPHEN NDICHU KARAGOPLAINTIFF/RESPONDENT

VERSUS

NYANDARWA COUNTY COUNCILAPPLICANT/DEFENDANT

RULING

Before me is a notice of motion dated the 28/03/2013 filed in court on the 03/04/2013. The application is brought under Order 16 Rule 2(3) and order 51 Rule 1 of the Civil procedure rules 2010. The applicant seeks the following orders.

1. That this suit be dismissed for want of prosecution
2. That costs for the application and the entire suit be awarded to the defendant/applicant.

The application is supported by the affidavit of Moses Maina Karuga dated 27th March 2013. The same stated that the suit against the defendant was filed in court on 8th July 2002 seeking damages for defamation, exemplary damages and cost thereon.

That the defendant filed its defense on 8/08/2002 seeking the suit to be dismissed with costs.

1. On 2/11/2011 advocates on record for the plaintiff indicated to the court that they had filed a Notice of change of advocate and were granted 2 weeks to enable them peruse the documents.
2. That when the matter came up for further mention on 14/11/2011 the advocates on record for the plaintiff M/S Kinyua Mwanik i& Wainaina Advocates indicated to the court that they were ready to proceed but the same neglected, refused and/or failed to take any steps to prosecute for a period the suit for more than 1 year and 3 months.
3. That there is no justifiable ground for such delay.
4. That the plaintiff's persistent neglect, refusal and or failure to prosecute this suit is an abuse of the court process.
5. That for the aforesaid reasons it is only fair and expedient for this suit to be dismissed with cost to the defendant.

There is an affidavit of service dated 18th April 2013 sworn by the Vincent Mambuya a process server instructed by the defendant's advocate.

The matter was scheduled to come up for hearing on 26th September, 2013 however the same never took off. The defendant's advocate took another hearing date and served the Plaintiff/respondent with a

hearing notice dated 17th December 2013. There is an affidavit of service sworn by the defendant's court process server Vincent Mambuya who indicated that he effected service on 20th January 2013 the same was served on the secretary of the firm who retained a copy but refused to acknowledge service.

The application came up for inter parties hearing on 23/1/2014 and the same was unopposed.

I have perused the court record. It is evident that the matter was last in court on 11/11/2011 when the court was told that the plaintiff was feeling better. The parties were to take a hearing date from the registry in the month of December. Since then the plaintiff has done nothing to set down the suit for hearing. Under Order 17 Rule 2(3) a party may apply for dismissal of the suit as provided under sub rule 1 which states that in any suit in which no application has been made or step taken by either party in a year the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if no cause is shown to its satisfaction the court can dismiss the suit.

In the case of **Ivita vs. Kyumbu [1984] KLR 441**, Chesoni, J as he then was stated as follows:

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”

The plaintiff though properly served did not attend the inter parties hearing. It is well over 2 years since the matter was adjourned. Litigation must come to an end in absence of any reasonable explanation from the plaintiff/respondent I find that the application dated 28/03/2013 has merit and I grant prayers 1 and 2 of the said application.

Orders accordingly.

Dated signed and delivered this 28th day of **January** 2014

R E.OUGO

JUDGE

.....For the Defendant/Applicant

.....For the Plaintiff/Respondent

.....Clerk