



**Docwide Business Centre Kenya Limited v APA Insurance & another; Abdalla & 4 others
(Interested Parties) (Civil Suit E008 of 2020) [2023] KEHC 22207 (KLR) (16 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 22207 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E008 OF 2020
F WANGARI, J
JUNE 16, 2023**

BETWEEN

DOCWIDE BUSINESS CENTRE KENYA LIMITED PLAINTIFF

AND

APA INSURANCE 1ST DEFENDANT

JUBILEE INSURANCE 2ND DEFENDANT

AND

BWANA ADI ABDALLA INTERESTED PARTY

INTERPEL INVESTMENT LIMITED INTERESTED PARTY

AMOS MYNYOKI INTERESTED PARTY

HARSAM GUYO KUTARA INTERESTED PARTY

JAMES OCHIENG ONYANGO INTERESTED PARTY

RULING

1. The 5th Interested Party moved the Court through a Notice of Motion dated August 30, 2022 and amended orally on February 5, 2023 to read '5th Interested Party' instead of '5th Defendant'. The application sought the following orders;
 - a. That the suit against the 5th Interested Party be dismissed for want of prosecution.
 - b. That costs of this suit and this application be awarded to the 5th Interested Party.
2. Upon service of the application, none of the parties responded save for the Notice of Preliminary Objection by the Plaintiff, dated October 11, 2022, which was withdrawn pursuant to the amendment to the application. Parties were directed to file their replying affidavits and written submissions. As at



the time of fixing this matter for ruling, the parties including the Plaintiff had not complied with the court's directions in respect to filing of replying affidavit. written submissions.

3. The basis of this application is that the Plaintiff filed this suit on October 14, 2020 for stay of proceedings in the lower court, where the Interested Parties in this suit are the Plaintiffs in various suits in the said court. The Applicant stated that the suit was last in court on May 26, 2021. At the time of filing his application for dismissal for want of prosecution, no action had been taken in the matter for over one year.

Analysis and determination

4. I have considered the application, and filed submissions together with the authorities relied upon by the 5th Interested Party, as well as the law and in my respectful view, there is only one issue for determination which is whether the Applicant has made out a case for grant of orders it seeks. Corollary to this finding is the issue of costs.
5. 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".
6. The party seeking to have the suit dismissed for want of prosecution must show that the plaintiff has taken no step for over one year since the matter was filed. The Plaintiff must also demonstrate that the failure to take action was excusable.
7. I have perused through the court proceedings. On May 26, 2021, a ruling was delivered dismissing the Plaintiff's application dated October 6, 2020. On October 12, 2021, November 18, 2021 and February 23, 2022, the matter came up for pre-trial conference. The parties complied with Order 11 of the Civil Procedure Rules.
8. On March 10, 2022, the matter was referred to the Court Annexed Mediation upon request by the Plaintiff. A tentative hearing date was fixed for July 12, 2022. On July 7, 2022 the matter was mentioned before the Deputy Registrar. Only the 2nd defendant was represented. The Mediator's report was that there was a non-settlement in the mediation proceedings. The matter was scheduled to be mentioned on July 19, 2022 before the trial court for directions.
9. No action was taken since then until when this application was filed and served upon the parties. As stated herein above, the application was not opposed. Order 51 Rule 14 of the Civil Procedure Rules provides as follows;

Grounds of opposition to application in High Court

- (1) Any respondent who wishes to oppose any application may file any one or a combination of the following documents —
 - (a) a notice preliminary objection; and/or;
 - (b) replying affidavit; and/or
 - (c) a statement of grounds of opposition;



10. . In this case, the Plaintiff filed a Notice of Preliminary Objection but was later withdrawn. The application to dismiss the Plaintiff's suit was not opposed. In *Kennedy Otieno Odiyo & 12 Others v Kenya Electricity Generating Company Limited* [2010] eKLR the court held as follows:-

“The respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the applicant in its supporting affidavit. Thus what was deponed to was not countered nor rebutted by the respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant's supporting affidavit, means that the respondents have no claim against the applicant”.

12. This court has a duty to determine the application on merits. In *Mwangi S Kimenyi v Attorney General and Another*, Civil Suit Misc No 720 of 2009, the court on considering whether or not the suit should be dismissed for want of prosecution stated as follows:-

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.

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 inexcusable;
- 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 of issues in action or causes or likely to cause serious prejudice to the Defendant; and
- 5) what prejudice will the 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.”

13. It is a fact that the Plaintiff took no action for over one year since the last appearance in court on March 10, 2022. Even after the matter was referred to Court Annexed Mediation, the Plaintiff did not appear for mention before the Deputy Registrar on July 7, 2022. This notwithstanding, even after this application was served, the Plaintiff did not oppose the application. The Plaintiff made no effort to explain the delay in prosecuting its suit. I find that Application by the 5th Interested Party has merits.

14. Even though the Defendants and the 1st to 4th Interested Parties did not file any response to the application, the court shall proceed to exercise its discretion in respect to the determination of the suit against them. The Plaintiff having not shown cause as to why the suit should not be dismissed for want of prosecution, the suit is hereby dismissed in limine.

15. On the issue of costs, Section 27 of the *Civil Procedure Act* decrees that the same follows the event. However, the court retains its discretion to either award or not to award costs.



16. Following the foregone discourse, the upshot is that the following orders do hereby issue; The application dated August 30, 2022 is merited and allowed as follows;
- a. The Plaintiff's suit is hereby dismissed for want of prosecution
 - b. Costs awarded to the Defendants and the Interested Parties

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 16TH DAY OF JUNE, 2023.

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F. WANGARI

JUDGE

In the presence of;

Maundu Advocate h/b for Achoke Advocate for 5th Interested Party

Mugambi Advocate for 2nd Defendant

Otwane Advocate for 3rd Interested Party

N/A for Plaintiff

N/A for the 1st Defendant

N/A for the 1st, 2nd & 4th Interested Parties

Barile, Court Assistant

