



**Mbeta v Ndambuki (Environment & Land Case 117 of 2019)
[2023] KEELC 18731 (KLR) (5 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18731 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 117 OF 2019**

**A NYUKURI, J
JULY 5, 2023**

BETWEEN

FIONA MUTHEU MBETA APPLICANT

AND

JOSEPHAT MUSYOKA NDAMBUKI RESPONDENT

RULING

Introduction

1. Before court is the application dated December 9, 2021 filed by the Respondent seeking dismissal of the Plaintiff's suit for want of prosecution. The application is supported by the grounds on its face together with the affidavit sworn by Muema Kitulu, counsel for the Applicant. The Applicant's case is that more than one year and eleven months had passed since the Plaintiff took any step in the suit and that therefore she had lost interest in the suit. That the circumstances of some of the defence witnesses may change causing them to be unavailable to testify or lose vital documents. He stated that the delay was inordinate.
2. The application was opposed. Kennedy Ochieng, counsel for the Plaintiff filed a replying affidavit sworn on February 18, 2022. The Plaintiff's case was that upon filing the suit by way of Originating Summons on October 24, 2019, service was effected on the Defendant/Applicant on November 21, 2019. That the Defendant entered appearance on 4th December 2019 but failed to file a response.
3. The Plaintiff's counsel stated that the Plaintiff filed application for directions dated 7th January 2020 seeking to have the matter proceed on the basis of affidavit evidence as there was no disputed fact. He stated that the application dated 7th January 2022 was fixed for hearing on 17th March 2020, but did not proceed due to the Covid-19 pandemic that led to the scaling down of court operations. That in the intervening period, the Defendant filed a replying affidavit on 5th May 2020, six months after service of



summons. That with the replying affidavit filed there were disputed facts and it was no longer tenable to proceed as proposed in the application dated 7th January 2020.

4. That due to the pandemic, it took counsel time to communicate with Plaintiff by email to obtain further instructions in view of the facts raised in the replying affidavit. Counsel blamed the Covid-19 pandemic for the slow pace the matter proceeded; and contended that the delay in prosecuting this matter was excusable. Counsel stated that the Defendant had not been prejudiced in any way by the delay and urged the court to give the Plaintiff a chance to prosecute this suit as she was ready and willing to do so.
5. The application was disposed by way of written submissions. On record are the Defendant's submissions dated 21st March 2022 and the Plaintiff's submissions dated 31st March 2022.

Submissions

6. Counsel for the Defendant submitted that the Defendant had satisfied the statutory threshold set out under order 17 rule 2 of the *Civil Procedure Rules* which provides that where no step is taken in a matter for a period of one year, the court may dismiss the suit for want of prosecution. Reliance was placed on the case of *Mwangi S. Kimenyi v. Attorney General & another* [2014] eKLR and *Nileshb Premchand Milji Shah & another T/A Ketan Emporium v. M. D. Popat & another* [2016] eKLR for the proposition that for a court to excuse a delay in prosecution of a suit, the delay must be well explained to the court's satisfaction. Counsel argued that the delay of one year and 11 months on behalf of the Plaintiff was inordinate and therefore her suit ought to be dismissed for want of prosecution.
7. On their part, counsel for the Plaintiff submitted that although there was a delay, counsel for the Plaintiff had given reasons for the delay which were not within his control and should be excused. Counsel relied on the cases of *Admult Collos Limited v. Ndima Tea Factory Limited* [2021] eKLR and *George Gatere Kibata v. George Kuria Mwaura & another* [2017] eKLR for the proposition that prolonged delay alone should not prevent the court from doing justice to all the parties by allowing the Plaintiff to prosecute their suit.
8. Counsel maintained that the delay was not inordinate and urged the court to allow the Plaintiff an opportunity to prosecute her case.

