



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL SUIT NO 385 OF 2015**

**ZIPPORAH WAITHERA MUNGAL.....PLAINTIFF**

**VERSUS**

**JOHN ADIENG ADWORK.....1<sup>ST</sup> DEFENDANT**

**KENYA HOSPITAL ASSOCIATION T/A**

**THE NAIROBI HOSPITAL.....2<sup>ND</sup> DEFENDANT**

**RULING**

**INTRODUCTION**

1. The 2<sup>nd</sup> Defendant's Notice of Motion application dated 20<sup>th</sup> April 2018 and filed on 23<sup>rd</sup> April 2018 was brought pursuant to the provisions of Order 17 Rule 2 (1) & (3) of the Civil Procedure Rules 2010. It sought the following orders:-

**1. THAT the suit be dismissed for want of prosecution.**

**2. THAT the Plaintiff do pay the 2<sup>nd</sup> Defendant the costs for this application and of the suit.**

3. The 2<sup>nd</sup> Defendant's Written Submissions were dated and filed on 18<sup>th</sup> October 2018 while the Plaintiff's List and Bundle of Authorities and Written Submissions were dated 2<sup>nd</sup> November 2018 and filed on 6<sup>th</sup> November 2018. Interlocutory judgment was entered in favour of the Plaintiff against the 1<sup>st</sup> Defendant on 31<sup>st</sup> July 2018. He did not therefore participate in the hearing of this application.

4. When the matter came before the court on 7<sup>th</sup> November 2018, the Respondent requested it to render its decision based on its Written Submissions which he relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

**THE 2<sup>ND</sup> DEFENDANT'S CASE**

4. The 2<sup>nd</sup> Defendant's present application was supported by the Affidavit of the 2<sup>nd</sup> Defendant's Company secretary, Mercy Kagiri Mbijiwe, that was sworn on 20<sup>th</sup> April 2018.

5. The 2<sup>nd</sup> Defendant contended that the Plaintiff filed suit on 11<sup>th</sup> November 2015 alleging negligence on its part for injury suffered to her vocal cords during surgery. It stated that it filed its defence on 16<sup>th</sup> December 2015 but that since then, the Plaintiff had not taken any steps to pursue this matter or to set the suit down for hearing.

6. It pointed out that there had been inordinate delay in the Plaintiff prosecuting here case was inexcusable and prejudicial to it as witnesses may not recall facts of the case due to loss of memory resulting from loss of time.

7. It therefore urged this court to allow its application as prayed.

**THE PLAINTIFF'S CASE**

8. In response to the said application the Plaintiff swore her Replying Affidavit was sworn on 28<sup>th</sup> June 2018 and filed on 29<sup>th</sup> June 2018.

9. She termed the present application as mischievous, misleading, ill willed, untenable, unsubstantiated, frivolous, vexatious and craftily designed to defeat the determination of the real issues in dispute, on merit. She was emphatic that she had a right to fair trial as has been envisaged in Article 50 of the Constitution of Kenya.

10. She therefore urged this court to dismiss the said application.

## **LEGAL ANALYSIS**

11. The 2<sup>nd</sup> Defendant premised its application on the provision of Order 17 Rule 2(1) and (3) of the Civil Procedure Rules that stipulates as follows:-

### **Notice to show cause why suit should not be dismissed [Order 17, rule 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.**

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

12. It placed reliance on the case of Naftali Onyango vs National Bank of Kenya [2005] eKLR where the test to be applied when considering dismissal of suit for want of prosecution had been set out. It was held that for an applicant to succeed, in such an application, he had to demonstrate that there had been inordinate delay on the part of the opposing party, that the delay was inexcusable and he was likely to be seriously prejudiced by the delay on the part of the opposing party.

13. It also relied on the case of Invita vs Kyumba [1984] KLR 441 and several other cases where the same test was applied.

14. It was emphatic that the Plaintiff's delay in filing her Reply to Defence or to fix a hearing date of the matter had been inordinate. It added that the fact that she was working outside the country or that she was unable to speak was not an excuse for her not to have prosecuted her case because she could have instructed her advocates in writing.

15. It argued that as Salmon L J remarked in Allan vs Sir Alfred McAlpine and Sons Ltd [1968] 1 ALL ER 543 that was cited in the case of Naftali Onyango vs National Bank of Kenya (Supra) that unless a credible excuse had been made out, the natural inference would be that it was inexcusable.

