



REPUBLIC OF KENYA



**Oparanya v Panyako (Civil Suit E002 of 2021) [2024] KEHC 8874 (KLR) (18 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8874 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL SUIT E002 OF 2021  
SC CHIRCHIR, J  
JULY 18, 2024**

**BETWEEN**

**WYCLIFF AMBETSA OPARANYA ..... PLAINTIFF**

**AND**

**SETH PANYAKO ..... DEFENDANT**

**RULING**

1. By way of a Notice of motion dated 14<sup>th</sup> July 2023, the defendant seeks for the following orders;
  - a. That this honourable court be pleased to dismiss the suit herein for want of prosecution
  - b. That the cost of his application and of the entire suit be awarded to the defendant/applicant.
2. The application is premised on the grounds on the face of the application and the supporting affidavit of Seth Panyako, the defendant.
3. In his affidavit, the defendant avers that the matter was last in court on 13<sup>th</sup> May 2022 . On that day the court delivered a Ruling on the Application dated 27<sup>th</sup> may 2021 , which allowed the joinder of the proposed 2<sup>nd</sup> defendant (Kenya News TV) in the suit. The plaintiff was consequently granted leave to amend the plaint.
4. The defendant further states that despite the order having been made a year ago, the respondent/ plaintiff has neither made any attempt to enjoin the proposed 2<sup>nd</sup> defendant as a party to the suit, nor list the case for pre-trial conference, in compliance with Order 11 of the *Civil procedure* .
5. The defendant further asserts that since the summons to enter appearance has not been issued to the 2<sup>nd</sup> defendant, the plaintiff/ respondent case against the 2<sup>nd</sup> defendant has since abated.
6. The plaintiff/ respondent did not file any response in respect to the application and none of the parties filed any submissions.



7. The only issue before the court is whether the suit herein should be dismissed for want of prosecution.

### Determination

8. Order 17 Rule 2 (3) of the Civil Procedure Rules provides, inter alia:-

- “ 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). ....
- 3). any party to the suit may apply for its dismissal as provided in Sub-rule 1”

9. The powers granted to court are discretionally and have to be exercised judicially, fairly and capriciously.

10. In Argan Wekesa Okumu v Dima College Limited & 2 others [2015] eKLR the court considered the principles for dismissal of a suit for want of prosecution and stated as follows:-

“The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the Defendant is likely to be prejudiced by such delay.... Further to this, the decision of whether or not to dismiss a suit is discretionary and this Court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same.”

11. In Naftali Opondo Onyango v National Bank of Kenya Ltd [2005] eKLR, the court added another consideration. It stated as follows

“However, in deciding whether or not to dismiss a suit under rule 6 it is my view that a Court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay, that the Defendant will suffer no hardship and that there has been no flagrant and culpable inactivity on the part of the Plaintiff.”

12. In Ivita v Kyumbu [1984] KLR 441 there is an additional guideline. Justice Chesoni ( as he then was ) stated :

“(the defendant) must show that justice will not be done in the case due to the prolonged delay on the part of the Plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution.”

13. A perusal of the record show that the plaintiff filed an application dated 27<sup>th</sup> May 2021 where he sought inter alia to include Kenya Television Network as a party to the suit. Through the Ruling delivered by Justice Musyoka on 13<sup>th</sup> May 2022 that prayer was granted.

14. Since then there has not been no action taken by the plaintiff to amend the plaint and or take out summons against the new entrant to the suit. The matter has never been listed for pre- trial conference and there have been no other further steps whatsoever, towards the prosecution of the suit. In deed the suit remained dormant until it was revived by the present Application.



15. It is doubtful whether the plaintiff was even serious when it sought to include KTN NEWS in the suit considering that they have not made use of the orders of 13<sup>th</sup> may 2022. Those orders were therefore issued in vain. The courts' time should not be used to obtain orders which end up being in vain. Such actions amount to misuse of judicial time and constitute an abuse of the court process.
16. It is also instructive that the plaintiff has not filed any response to the present Application, another demonstration that the plaintiff has lost interest in the suit or an affirmation of the indolence on the part of the plaintiff.
17. It is unfair for the defendant to be held in a state of uncertainty on the fate of this suit when the plaintiff has clearly shown that he is no longer interested in pursuing it.
18. The Application is merited. The suit herein is dismissed for want of prosecution.
19. The defendant will have the costs of this Application and the costs of the suit.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 18<sup>TH</sup> DAY OF JULY 2024.**

**S. CHIRCHIR**

**JUDGE**

In the presence of:-

Godwin- Court Assistant

Mr. Musiega for the Applicant.

