Francis Gichuki Muthoni t/a Izay Group Limited v Nelly Cheptanui Some t/a Chebagogofarm and Resort (Civil Appeal E194 of 2022) [2024] KEHC 7197 (KLR) (19 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7197 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E194 OF 2022

RN NYAKUNDI, J

JUNE 19, 2024

BETWEEN

FRANCIS GICHUKI MUTHONI T/A IZAY GROUP LIMITED ..... APPELLANT

AND

NELLY CHEPTANUI SOME T/A CHEBAGOGOFARM AND RESORT ..... RESPONDENT

RULING

Representation:

M/s Koech Law Advocates.

M/s Kalya & Co. Advocates

1. On 16th December, 2022, the intended appellant filed a memorandum of appeal against judgment of the court in SMCC 311 of 2022. Since that particular date, no positive steps have been taken to prosecute the appeal. In terms of Order 42 Rule 35(1) the court is empowered to exercise discretion to dismiss the appeal for want of prosecution. The notice was duly served for the intended appellant to show cause why the appeal should not be dismissed for want of prosecution.

The decision

2. The court maintains rules of proper conduct and certain sanctions to ensure the integrity of its processes and proper administration of justice. One such power is the power to dismiss a proceeding for want of prosecution. The court may act on an application to dismiss the suit for want of prosecution or may contextualize it suo moto. The power to dismiss a cause of action which no prosecution has been initiated serves the dual purposes of ensuring fairness to the litigants and preserving the integrity of the judicial system. One of the other purposes is aimed essentially to protect the respondent or defendant from prolonged delay in litigation which is likely to affect his/her finances psychological well being and

infringement of his right to have the trial begin and concluded within a reasonable time. Admittedly, in law dismissal of a case is also a disciplinary consequence for parties who initiate and file cases and without sufficient cause abandon them on the way without any reasonable explanation to the court. On an application to dismiss a proceeding for want of prosecution, there is no fixed formula which can be prescribed to limit judicial discretion. However, the decisions from the various superior courts give guidance where certain questions become relevant as tools to exercise discretion. The delay which is inexcusable entails the following issues:

Whether the delay is intentional and contumelious

Whether the delay is an abuse of the court process

Whether the delay gives rise to substantial risk to fair trial to cause serious prejudice to the defendant;

What prejudice will the dismissal occasion the Plaintiff

Whether the Plaintiff has offered a reasonable explanation for the delay; and

What the interest of justice dictated; lenient exercise of discretion. (see Allen v Alfred Mcalphine & sons (1968) 1 ALL ER 543, AGIP (Kenya) Limited v Highlands Tyres Limited (2001) KLR 630 and Sagoo V Bhari (1990) KLR 459

3. In respect of this appeal, no reasons for the delay have been given which delay I consider inordinate and inexcusable. As a result of the delay, there is a substantial risk that it is not possible to have a fair trial as the delay is likely or has already caused serious prejudice to the respondent.

4. The court in Bremer Vulkan Schiffbau & Maschinenfabrik v South India Shipping Corporation Ltd (1981) 2 WLR 141 addressed the issue by accepting that the court has inherent jurisdiction in our case expressly stated in Section 3 and 3A of the *Civil Procedure Act* to protect itself from abuse of its processes by litigants who filed actions with no intention to prosecute them. Thus:

> "The high court's power to dismiss a pending action for want of prosecution is but an instance of a general power to control its own procedure so as to prevent its being used to achieve injustice. Such a power is inherent in its constitutional function as a court of justice. Every civilised system of government requires that the state should make available all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access in the role of Plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant. Whether or not to avail himself of this right of access to the court lies exclusively within the Plaintiff's choice; if he chooses to do so, the defendant has no option in the matter; his subjection to the jurisdiction of the court is compulsory. So, it would stultify the constitutional role of the High Court as a court of justice if it were not armed with power to prevent it process being misused in such a way as to diminish its capability of arriving at a just decision of the dispute.
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> The power to dismiss a pending action for want of prosecution in cases where to allow the action to continue would involve a substantial risk that justice could not be done is thus properly described as an "inherent power" the exercise of which is in the "inherent jurisdiction" of the High Court. It would I thin be conducive to legal clarity if it (sic) use of these two expressions were confined to the doing by the court of acts which it needs must have the power to in order to maintain its character as a court of justice."

5. In addition, in Birkett V James (1977) 2 ALL ER 801, the court put it this way:

> " To commence and to continue litigation which you have no intention to bring to conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so required (which will frequently be the case) the courts will dismiss the action. The evidence which was relied on to establish the abuse of process may be the Plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in Birkett v James. In this case once the conclusion was reached that the reason for the delay were (Sic) one which involve abusing the process of the court in maintaining proceedings when there was no intention of carrying the case to trial the court were (sic) entitled to dismiss the proceedings."

6. Consequently, upon analysis of the record, and other legal considerations and from the above cases, it is clear that the appeal cannot be sustained for reason of inordinate delay which is also inexcusable. Indolent litigants are no longer permitted to file cases for the sake of it which do not serve the interests of justice. This is an appropriate intended appeal to be dismissed for want of prosecution.

DATED AND SIGNED AT ELDORET THIS 19TH DAY OF JUNE, 2024

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R. NYAKUNDI

JUDGE