REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Case 227 of 2006

PETER ABUGA OKAO.....PLAINTIFF

VERSUS

AIG INSURANCE.....DEFENDANT

R U L I N G

1. By a Notice of Motion dated 10 September 2012 the Defendant herein has prayed for this suit to be dismissed for want of prosecution. The Defendant maintains that the Plaintiff has refused and/or failed to take any steps to prosecute the suit for a period of one year since the last court appearance. The Defendant maintains that it continues to suffer unnecessary anxiety due to the delay in the prosecution. The Application is supported by the Affidavit of **Elsy Njagi** sworn on 10th September, 2012. The deponent states that she is the Assistant Claims Manager of the Defendant insurance company. Her Supporting Affidavit summarises the Plaintiff's claim and records that the Plaintiff, through his advocates on record, filed his List of Documents on 8 November 2005 and thereafter set the case down for hearing on 8 April, 2007. The deponent then stated that after the hearing did not take off on that date, she had been informed by the Defendant's advocates on record that neither the Plaintiff nor his Advocates had applied to this court for another hearing date nor had they invited the Defendant's advocates to attend the Court Registry with a view to fixing another hearing date.

2. Miss Njagi continued her Supporting Affidavit by stating that the Defendant had filed an application for dismissal for want of prosecution dated 16 November, 2009 which application was adjourned at the Plaintiff's request on 17 February, 2010. Since then there had been no further attempt by the Plaintiff or his advocates to set this suit down for hearing and the deponent was apprehensive that the dilatory approach as to how this matter has been handled by the Plaintiff and/or his advocates, was likely to prejudice the Defendant in terms of the availability of witnesses and the accuracy of their testimony being impaired by passage of time. The deponent requested that this court do dismiss the suit for want of prosecution with costs to the Defendant.

3. The advocate on record for the Defendant **Ezekiel Oduk** swore a Replying Affidavit on 1 November 2012. The deponent recorded in his said Affidavit the fact that the Defendant had filed its statement of Defence on 31 October, 2006. Thereafter the Plaintiff's advocates had written to the Defendant's advocates as regards setting a hearing date for this matter on 30 December, 2006, 29 January, 2008, and 5 of November 2009. All the hearing dates had been vacated and on 7 August, 2009 the Plaintiff's advocates had written to the Defendant's advocates with a view to pursuing a negotiated settlement of this matter. Thereafter, the Defendant had filed a Notice of Motion on 21 January, 2010 seeking the dismissal of this suit for want of prosecution. The deponent did not detail what had happened to that Application. He did however record that on the 9 December, 2010, the advocates for the Defendant had invited his firm to fix a date for the hearing of the suit. That date was 27 June, 2011 and his firm had received the hearing notice therefore. Mr. Oduk wrapped up his said Affidavit by detailing that in his opinion, the

period that had lapsed could not be termed as inordinate or inexcusable delay and that the Plaintiff was keen to pursue the prosecution of the suit. He maintained that for all intents and purposes, even if the memories of witnesses were impaired by time, reliance could be placed on witness statements recorded with the Police as well as with the Defendant.

4. Mr. Mogere for the Defendant noted that when the matter was before this court on 18 October, 2012, I had ordered that the Plaintiff herein should file an affidavit as regards the Application and the delay in prosecution of the case. He noted that instead of the Plaintiff filing the Replying Affidavit, his advocate had done so. He maintained that this was typical of how this matter had been handled by the Plaintiff; he asked the court to disregard the Replying Affidavit. However, he went on to say that if the Affidavit was accepted by the court, it should note that the last time that the Plaintiff had taken action as regards fixing a date for the hearing of the suit was in 2008. He submitted that the delay in having this suit heard was entirely on the Plaintiff's side. He asked the court to allow the Defendant's said Application accordingly. At this stage, Miss Kwinga appearing for the Plaintiff asked for an adjournment so as not to prejudice the Plaintiff, who Mr. Oduk had stated, that he wished to have him swear a further Affidavit. The adjournment request was vehemently oppose by Mr. Mogere and disallowed by the court.

5. Miss Kwinga, in her submissions, noted that the annexures to the Replying Affidavit "EO 1 – 3" all showED the intent of the Plaintiff to proceed with this case. There had been an attempt to achieve a settlement between the parties in 2009. The 3 hearing dates fixed were all vacated not because of the Plaintiff. Thereafter counsel repeated the averments as detailed in the Replying Affidavit of Mr. Oduk as above. She concluded by saying that the Plaintiff should not be barred from prosecuting this suit until the same had been determined. She asked the court to dismiss the Notice of Motion in its entirety.

6. **Order 17 rule 2** reads as follows:

"17. 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.

(4) The court may dismiss the suit for non-compliance with any direction given under this Order".

The Defendant's Application dated 10 September, 2012 is brought under the provisions of **rule 2 (1)** as above. I find that the same was properly before court as per **rule 2 (3)**.

