



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL SUIT NO 27 OF 2009

ESPOSITO
FRANCO.....PLAINTIFF

VERSUS

1.CAROLINE JEPKEMOI WAIYAKI
2.MAINA KARANJA t/a KITTONY MAINA KARANJA & COMPANY ADVOCATES.....
.....DEFENDANTS

R U L I N G

1. This is an application by the Defendant (**notice of motion dated 8th February 2013**) for dismissal of the Plaintiff's suit for want of prosecution. It is brought under **Order 17, Rule 2** of the **Civil Procedure Rules, 2010** (the **Rules**). It is premised upon the single ground that it is over one year since the Plaintiff took any step towards prosecution of his suit.
2. A supporting affidavit sworn by the Defendant's learned counsel, **Nelson Havi**, points out that the suit was last in court on 6th October 2011 for hearing of the Plaintiff's notice of motion dated 18th April 2011 (when the application was withdrawn), and that since then the Plaintiff has not taken any steps to fix the case for hearing, a period of 1 year and 4 months.
3. The Plaintiff has opposed the application by replying affidavit filed on 10th May 2013. It is sworn by the Plaintiff's learned counsel, **Richard Otara**. The delay is explained as follows in the affidavit –
 - (i) That the Plaintiff's suit against the Defendants (a firm of advocates) is in professional negligence in connection with **Malindi HC Election Petition No. 1 of 2008 (Esposito Franco – vs – Amason Kingi Jeffar & 2 Others)**. He seeks general and special damages, costs and interest. His case is that his petition was struck out on account of the Defendants' negligence. Part of his claim is the costs he expects to have to pay in the said petition. The Defendants have counterclaimed the sum of KShs 550,000/00 plus interest, and also "further fees as shall be taxed...".
 - (ii) That though the Respondents' bills of costs in the said petition have been taxed, the taxations have been challenged by reference to the High Court, and those

references are still pending.

(iii) That once the issue of costs in the petition has been settled, the Plaintiff shall apply to appropriately amend the plaint and then prosecute the suit.

(iv) That it would be unjust to dismiss the suit now.

4. Annexed to the replying affidavit are various documents, including the 1st respondent's bill of costs in the election petition, certificate of taxation, and notice of objection to taxation.

5. I have considered the submissions of the learned counsels appearing. No authorities were cited.

6. I am satisfied that in the circumstances of this case it is necessary that the issue of costs that the Plaintiff shall be required to pay in Malindi HC Election Petition No. 1 of 2008 be settled first, so that he is able to know the extent of his special claim against the Defendants in this suit. Only then will he be able to properly prosecute the case. I am also satisfied that the said issue of costs in the election petition is being pursued actively by the Plaintiff.

7. I am thus not satisfied that there has been inordinate delay in prosecution the suit, or that a fair trial of the action will no longer be possible once the issue of the aforesaid costs in the election petition is settled.

8 I will in the event refuse the application with costs thereof in the cause. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF SEPTEMBER 2013

H. P. G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 27TH DAY OF SEPTEMBER 2013