REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 591 of 1992

BAREY ALI HABASHOW :: PLAINTIFF

VERSUS

GODFREY GICHUHI :: DEFENDANT

RULING

The Plaintiff/Respondent filed suit against the defendant vide a plaint dated 28th January l992 and filed on 4th February l992. A reading of the same reveals that the claim is based on negligence arising from an accident which is averred to have occurred on 21.6.l989 at 3.20 p.m. The accident was alleged to have occurred as a result of collision between motor vehicle registration number KXU 523 and KRF 180. The former driven by the deceased and the latter by the defendant. It was further averred that the said accident was as a result of the negligent driving, attributed to the defendant as particularized in paragraph 3 of the plaint. In consequence of which the deceased's estate suffered loss and damage on account of which the plaintiff seeks both special and general damages.

Appearance dated 19.5.l992 was entered on 21.5.92 while the defence is dated 16th June l992 and filed on 19th June l992.

The averments of the same deny the allegations of the plaint against them. It goes further to shift the blame on the plaintiffs' agent who allegedly occasioned the said accident as a result of negligence Acts attributed to him and specified in paragraph 3 of the defence. In consequence thereof the defendant put in a counter claim.

Agreed issues are dated 3rd October l992 and filed the same date. A perusal of the entries in the proceedings, section of the file reveals that the matter was first fixed for hearing on 24.ll.92 for 10th and 11th march l993. On 10.3.93 the matter was not heard but fixed for mention on 21.4.93 when it is noted that there was no appearance by either party and the matter was marked S.O.G.

No action was thereafter taken in the matter by the plaintiff prompting the defendant to file an application by way of chamber summons under orders XVI rule 2 and 5(d) Civil Procedure Rules dated 23rd, April l997 and filed on 28.4.l997 seeking the dismissal of the suit for want of prosecution with costs.

A perusal of the record reveals that the said application was not agitated on because on 15.6.98, parties filed consent in Court withdrawing the same on condition that the Plaintiff pays Kshs.2,400/- as costs to the defendant. No action was taken in the matter by the Plaintiff till 21.6.99 when it is noted on the record that the matter had been wrongly listed.

The in action prompted the defendant once more to file the current application under consideration dated 13th march 2007 and filed on 28th March 2007. The applications is brought by way of notice of motion under Order L rule 1, order XVI rule 6 of the Civil Procedure Rules and all enabling provisions of the law seeking dismissal of the suit with costs to the defendant both for the application and the entire suit.

The grounds in support are set out in the body of the application supporting affidavit and oral submissions in court as well as principles in case law. The major ones are:-

(1) Since filing of the suit, the plaintiff has not been taking a keen interest in setting down the matter for hearing and disposal.

(2) This in action prompted the defendant to file a similar application in l997 which was however withdrawn by consent.

(3) Since then, it is now over 9 (nine) years and the plaintiff has not bothered to set down the suit for hearing and final determination, hence it is a proper candidate for dismissal for want of prosecution.

(4) That the Applicant has satisfied both principles of law on dismissal for want of prosecution and case law on the subject.

(5) The plaintiffs disinterest is further shown by the fact that despite the Plaintiffs Counsel having been served with the application and they have been dutifully sending their representatives to take convenient dates for hearing of the application, they have not bothered to put in a reply to the application. Neither did they attend trial to oppose it.

On the courts assessment of the facts herein, the court, is of the opinion that failure to contravert the application though in certain circumstances operates as an admission of the allegations of the opposite party, does not automatically give the applicant a clean bill of success. The applicant has to prove to the satisfaction of the court that he has brought himself within the ambit of the principles governing the granting of the said relief.

The applicant seeks the relief under order XVI rule 6 Civil Procedure Rules. It reads:-

"*In any case not otherwise provided for in which no application is made or step taken for a period of three years by either party with a view to proceedings with the suit the court may order the suit to be dismissed and in such case the Plaintiff may, subject to the law of limitation bring a fresh suit*".

