



FW v WWW (Civil Case 4 of 2019) [2023] KEHC 20420 (KLR) (Family) (14 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20420 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL CASE 4 OF 2019
MA ODERO, J
JULY 14, 2023

BETWEEN

FW PLAINTIFF

AND

WWW DEFENDANT

RULING

1. Before this Court for determination is the Notice of Motion application dated March 9, 2021 by which Applicant W.WW seeks the following orders:-
 - “ 1. That the Honourable Court be pleased to dismiss the Plaintiff/Respondent’s plaint dated February 12, 2019 for want of prosecution.
 2. That the Honourable Court be pleased to proceed with the Defendant/ Applicant’s counterclaim dated April 18, 2019 and filed on April 23, 2019.
 3. That this Honourable Court be pleased to grant any other or further orders as it may deem necessary and just in the circumstances.
 4. That the costs of this application be in favour of the Defendant/Applicants, in any event.”
2. The application was premised upon to Order 17 Rule 2(1) and (3) and Order 51 Rule 1 of the [Civil Procedure Rules](#) and Section 3A of the [Civil Procedure Act](#), Chapter 21, Laws of Kenya and was supported by the sworn affidavit of even date sworn by Evanson Kagwima Kimani, the Defendant’s Advocate.



3. The Respondent FW opposed the application through the Grounds of Opposition dated February 15, 2023 in which he raised the following grounds:-

- “ 1. The application is fatally defective for being anchored on a defective affidavit.
2. Paragraph 12, 13 and 14 of the Affidavit is a clear indication that the Affidavit is a cut and paste affair and not a true and genuine deposition.
3. An application of this nature can only be supported by an affidavit of the party and not the advocate as in the instant case where it is embarrassing, scandalous and vexatious.
4. That the delay in not prosecuting the suit is not inordinate and inexcusable.
5. The circumstances of the Plaintiff/Respondent affecting his ability to prosecute the suit expeditiously (being illness) would be within the knowledge of Defendant/Applicant as spouse and cannot feign ignorance.”

4. The matter was canvassed by way of written submissions. The Applicant filed the written submissions dated September 29, 2022 whilst the Plaintiff /Respondent did not file any written submissions.

Background

5. The Plaintiff herein had filed this suit on February 19, 2019 seeking various orders in respect of matrimonial property. The Defendant opposed the suit by way of a Defence and counterclaim dated April 18, 2019. The matter came up in court several times but the suit was never heard. The Defendant then filed this application seeking to have the suit dismissed for want of prosecution.

Analysis and Determination

6. I have carefully considered the application before this court. The grounds filed in opposition as well as the written submissions on record.

7. Order 17 Rule 2(1), *Civil procedure Rules* 2010 governs dismissal of suits for want of prosecution, provides as follows:

“In any suit in which no 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.”

8. Order 17 Rule 2(3) states as follows:-

“ Any party to the suit may apply for its dismissal as provided in sub-rule 1”

9. The decision of whether or not to dismiss a suit for want of prosecution purely discretionary. However, the court must bear in mind that said discretion should be exercised judiciously taking into account all relevant matters. It is trite law that dismissal of a suit is a draconian measure which ought only be reserved for the most hopeless situations. Courts ought to aim at preserving a suit in order to allow parties their right of access to justice.



10. In the case of *Sheikh vs Gupta & Others* [1969] EA 140, the court held as follows:-

“In deciding whether or not to dismiss a suit under rule 6 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... it is the duty of the plaintiff’s adviser to get on with the case. Public policy demands that the business of the courts should be conducted with expedition. It is of the greatest importance in the interest of justice that these actions should be brought to trial with reasonable expedition”. [own emphasis]

11. Likewise the case of *Et Monks & Company Ltd vs Evans* [1985] KLR 584 the court stated as follows:-

“The court when pondering over an application to dismiss a suit for want of prosecution should among other things ask whether the delay was lengthy, has it made a fair trial impossible and was it inexcusable” Whether or not the application should be allowed is a matter for the discretion of the judge who must exercise it, of course, judicially. Each turns on its own facts and circumstance...

12. In this case the suit was filed in the year 2019. Thereafter attempts were made at mediation in the hope that the parties would be able to reach an out of court settlement. On December 19, 2019 it was indicated that the parties were close to reaching a settlement.

13. The matter was mentioned before the Hon. Deputy Registrar on January 13, 2022. Further mentions occurred on February 16, 2022 and April 7, 2022.

14. On May 18, 2022 the matter was mentioned by Hon. Justice Muchelule (as he then was) who gave directions on hearing of application and a further mention for October 4, 2022.

15. From the above narration it is quite evident that the suit has been active in court. The Plaintiff did not file the suit and go to sleep thereafter. The matter was constantly on the radar of the court.

16. The plaintiff explained that the delay in prosecuting the suit has been caused by his ill health. Given that the Plaintiff is about 85 years of age this is a plausible explanation for the delay.

17. In the case of *AGIP (Kenya) Limited vs Highland Types Ltd* [2001] eKLR Hon. Justice Visram (as he then was) observed as follows:-

“It is not correct that Order 16 rule 5(d) of the Civil Procedure Rules gives the court no discretion but to dismiss the suit otherwise it would mean that every application by a defendant under the said provisions would succeed automatically. The law and the practice of the Court does not lend any support to such an argument. It is the function of the Courts to determine whether the interests of justice would be achieved in allowing or refusing an application. In another aspect, it is clear that the process of our judicial system requires that all parties before the Court should be given an opportunity to present their cases before a decision is given. It is not possible that the Rules Committee intended to leave the plaintiff without remedy and take away the authority to the court when it made Order 16 Rule 5. Otherwise such a rule would be itself be void if its effect were to deny the court an opportunity to hear and determine a case on merit as that would amount to interfering with the Court’s inherent powers to do justice... A consideration of the principles to be applied in deciding whether or not a suit ought to be dismissed for want of prosecution, shows that an application by a defendant under Order 16 Rule 5 of the Rules is not automatic and



certain factors have to be considered such as (i) the delay whether inordinate (ii) whether the inordinate delay is excusable and (iii) whether the defendant is likely to be prejudiced by the delay... Delay is a matter of fact to be decided on the circumstances of each case. Where a reason for the delay is offered, the court should be lenient and allow the plaintiff an opportunity to have his case determined on merit. Finally, the court must consider whether the defendant has been prejudiced by the delay. [own emphasis]

18. In the same case the court went on to state as follows:-

“... the test in an application for dismissal of a suit for want of prosecution is whether the delays is prolonged and inexcusable and if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and the Defendant; so both parties to the suit must be considered and the position of the judge too...”

19. As stated earlier the suit was filed in the year 2019. The delay is about four (4) years. In my view given the sheer volume of work in the Nairobi High Court that delay cannot be said to be either prolonged nor inexcusable. The Plaintiff has given a plausible explanation for the delay in prosecuting his suit. The Defendant has not demonstrated what prejudice she stands to suffer if the suit is heard and determined on merit.

20. It serves the best interests of justice to have the suit set down for hearing as soon as possible. Accordingly, I find no merit in this application.

21. Finally, this court makes the following orders:-

- (1) The Notice of Motion dated March 9, 2021 is hereby dismissed in its entirety.
- (2) The Plaintiff is directed to set down this suit for hearing within four (4) months of the date of this Ruling.
- (3) In event of failure to have the suit set down for hearing as directed in (2) above the suit will then stand dismissed with no further reference to the Plaintiff.
- (4) This being a family matter each side shall bear its own costs.

DATED IN NAIROBI THIS 14TH DAY OF JULY, 2023.

MAUREEN A. ODERO

JUDGE

