



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 1912 of 1996

KENNETH SHAKO.....1ST PLAINTIFF/RESPONDENT

BRIAN KIWINDA SHAKO.....2ND PLAINTIFF/RESPONDENT

AGGREY MSOOM SHAKO.....3RD PLAINTIFF/RESPONDENT

VERSUS

PATIENCE KEZIA SHAKO.....1ST DEFENDANT

NOEL JUMA MWAJAMBIA.....2ND DEFENDANT

ROGER SHAKO.....3RD DEFENDANT

MWASUI LIMITED.....4TH DEFENDANT

HARRY HORN.....5TH DEFENDANT

STANDARD CHARTERED ESTATE MANAGEMENT LTD.....6TH DEFENDANT/APPLICANT

RULING

The 6th Defendant/Applicant filed a notice of motion application dated 5/6/2012 seeking orders that the suit against itself be dismissed for want of prosecution and the costs of the main suit and this application be borne jointly and severally by the Plaintiffs/Respondents. The application is premised on the grounds that the Respondents have not taken any steps to set down the suit for hearing since 30/9/2010. Further that the failure to prosecute the suit constitutes an abuse of the process of the Court and has caused and continues to cause anxiety and prejudice to the Applicant. Consequently it is only fair and just that the suit be dismissed for want of prosecution.

The application is supported by an affidavit sworn on 5/6/2012 by Charles Wambua who deposes that he is an accountant manager with the Applicant. It is his disposition that a suit was instituted against the Applicant and five others by a Plaint dated and filed on 5/8/1996. That the Applicant entered appearance on 30/10/1996 and filed its defence dated 14/11/1996 on 15/11/1996. He deposed further that he was advised by the Applicant's counsel that the Respondents have not taken any active steps to prosecute the matter since 30/9/2010 and since it has been over one year, it is just and proper to have the suit against the Applicant dismissed for want of prosecution. He also deposed that the Applicant continues to suffer anxiety and prejudice due to the fact that legal costs continue to accrue yet the Respondents fail to prosecute the suit.

By an application dated 10/2/2010 counsel for the Plaintiffs sought leave of this Court to cease acting for the Plaintiffs for lack of instructions. This application was prosecuted before the Deputy Registrar of this division wherein he allowed the Counsel to withdraw from acting. Consequently, the Applicant had to effect personal service of this application upon the Respondents. Service was effected vide registered post and there is evidence to that effect attached to an Affidavit of Service sworn on 17/1/2013 by Robinson MuhandoKhaliali. Counsels for the 3rd Defendant and the 4th and 5th Defendants were also served of the application and hearing notices. Notably, judgment in default of appearance was entered against the 1st and 2nd Defendants on 24/12/1997.

Despite service of the application and hearing notices upon all the necessary parties, none has filed any response, and none turned up in Court during when the application was set to be heard. Accordingly, the application was heard *ex-parte* and the same was unopposed. Order 17 gives the Court discretion under to dismiss a suit where no application has been made or step taken by either party for one year either on its own motion [Rule 2(1)] or upon application by either party. I note that prior to the Plaintiffs counsel's application to cease acting dated 10/2/2010, this matter was last in court on 28/6/2005. It is also clear that this matter never took off as it was adjourned the two times it was listed for hearing.

It is established the test to be 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. See **Ivita v Kyumba (1984) KLR 44; Salkas Contractors Limited v Kenya Petroleum Refineries Limited Civil Appeal No. 250 of 2003**. Refer also to the decision in the case of **Allen v Sir. Alfred McAlphine & Sons Limited (1968) 1 All ER 543** which laid down the principles to be applied in dismissing a suit for want of prosecution to wit;

- i) There has been inordinate delay.
- ii) That this inordinate delay is inexcusable
- iii) That the defendants are likely to be seriously prejudiced by the delay.

As noted hereinabove, the case was filed in August of 1996. It never took off and was last listed before

Court on 28/6/2005. There was no action until 10/2/2012 when the Respondent's advocate filed an application to cease acting for lack of instructions. Despite being served of this application and hearing notices, the Respondents have failed to attend Court or file a response to this application. Thus there is no explanation before this Court as to the delay in the prosecution of this matter. It appears that the Respondents become disinterested in the matter soon after the same was filed. I agree with the Applicant that there is prejudice occasioned to it in terms of the legal costs that is accruing with the pending of this suit.

In that regard, I allow this application and dismiss the Respondents' suit as against the Applicant. The Respondents shall jointly and severally pay to the Applicant the costs of the suit and of this application.

SIGNED & DELIVERED THIS 15TH DAY OF MARCH 2013.

**MARY M. GITUMBI
JUDGE**