



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 2741 OF 1995

EMBASSY OF KOREA.....PLAINTIFF

VERSUS

JAMES EVANS NJOGU.....DEFENDANT

RULING

This is an application by the Defendant under Order XVI Rule 5 of the Civil Procedure Rules for an order that the Plaintiff's suit against him be dismissed for want of prosecution. The defendant says that there has been inordinate delay. In support of the application A. Manilal Pares, Advocate for the defendant has sworn an affidavit giving grounds for the application. I shall give a brief history of the case.

The suit was instituted by the Plaintiff on 31st August 1995. The relief sought by the Plaintiff is for Shs.1,360,054.85 being special damages for repair charges incurred in respect of the Plaintiff's motor vehicle which was involved in an accident which occurred on 15th April 1994, and the Defendant stood blamed for the accident wholly.

The Defendant entered appearance on 6th November 1995 and the same date he filed his defence. It appears nothing further took place until 28th October 2003 when the Defendant made an application for dismissal of the suit for want of prosecution. The application was set down for hearing on 17th December 2003 when the Plaintiff's advocate applied for adjournment to file replying affidavit.

The Plaintiff filed his replying affidavit on 25th February 2004 in which he deponed that failure to prosecute this suit was because the Plaintiff's driver had not been traced but as at 19th February 2004 the said driver had been traced. On 8th March 2004 the Defendant's application for dismissal of the suit for want of prosecution was dismissed for non attendant. The main suit was fixed for hearing on 18th October 2004 when the Plaintiff's advocate applied for adjournment.

The Plaintiff was granted adjournment and ordered to fix the date for the hearing of the suit and was ordered to pay costs to the defendant as well as court adjournment fees. On 26th October 2004 the Plaintiff's advocate invited the Defendant's advocate to meet at the High Court Registry to take a date but on 4th November 2004 the Registry staff declined to fix a date as the Plaintiff had failed to pay to the court the adjournment fees as ordered. Since then the Plaintiff has not taken any step to set the suit down for hearing. It is this inactivity on the part of the Plaintiff that has led the Defendant to file this Notice of Motion.

Order XVI Rule 5 provides:

“If within three months after the close of pleading or the removal of the suit from the hearing list or the adjournment of the suit generally, the Plaintiff does not set down the suit for hearing, the Defendant may either set down the suit for hearing or apply for its dismissal.”

The Plaintiff was served with this application but did not file any papers to oppose the application.

Mr. Wandabi for the Defendant submitted that there has been inordinate delay on the part of the Plaintiff in prosecuting his suit. It is the duty of the Plaintiff to bring his suit to early trial. The cause of action arose about 13 years ago and it is about 12 years since this suit was filed. It is evident that the Plaintiff has not been keen in prosecuting his suit. On 18th October 2004, he applied for adjournment and was granted on condition that he pays costs to the Defendant and court adjournment fees. He failed to pay the court adjournment fees and the court later declined to give a date because he had failed to pay the court adjournment fees and it is now over 2½ years since the suit was adjourned generally where the delay is inordinate and inexcusable the suit ought to be dismissed straightaway.

The law and principle upon which court go to dismiss the suit for want of prosecution are clear. The test was enunciated by Lord Denning MR in *Allen V. Sir Alfred McAlpine & Sons Ltd* [1968] 1 ALL ER 543 at page 547 and it was repeated by Edmund Davies LJ in *Paxton Vs. Allsopp* [1971] 3 All ER 370 at page 378 who put it as follows:

“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 suit straight away.

So the overriding consideration always is whether or not justice can be done despite the delay.”

In the instant suit the Plaintiff was served but did not file any papers to oppose the application. It is apparent from what I have stated that the Plaintiff has not shown sufficient excuse for the alleged delay. I am satisfied that the defendant has established that there was inordinate and inexcusable delay without explanation.

Accordingly, in exercise of my discretion, I allow the Applicant’s application and dismiss the suit for want of prosecution. I award the Defendant the costs of the suit and of this application.

Dated and delivered at Nairobi this 30th day of July 2007.

J.L.A. OSIEMO

JUDGE