16. It further relied on the case of Nilesh Premchand Mulji Shah & Another vs M.D Popat & Others [2016] eKLR where it was held that:-

**“...the court is bound to do justice to both parties without undue delay, which delay occasions injustice to either party to the dispute... delay defeats unity.”**

17. The Plaintiff also relied on the case of Allen vs Sir Alfred McAlpine & Sons (Supra) which was also quoted in the case of Agip (Kenya) Ltd vs Highlands Tyres Ltd [2001] eKLR where the principles to govern applications for dismissal of want of prosecution were set out. The test that was set out was the same as was in the case of Naftali Onyango vs National Bank of Kenya Ltd (Supra) that was relied upon by the 2<sup>nd</sup> Respondent herein.

18. She reiterated that it was not her intention not to prosecute her case and referred this court to the case of Moses Otsyula vs Children of God Relief Institute [2015] eKLR where Aburili J dismissed an application for dismissal of suit for want of prosecution because the plaintiff therein had been unable to give instructions to her advocates as she had suffered a stroke.

19. She also referred in the cases of Agip (k) Ltd vs Highlands Tyres Ltd (Supra) and Ivita vs Kyumba (Supra) to buttress her argument that the 2<sup>nd</sup> Respondent had not been prejudiced by the delay in her prosecution of the case herein.

20. This court carefully analysed the parties' Written Submissions and case law that they each relied upon noted that they were all agreed that a suit will be dismissed if there has been inordinate and inexcusable delay in prosecution of the same and that such delay must have caused a defendant prejudice.

21. The suit herein was filed in 2015. Three (3) years have passed since it was filed. The Plaintiff sought entry of interlocutory judgment against the 1<sup>st</sup> Defendant on 28<sup>th</sup> May 2018. The same was entered on 31<sup>st</sup> July 2018.

22. A case belongs to a plaintiff. It is his responsibility to progress his matter to ensure that the same is concluded expeditiously as is contemplated in Section 1A, 1B and 3A of the Civil Procedure Rules and Article 159 (2) (b) of the Constitution of Kenya. A plaintiff cannot move at the pace of a defendant.

23. The Plaintiff herein appeared to be moving at a snail's pace. The explanation that she had lost her voice was inexcusable as she could have instructed her advocate in writing. The fact that she was outside the country was also no reason or excuse not to have availed herself so that she could prosecute her case.

24. This court thus agreed with the 2<sup>nd</sup> Defendants that the delay had great potential to prejudice them. The Sword of Damocles has continued to hang over its head for over three (3) years without it knowing when the case against it will come to an end.

25. This court found that the Plaintiff had not advanced a plausible explanation for the delay in prosecuting her case. Though there was a delay in requesting for entry of the said judgments, this was a step towards the prosecution of her suit within the last one (1) year. The delay from 31<sup>st</sup> July 2018 was thus not inordinate.

26. Accordingly, having considered the parties' Written Submissions and case law that they each relied upon, this court found and held that although the Plaintiff had not given a plausible explanation for the delay in prosecuting her case, which had the potential to cause 2<sup>nd</sup> Defendant prejudice, the last step was taken less than a year ago.

27. It must be appreciated that, a court should only dismiss a matter where all the three (3) ingredients to wit, inordinate and inexcusable delay and prejudice to an opposing party exist. If one (1) ingredient is absent, a court should lean towards saving a suit for determination on merit.

28. Notably, every person is entitled as envisaged under Article 50 of the Constitution of Kenya to have a fair trial. The said Article 50 of Constitution of Kenya provides as follows:-

**“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”**

29. It therefore follows that every person ought not to be shut out from accessing court or having his day in court. Indeed, the right of a party to enjoy the fruits of his judgment must be weighed against the right of a party to access court to have his dispute heard and determined by a court or tribunal of competent jurisdiction.

#### **DISPOSITION**

30. For the foregoing reasons, the upshot of this court's decision was that the 2<sup>nd</sup> Defendant's Notice of Motion application dated 20<sup>th</sup> April 2018 and filed on 23<sup>rd</sup> April 2018 was not merited and the same is hereby dismissed. Costs shall be in the cause.

31. To progress this matter, it is hereby directed that the same be mentioned before the Deputy Registrar High Court Milimani Law Courts Civil Division on 21<sup>st</sup> February 2019 with a view to her giving directions in respect of the Pre-Trial Conference.

32. In the event that the Plaintiff shall not prosecute her case expeditiously, the 2<sup>nd</sup> Defendant will be at liberty to take such appropriate steps to safeguard its interests.

33. It is so ordered.

**DATED and DELIVERED at NAIROBI this 14<sup>th</sup> day of February 2019**

**J. KAMAU**

**JUDGE**