7. In dealing with applications of this nature, I gained considerable guidance from the words of Kneller J (as he then was) in the case of the **E. T. Monks and Co Ltd v Evans (1985) KL R 584** when he stated as follows:

"The court when pondering over an application to dismiss a suit for want of prosecution should among other things asked whether the delay was lengthy, as it made a fair trial impossible and was it inexcusable? Whether or not the application should be allowed is a matter for the discretion of the judge who must exercise it, of course, judicially. Each turns on its own facts and circumstances….. If an action is dismissed for want of prosecution the plaintiff has certain options if it is not his fault. It may sue its advocate for negligence unless it has caused or consented to the delay which has resulted in the action being dismissed for want of prosecution. Advocates for the most part ensure against the risk of liability for professional negligence. The plaintiff then has a remedy not against the defendants but against its own advocates. Should the trial proceed despite a prolonged delay the plaintiff may not succeed because it cannot after such a long time establish liability and then it has no remedy is anyone else. If the plaintiff has caused or consented to the

delay which led to its suit being dismissed for want of prosecution then it must blame itself….. The court may consider the matter of limitation and whether or not the plaintiff might probably succeed in the actionable negligence against its lawyers and might prefer to be slow in deciding to dismiss for want of prosecution, but looking at the matter as a whole may order the application be dismissed and the award the defendants the costs of the suit and of the application…. It is the duty of the plaintiff to bring his suit early trial, and he cannot absolve himself of this duty by saying that the defendant consented to the position. A plaintiff who, for whatever reason, delays for over six years before bringing his suit for trial can expect little sympathy…. If the court is satisfied that there will be prejudice to the defendant as a result of a delay of 10 years if the case proceeds and it would be impossible to have a fair trial then the suit is dismissed for want of prosecution."

8. It is quite clear from the above that this court has the absolute discretion as to whether to allow the Plaintiff to proceed with his suit or otherwise. To this end, I have perused the record of this court. Pleadings were closed with the filing of the Defendant's statement of Defence to the further Amended Plaint on 16 November, 2006, over six years ago. The first hearing date being 30 April, 2007, was fixed ex parte by the Plaintiff's advocates on 8th December 2006. On that date, before Okwengu J., Mr. Oduk, the advocate for the Plaintiff, applied for an adjournment which was allowed and the matter was stood over generally. The next date, so far as the court record is concerned, was the 17 February, 2010 again fixed ex parte by the advocates acting for the Defendant as regards its Notice of Motion dated 16 November, 2009. This was the Application seeking the dismissal of the suit for want of prosecution. That Application came before my learned brother Njagi J. on 17 February 2010. Again counsel appeared before the Judge requested for an adjournment as Mr. Oduk was engaged in a Civil Appeal in the High Court at Kisii. That adjournment was allowed and the Application was stood over to a fresh date to be taken at the Registry. It seems that the said Application was never re-fixed for hearing as, on the 16 December, 2010, the advocates for the Defendant fixed a date for the hearing of the suit for 27 June 201. Notice thereof to the Plaintiff's advocates was to issue.

9. On 27 June, 2011, Mr. Oduk appeared for the Plaintiff and Mr. Khaseke appeared for the Defendant, before Njagi J. again. Once more, Mr. Oduk stated that he had the Plaintiff in court ready to give evidence but that he had not been able to get the driver of the suit vehicle to come to court as he was apparently in Southern Sudan. He asked for a further adjournment which Mr. Khaseke opposed but the learned Judge granted the adjournment:

"…. To allow the Plaintiff's counsel to gather his witnesses so that some reasonable ground may be covered when the trial commences. A fresh hearing date be taken at the Registry and the same be granted on a priority basis…."

Then over a year later, the advocates for the Defendant, on 12 September, 2012, filed the present Application before court which was returnable on the 18 October 2012.

10. From the above, it is quite apparent to this court that the Plaintiff has proved reluctant to prosecute this suit. Certainly no effort was made by the Plaintiff's advocates to set down the suit for hearing on a priority basis as ordered by Njagi J. on 27 June, 2011. In any event, there had already been a previous Application by the Defendant herein for dismissal of this suit for want of prosecution, which should have been warning enough to the Plaintiff to get on with matters. In exercising my discretion, I would consider it unfortunate, nay negligent, on the part of the Plaintiff's advocates not to have abided by the Order of this court as to the setting this suit down for hearing on a priority basis. In the event, I consider my hands tied by **Order 17 rule 2 (1)** as the Plaintiff failed to set down the suit for hearing within the one-year stipulated in that rule. In consequence thereof, I allow the Defendant's Notice of Motion dated 10 September, 2012 with costs. The Plaintiff's suit herein is hereby dismissed for want of prosecution.

DATED and delivered at Nairobi this 13th day of December 2012.

J. B.HAVELOCK
JUDGE