



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL SUIT NO.146 OF 2007

HUDSON BARASA WASIKE.....PLAINTIFF/APPLICANT

VERSUS

NYAGA KIRONGA.....1ST DEFENDANT/1ST RESPONDENT

MATUNDA BUS SERVICE.....2ND DEFENDANT/2ND RESPONDENT

LAWRENCE MIRIUKI.....3RD DEFENDANT/3RD RESPONDENT

RAHIM JUNEJA.....4TH DEFENDANT/4TH RESPONDENT

RULING

Introduction & Background

1. The application dated the 17th of August 2021 primarily seeks to review the orders of court made on the 5th of April 2019 dismissing the suit for want of prosecution. In particular, the applicant wants the suit reinstated for hearing and determination on merits.
2. The brief facts of the case necessitating the instant suit is that on the 9th of December 2006, the applicant was involved in a road traffic accident between a Mercedes Benz Trailer KAQ 744G/ZC 0817 and an Isuzu Bus registration number KAW 172D belonging to the 2nd defendant. As a result of the accident, the applicant suffered grave injuries which necessitated the filing of the instant suit.
3. The application is grounded on the supporting affidavit of Hudson Barasa Wasike, the applicant herein, sworn on the 30th of August 2021 wherein he deponed that vide a consent recorded on the 29th May 2009, this court adopted Eldoret HCCC No.107 of 2007- Viscard Kipngetch (Suing as the personal representative of the Estate of Ronoh Priscah Chepkemoi) vs Matunda Fruits Bus Services Ltd & 4 others, as the test suit to determine the question of liability. In this regard, the applicant deponed that the court stayed the hearing of the other suits, including the instant suit, pending the determination of the test suit which was delivered on the 28th of May 2019 and which found the 3rd and 4th respondents jointly and severally 100% liable for the accident.
4. He further deponed that it is only when his advocate proceeded to set down the instant suit for formal proof to assess quantum, that they learnt that the suit had been dismissed for want of prosecution.
5. The application was duly served on the respondents but there is no response on record.
6. The application was canvassed orally on the 9th of November 2021 where counsel for the applicant reiterated the averments made in the supporting affidavit of the applicant highlighted above.

Determination

7. The only issue arising for determination is whether the court should reinstate the suit that was dismissed for want of prosecution.
8. Considering that the application is predicated on Order 17 rule 2, it is instructive to highlight the same.
9. Order 17 Rule 2 of the Civil Procedure Rules lays down the legal framework on dismissal of suit for want of prosecution. In particular, order 17 Rule 2 provides that: -

“2. (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) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.

(4) The court may dismiss the suit for non-compliance with any direction given under this Order.”

10. My understanding of the above provision is that a court may *suo motto* dismiss a suit for want of prosecution and within the same framework, the court may dismiss a suit on the same ground on the application of either party to the suit. This position was affirmed in **George Gatere Kibata v George Kuria Mwaura & another [2017] eKLR and Invesco Assurance Company Limited v Oyange Barrack [2018] eKLR.**

11. In **Ivita -vs- Kyumbu(1984) KLR 441**, the court affirmed the test in dismissing a suit for want of prosecution as follows: -

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

12. In addition, in **Mwangi S. Kimenyi -vs- Attorney General and Another, Civil Suit Misc. No. 720 of 2009**, the court restated the test 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 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.” Emphasis added

13. Thus, for a suit to be dismissed for want of prosecution, the following threshold must be met:

a. The threshold of one year stipulated in Order 17 Rule 2 of the Civil Procedure Rules must have lapsed.

b. There must have been inordinate and inexcusable delay in the circumstances of the case.

c. The court must be satisfied that a party may be prejudiced by the delay if the suit were to be allowed to proceed to trial and lastly,

d. The court must be satisfied that owing to the delay, a fair trial cannot be achieved.

14. In the instant suit, the primary question is whether there was inordinate delay in the circumstances of the case to warrant the dismissal of the suit for want of prosecution. That is, was there intentional delay by the applicant to prosecute his case therefore warranting court to dismiss his suit?

15. In my opinion, the answer is in the affirmative. This is because, it is clear from the record that on the 29th of April 2009, the court by consent of the parties, adopted suit no Eldoret HCCC 107 of 2007 as a test suit to determine the question of liability between the 1st and 2nd defendants on one part and the 3rd and 4th defendants on the other part. Consequently, the parties agreed that the finding in liability in the aforementioned suit, was to apply in and would bind on the parties in all the suits listed in the application. The order by consent has been attached and is marked HBW1.

16. As a result of the above order, it would have been impossible for the instant suit to proceed when the test suit was still pending. In the circumstances, the delay in the prosecution of the instant suit between 2014 and 2019 cannot be considered inordinate or inexcusable, since

there are valid reasons why the applicant did not prosecute his case. That is, the applicant had to await the outcome of the test suit which was finally delivered on the 28th of May 2019.

17. However, the applicant did not prosecute his case after the delivery of the judgement in 2019 and only followed up on his case in 2021, 2 years after the delivery of the said judgement. This in my opinion constitutes inordinate.

18. The above withstanding, this is a matter where the plaintiff has suffered body injuries and the Court is prepared to excuse the delay herein in the interest of justice, which I hereby do.

19. I therefore allow the application and direct that the matter be listed for hearing within 60 days.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 7TH DAY OF DECEMBER 2021

E. O. OGOLA

JUDGE