REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

Civil Suit 81 of 2007

RICHARD KINYANGA KUBAI …….....…….PLAINTIFF

VERSUS

RICHARD KINYANGA KUBAI …….....…….1ST DEFENDANT

FRANCIS GATOBU ALIAS

FRANCIS GATOBU M'MWENDA M'MAUTA……...2ND DEFENDANT

R U L I N G

The 2nd defendant/applicant through an application dated 19th March, 2012 brought under Order 17 Rule 2(3) of Civil Procedure Rules and Section 1A,1B,3,3A and 63(e) of the Civil Procedure Act seeks the following Orders:-

1. That this Honourable court be pleased to dismiss the plaintiff's suit herein for want of prosecution.

2.That this Honourable court do award cost of this suit and this application to the 2nd defendant

3.That this Honourable court do make such further orders to meet ends of justice.

The application based on the grounds on the face of the Notice of Motion being the following:-

a) The plaintiff has lost interest in the prosecution of this case and the continued pendency of the same is causing prejudice on the 2nd defendant.

b)That the suit herein was in court lastly in the year 2008 and its now over 4 years and the plaintiff is not keen in prosecuting the same despite various attempts to remind him to fix hearing dates.

c) That it is fair and in the best interest of justice that civil suit No.81 of 2007 against the 2nd defendant be dismissed with cost.

The application is further supported by affidavit of the applicant dated 19th March, 2012 in which affidavit it is stated as follows: That this suit was instituted against the defendants in 2007. That the court through its order of 14th May, 2008 ordered the Executive Officer to visit the site to verify various claims in presence of the respective counsel. The order is annexed and marked as "FGI". The Executive

Officer's report is annexed and marked as "FG2". The report's finding was that on visitation and observation of plot No.46 Kaelo market measuring approximately 20'X100' was found not to belong to the plaintiff but the same comprised of several market stalls owned by various people and who had each developed his portion as per the sketch plan drawn and filed in court as per annexture marked "FG2" being a copy of the report and plan by Executive Officer. That the applicant deponed that upon the filing of the Executive Officer's findings the plaintiff completely lost interest in the suit and he averred that the respondent/plaintiff had slim chances of success and that he has adamantly refused to prosecute the suit for a period of over 4years despite various invitations to fix hearing dates. The applicant annexed copies of invitation to fix hearing dates marked "FG3" being invitation letters dated 6/4/2009,and 27/7/2009. The applicant averred that the plaintiff has completely lost interest in this case and it is fair that the same is dismissed for want of prosecution as the continued pending of this suit is prejudicial to the 2nd defendant.

The plaintiff/respondent in his replying affidavit dated 23rd April, 2012 averred that it is not true that he has lost interest in this case and that it was not true the finding of the Executive Officer were unfavourable to the plaintiff's case. He averred that he had been advised by his advocates that getting dates at the registry has been a problem. He further averred that be that as it may, the applicant was under duty to fix the suit for hearing. That he is ready and willing to take a hearing date at any time convenient to the court.

When the application came up for hearing the learned Counsel for applicant Mr. J. G. Mugambi relied on the grounds set out on the face of the Notice of Motion and affidavit in support of the application by the applicant. He however added that it is trite law that litigation has to come to an end. He submitted that the plaintiff/respondent has never bothered to invite the defendant/applicant to take a hearing date. However the 2nd defendant had been inviting the plaintiff/respondent to take date. He submitted the plaintiff/respondent allegation that he had been trying to set the suit down for hearing as a lie as the plaintiff/respondent had never sent any invitation to the 2nd defendant/applicant.

The learned Counsel argued that the continued pendency of this case would prejudice the 2nd defendant/applicant . The learned Counsel Mr. Lekoona for the plaintiff/respondent vigorously opposed the application for dismissal of the suit for want of prosecution. He argued that the applicant was misleading the court. He submitted that this suit was last before court in December, 2009 and not 2008. That the suit was also slated for hearing last on 24/4/2010 and that the failure to take dates were due to the fact that dates were not available at the Civil Registry. He further submitted that it was duty of the defendant/applicant to take a hearing date. He submitted that the plaintiff/respondent never received invitation letter.

In the instance case the 2nddefendant/applicant is seeking that the plaintiff/respondent's suit be dismissed for want of prosecution. The application is brought under Order 17 Rule 2(3) of Civil Procedure Rules. Order 17 Rule 2(1),(2) and (3) of Civil Procedure Rules provides:-

"2. (1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

(3) Any party to the suit may apply for its dismissal as provided in Sub-rule 1.

Under the above-mentioned order any party to the suit can apply for a suit to be dismissed in which no application has been made or steps taken by either party for one year. The Counsel for the plaintiff/respondent submitted that court had issued notice to show cause why the suit could not be dismissed for want of prosecution. He stated in his submissions when they appeared before Hon. Lady Justice Lesiit.The plaintiff was given 90 days to set suit down for hearing. That since then 90 days have

expired and that suit has not been set down for hearing todate. I have perused the court file and interestingly the notice alluded to by the counsel for the plaintiff/respondent and the court's order are not in the court file, but that notwithstanding I have no reason to doubt what the counsel for the plaintiff/respondent stated. The Notice to show Cause and court's order must have been issued notwithstanding that I cannot trace them in the court file.