Analysis and Determination

9. Having considered the application, replying affidavit and submissions, the sole issue that arise for determination is whether the Applicant has met the threshold for dismissal of the Plaintiff's suit for want of prosecution.
10. Order 17 Rule 2, (1) (2) and (3) of the *Civil Procedure Rules* provides that in any suit where no step is taken by either party for one year, the court may give a written notice to the parties to show cause why the suit should not be dismissed for want of prosecution. In addition, any party to the suit may apply for the dismissal of a suit where no action has been taken by either of the parties for one year.
11. In considering whether or not to dismiss a suit for want of prosecution, where none of the parties has taken a step in a suit, the court is guided by several factors including the period of the delay, the reason for delay, whether the delay was intentional, whether the delay would prejudice fair trial of the action and the prejudice to be suffered by the Plaintiff if the suit is dismissed for want of prosecution. The court should strive to have a suit filed before it, heard on merit, but at the same time, the Defendant should not be held at ransom by a Plaintiff who is unwilling to prosecute their claim for an inordinate period as this will be contrary to article 159 of *the Constitution* that guarantees that justice shall be



without delay. It is upon the court to balance the Plaintiff's Constitutional right to be heard on merit and the right of parties to an expeditious trial of the action.

12. In the case of *Ivita v. Kyumbu* [1984] KLR 441, in discussing the test to be applied in determining whether to allow or refuse an application for dismissal for want of prosecution, the court held as follows;

The test is whether the delay is prolonged and inexcusable and, if it is, can justice be done despite such delay.

13. Similarly, in the case of *Mwangi S. Kimenyi v. Attorney General & Another* Civil Suit Misc. No. 720 of 2009, the court aptly captured the test to be applied as follows;

1. When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties – the Plaintiff, the Defendant and any other third or Interested Party in the suit; lest justice should be placed too far away from the parties.
2. Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues;
 - (1) Whether the delay has been intentional and contumelious;
 - (2) whether the delay or the conduct of the Plaintiff amounts to an abuse of the court;
 - (3) whether the delay is inordinate and excusable;
 - (4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial issues in action or causes or likely to cause serious prejudice to the Defendant; and
 - (5) what prejudice will be dismissal cause to the Plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.

14. In the instant suit, it is not disputed that the suit was filed on October 24, 2019 and upon service, the Defendant entered appearance on 4th December 2019, without filing a response to the Originating Summons. The record shows that on January 10, 2020 the Plaintiff filed application dated January 7, 2020 seeking directions on the manner of hearing the Originating Summons, therein proposing that the same be heard by way of affidavit evidence on the basis that the suit had not been opposed. On June 2, 2020, counsel for the Plaintiff wrote to the defence counsel indicating that the Defendant's response to the Originating Summons had raised disputed facts which required cross-examination and that therefore it was necessary for the matter to proceed by way of viva voce evidence. That letter indicates that counsel for the Defendant was served on June 3, 2020. This was in view of the letter dated May 28, 2020 forwarding the replying affidavit filed by the Defendant.

15. The Plaintiff's counsel explained that the mode proposed in how the matter was to proceed was no longer tenable as there was need for cross-examination of witnesses. He further stated that there was Covid-19 pandemic which disrupted court operations affecting the prosecution of this matter.

16. It is clear that the Defendant contributed in the delay of this matter as having been served in November 2019, and upon entering appearance on December 4, 2019, he failed to file replying affidavit to the suit, which he filed in May 2020, which was six months after he was served. It is common knowledge



that Covid-19 was first reported in this country in March 2020, which affected court operations and derailed hearing of suits in court.

17. In response the Defendant's Counsel deponed that the Defendant's circumstances may have changed so that some of the witnesses may not be available or documents lost. This in my view is merely speculative as specific witness is shown to be unavailable due to the delay and no specific documents was said to have been lost between June 2020 and December 2021. The delay from June 2020 and December 2021 is a delay of 18 months, however as the Defendant has not demonstrated the prejudice he may suffer if the Plaintiff is allowed to prosecute her claim, it is my view that the Plaintiff ought to be given opportunity to prosecute her claim.
18. In the premises, the application dated December 9, 2021 lacks merit and the same is dismissed. As the delay was on the part of the Plaintiff, the costs of the application shall be borne by the Plaintiff.
19. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 5TH DAY OF JULY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Ms Anyango holding brief for Mr. Ochieng for the Applicant

Mr. Kitulu for Respondent

Josephine – Court Assistant

