



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO. 483 OF 2010

HASSAN ZUBEDIPLAINTIFF

VERSUS

1. JACOB JUMA

2. NECTEL (K) LIMITED.....DEFENDANTS

RULING

1. This is an application (by **notice of motion dated 8/2/2013**) brought under **Order 17, Rule 2(3)** of the **Civil Procedure Rules, 2010** (the **Rules**) for dismissal of the Plaintiff's suit for want of prosecution. The single ground for the application appearing on the face thereof is that "it is over one year since the Plaintiff took any step towards prosecution of his suit".
2. The application is supported by the annexed affidavit of the 1st Defendant. He depones, *inter alia*,
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 - i. That the pleadings in this suit closed on 8th April 2011, and that it is one year and nine months since then, yet the Plaintiff has not taken any step towards preparing the suit for hearing.
 - ii. That the Plaintiff's inaction amounts to abuse of the process of the court, and it is just and expedient that the suit be dismissed for want of prosecution.
3. The Plaintiff has opposed the application by replying affidavit filed on 11th June 2013. The points of objection raised include the following –
 - (i) That the delay in prosecuting the suit was caused by the fact that documents the Plaintiff required for prosecution of his suit were being held by the **Banking Fraud Investigations Unit** of the **Kenya Police** who were investigating a complaint lodged by the 2nd Defendant in respect to the Plaintiff.
 - (ii) That the Plaintiff has now filed his list and bundle of documents together with witness statements, and he is ready to prosecute his suit.

iii. That in the circumstances the Defendant's application should be refused.

4. I have considered the submissions of the learned counsels appearing, and also the cases relied upon. I have particularly considered the ruling of Kimondo, J dated and delivered on 26th April 2013 in *Nairobi HCCC No. 303 of 2010 (Commercial Division), Dubai Bank Kenya Ltd –vs– Nectel Kenya Limited & Others (unreported)*. The learned Judge was dealing with a similar application where the facts and circumstances were very similar to those herein. He allowed the application and dismissed the suit for want of prosecution. In doing so he relied upon the words of Lord Denning in *Reggentine –vs– Beecholme Bakeries Ltd [1967] III Sol, Jo. 216 –*

“It is the duty of the plaintiff's advisers to get on with the case. Public policy demands that the business of the courts should be conducted with expedition...The delay is far beyond anything that can excuse. This action has gone to sleep for nearly two years. It should now be dismissed for want of prosecution.”

5. Kimondo, J also set out the test in applications for dismissal for want of prosecution as laid out in *Ivita Vs Kyumbu [1984] KLR 441 –*

“It is whether the delay is prolonged and inexcusable, and if it is, whether justice can still be done. In that event instead of dismissal, the court may exercise its discretion to set the suit down for hearing.”

6. In the case of *Victory Construction Co. –vs– A N Duggal [1962] EA 697* it was held, *inter alia*, that –

“(i) ...

(ii) Where parties to an action are called upon to show cause why an action should not be dismissed for want of prosecution, the court should be slow to make an order if satisfied that the suit can be heard without further delay, that the defendant will suffer no hardship and that there has been no flagrant and culpable inactivity on the part of the plaintiff.

iv.”

This is good law even in an application by a defendant for dismissal for want of prosecution.

7. In the present case the Plaintiff admits the delay complained of. He offers the explanation that documents he intended to rely upon had been with the police in the course of investigations of a complaint by the 2nd Defendant in respect of the Plaintiff's account with the 2nd Defendant. This fact (that documents that the Plaintiff required to prosecute his case were with the police) has not been disputed by the Defendants.

8. The Plaintiff has since obtained the documents he required, and on 11th June 2013 he filed his list and bundle of documents. There is no complaint by the Defendants that a fair trial of the action is no longer possible on account of the delay. Apart from the plea that the delay amounts to an abuse of the court process by the Plaintiff, there is in fact no plea of any particular prejudice that the Defendant may suffer.

9. I am satisfied that a fair trial of the action will still be possible. Dismissal of the Plaintiff's case unheard when he has finally taken appropriate steps to prepare it for trial would be too harsh a penalty to impose in the circumstances of this case, particularly when a fair trial of the action without further undue delay is possible.

10. I will in the event refuse the application. It is hereby dismissed upon the following conditions –

(i) The Plaintiff shall within thirty (30) days of delivery of this ruling set the case down for pre-trial directions.

(ii) The Plaintiff shall pay the Defendants' costs of this application, hereby assessed at KShs 20,000/00, within fourteen (14) days of delivery of this ruling. In default the Defendants may execute for the same.

11. Those will be the orders of the court.

DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF SEPTEMBER 2013

H. P. G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2013