The issue for consideration in this application is whether the suit should be dismissed for want of prosecution. The principles that should be applied when considering an application for dismissal of a suit for want of prosecution has been set out in various cases.

In the case of **VICTORY CONSTRUCTION CO. – V- A. N. DUGALL(1962)EACA** 697 the Court of Eastern Africa held at page 698:-

"However, in deciding whether or not to dismiss a suit under r.6 it is my view that, where the parties have been called upon to show cause against such an order, a court will be slow to make an order if it is satisfied that the hearing of the suit can proceed 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. In regard to the latter two conditions, however, a defendant may find it difficult to persuade a court of hardship or of culpable inactivity in failing to take any step to protect himself under the provisions of r.5 of O.XVI, which gives him a remedy in the event of a plaintiff failing to prosecute his suit. Rule 5 in these terms:-

Yet in the case of **NILANI – V- PATEL AND ANOTHER(1969) E.A 340** at page 342 held:-

"The principle on which we go is clear: When the delay is prolonged and inexcusable, and is such as to do grave injustice to one side or the other, or to both, the court may in its discretion dismiss the action straight away, leaving the plaintiff to his remedy against his own solicitor who has brought him to this plight."

In the case of **IVITA – V- KYUMBU(1984) KLR 441** Hon.Chesoni, J as he then was, on page 449 stated as follows:-

"So 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 to, because it is no easy task for the document, 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 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 and that justice can still be done to the parties notwithstanding 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. Where the defendant satisfies the court that there has been prolonged delay and the plaintiff does not give sufficient reason for the delay the court will presume that the delay is not only prolonged but it is also inexcusable and in such case the suit may be dismissed. To put it in the words of Salmon LJ in Allen V McAlpine at P.561, as a rule, when inordinate delay is established until a credible excuse is made out, the natural inference would be that it is inexcusable. It is an all-timesaying, which will never wear out however often said that, justice delayed is justice denied."

The issue in this case is whether the delay complained of is prolonged and inexcusable and whether justice can be done despite such a delay. The instance case was lastly before court on 24th June, 2009. The plaintiff/respondent lastly took a hearing on 28th July, 2009 when the suit was set down for hearing on 5/10/2009 when the same was taken out of the causelist of 5/10/2009 as the trial Judge was not sitting due to other duties. The 2nd defendant/applicant's application is dated 19th March, 2012 which is about 2years and 6 months since the suit was taken out of the hearing causelist of 5th October, 2009. The

delay of 2years and 6 months I think by all standards is a prolonged delay.

The other issue for consideration is whether the delay has been explained by the plaintiff and whether that explanation is credible and excusable. The respondent through his affidavit and submission by his Counsel has explained that they have not lost interest in the case and that getting hearing dates at the registry has been a problem. The plaintiff and the Counsel did not explain what steps they took to secure a hearing date in the year 2009,2010,2011 and 2012 and what was the problem of failing to get a hearing date if any. The plaintiff's counsel admitted in his submissions that court gave the plaintiff notice to show cause why the suit should not be dismissed for want of prosecution and was given 90 days to take a hearing date. No explanation has been offered as to what transpired since the plaintiff was served 90 days to take a hearing date and why a hearing date has todate not been taken. No single document has been exhibited by the plaintiff/respondent to demonstrate any attempt to set this matter down for hearing since it was last adjourned in 5/10/2009. I find there is no reasonable explanation for the prolonged delay in setting this suit down for hearing. The delay is therefore prolonged and inexcusable.

The other issue to consider is whether justice can be done despite such a delay. Justice is justice to both the plaintiff and the defendant so both parties to the suit must be considered and the position of the Judge too. There has been no allegation that any documents may be misplaced or missing, or witnesses may be missing or evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant/applicant has not satisfied the court that he would be prejudiced by the delay or even the plaintiff will be prejudiced. The defendant/applicant must show justice will not be done in the case due to prolonged delay on part of the plaintiff/respondent before the court will exercise its discretion in his favour and dismiss the suit for want of prosecution.

In the instance case I find the delay is prolonged and inexcusable, however notwithstanding the delay justice can be done to parties and the suit should therefore be set down at the earliest. The suit should be set down for hearing within the next 90 days from the date hereof in default the suit shall stand dismissed for want of prosecution.

Accordingly in exercise of my discretion I refuse to grant the application and order the plaintiff to set suit down for hearing within the next 90 days from this day in default where the suit shall stand dismissed for want of prosecution with costs to the 2nd defendant/respondent. I award costs of this application to the 2nd defendant/applicant.

DATED, SIGNED AND DELIVERED AT MERU THIS 24TH DAY OF MAY, 2012

J. A. MAKAU
JUDGE

DELIVERED IN OPEN COURT IN PRESENCE OF:

1. Mr. Lekoona for plaintiff/respondent

2. Mr. J. G. Mugambi for 2nd defendant/applicant

3. Mr. H. Gitonga for 1st defendant

J. A. MAKAU
JUDGE