The background information set out above herein reveal that the last time the matter appeared in court was l999. There after neither party took any action in the matter till 28.03.07 when the application subject of this ruling was filed. The applicant is therefore within the ambit of that provision.

On the case law the court was referred to the case of **IVITA VERSUS KYUMBU (1984) KLR** where on an application for dismissal for want of prosecution, the court held inter alia:-

(1) The three months limitation period in the civil procedure rules order XVI rule 5 does not apply to a defendants' application to dismiss the suit for want of prosecution at any time after the three months limitation. A failure to take out such notice casually does not prejudice the success of the defendant's application.

(2) A defendant who has waived or acquiesced in delay is not entitled to a dismissal of the actions for want of prosecution. But mere in action on the part of such defendant does not amount to a waiver or

acquiescence.

(3) The test applied by the courts in an application for the dismissal of a suit for want of prosecution is whether the delay is prolonged and in excusable and if it is whether justice can be done despite the delay. Thus even if the delay is prolonged, if the court is satisfied with the plaintiffs excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time. It is a matter in the discretion of the Court.

The decision is a High Court decision, a court of concurrent jurisdiction, and therefore not binding on this Court. It is therefore persuasive. This Court has considered the said principles enunciated by the said decision and applied them to the ingredients in order XVI rule 6 Civil Procedure Rules and finds that the same are within the said ingredient, and so this court is persuaded to apply them herein. The court has so applied them to the scenario displayed herein and so makes the following findings:-

(i) The defendant has not waived his rights under the said Order XVI rule 6 because there is no assertion by the Plaintiff that there is such a waiver which should be resolved in their favour.

(ii) There is no allegation of the defence also being guilty of acquiescence.

(iii) Indeed there is evidence of in action but as ruled by Chesoni J. as he then was this does not disentitle the defendant to the reliefs of dismissal for want of prosecution, when he chooses to avail himself of one as the defendant has done herein.

(iv) As for saving of the suit in the interests of justice to both parties, the plaintiff has not moved to avail herself of the said relief. The interests of justice that the court is confronted with is the one which requires the court not to unnecessarily allow the defendant to be over burdened by presence of a suit hanging on him necessitated by a plaintiff who has gone not only to sleep, but seems to be enjoying his sleep to the detriment of the defendant who has to keep awake for summons to attend court for trial. The best way to deal with such a sleeping litigant is for the court to cushion her and make her move comfortable in sleep by terminating the proceedings against the watchful defendant so that he can also have rest and sleep and this is a proper case where such an order can be made.

(v) As for the exercise of discretion, it is now trite law that the exercise of the same is not unfettered but the only fetter attached to it is that it has to be exercised judicially, and for good reason. Herein on the facts displayed, the only best way of exercising the courts discretion is that the same be exercised in favour of the applicant for the reason that:-

(a) He has brought himself within principles governing the granting of the relief both as required by the rules on the subject as well as case law.

(b) He has earned the courts discretion because it is not his business to shoulder the burden of prosecuting the action brought against him. That burden lies with the Plaintiff who has not discharged it.

(c) Despite the defendants wake up call to the plaintiff that if no move is made to prosecute the action the same will be dismissed for want of prosecution, the plaintiff has decided to give a deaf ear to the wake up call.

(d) No explanation as to why no action has not been taken to prosecute the matter herein and so it is a proper case where the plaintiff has lost interest in the action.

(e) It is one matter which has been contributing to the bloating of the judiciary work load for no apparent reason and it is high time it left the judiciary shelves and space to create room for more deserving matters of serious litigants willing to take up not only the challenge as well the opportunity to use litigation facilities offered by the judiciary speciality.

(f) It is a proper candidate for dismissal for want of prosecution.

The application dated 13th March 2007 and filed on 28.3.07 has merit. The same is allowed in terms of prayer 8 thereof with costs to the defendant both for the application and the entire suit.

DATED, READ AND DELIVERED AT NAIROBI THIS 24TH DAY OF APRIL 2008

R.N. NAMBUYE

JUDGE