



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 358 OF 2006**

**SOLOMON OKOTH ODUMA.....PLAINTIFF**

**VERSUS**

**MUNYARUGERERO GERMAIN.....1<sup>ST</sup> DEFENDANT**

**RWAKEN INVESTMENT LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. On 26<sup>th</sup> February 2019, this court on its own motion issued a notice to show cause why this case should not be dismissed for want of prosecution. The notice to show cause was scheduled for hearing on 8<sup>th</sup> March 2019 and the parties were served accordingly.
2. On the hearing date, learned counsel for the plaintiff *Ms Marienga* attended the court but there was no representation for the defendant. In response to the notice to show cause, learned counsel for the plaintiff filed an affidavit dated 6<sup>th</sup> March 2019 in which she sought to explain the reasons for the delay in the prosecution of the case. She re-iterated the depositions made in her affidavit in the brief oral submissions she made before the court.
3. Learned counsel submitted that the plaintiff has always been eager and ready to prosecute the suit but has been impeded from doing so by the existence of a moratorium order issued by the court in respect of all claims made against *Standard Assurance Limited*, closure of the court diary at times when the plaintiff was desirous of fixing the suit for hearing and unavailability of the court file as the same was missing from the court registry from 28<sup>th</sup> June 2018. The deponent annexed to her affidavit what she referred to as the moratorium order; several letters addressed to the defendants' advocates *M/s B M Mutie & Company Advocates* inviting them to attend the court registry on different dates to have the parties fix a mutually convenient date for hearing of the suit and other letters addressed to the Deputy Registrar complaining about the plaintiff's inability to set down suit for hearing owing to the unavailability of the court file and seeking the Deputy Registrar's intervention in having the file traced.
4. I have considered the court record, the oral submissions made by learned counsel and the depositions in her affidavit sworn on 6<sup>th</sup> March 2019 and all the annexures thereto. I find that the last time the case was in court for hearing was on 20<sup>th</sup> January 2015 when the same was stood over generally after the court was informed about the existence of a moratorium issued in favour of the *Standard Assurance Company Limited*, the insurance company that had insured the motor vehicle subject matter of the suit. Since that date, no other action or step appears to have been taken towards prosecution of the suit.
5. I have perused what the plaintiff referred to as the moratorium order which prevented hearing of the suit on 20<sup>th</sup> January 2015 and I find that what was annexed to the affidavit is not the actual moratorium but an extract of a court order extending the moratorium to 30<sup>th</sup> January 2015. Since the actual moratorium is not annexed, it is not possible for this court to tell what it was all about and whether it ordered stay of proceedings in claims filed in court against policy holders of the aforesaid insurance company. But since the order clearly shows that the same was extended to 30<sup>th</sup> January 2015 and there is no indication whether or not the order was subsequently extended or whether it lapsed or is still in force, I find that the alleged existence of a moratorium cannot operate as a bar to prosecution of the suit in the absence of evidence to confirm its existence or its terms.
6. Be that as it may, the plaintiff appears to have made commendable effort in seeking to have the suit fixed for hearing as evidenced by the letters annexed to the affidavit. The first three letters addressed to the defendant's counsel are dated 13<sup>th</sup> October 2015; 29<sup>th</sup> June 2017 and 3<sup>rd</sup> July 2017 while those addressed to the Deputy Registrar which are five in number have dates running between 24<sup>th</sup> May 2018 to 15<sup>th</sup> October 2018. Most of the letters were received in the court registry since they bear the court registry stamp. The letter dated 4<sup>th</sup> July 2018 shows that the plaintiff had extended his search of the court file from the court registry to the archives located in the Supreme Court building. In my view, the said letters taken as a whole amount to good evidence to substantiate the plaintiff's claim that he is still interested and keen on pursuing his claim and that the delay of about three years has been caused by factors beyond his control.
7. Given my foregoing findings, I am satisfied that the plaintiff has sufficiently shown cause why the suit should not be dismissed for want of prosecution as proposed. In the interest of justice, I am prepared to give the plaintiff another chance to prosecute his suit so that the same can be heard and determined on merit. However, in order to ensure that there is no further delay in the disposal of the suit and now that the court file is available, I direct that the suit be prosecuted within the next six months of today's date failing which it shall stand dismissed for want of prosecution. But since it is not clear from the material placed before me whether or not the aforesaid moratorium is still in force and what its terms are, I think it is prudent to put a rider to the application of the aforesaid order so that if the moratorium is still in existence and it affects the hearing of the suit, the order requiring prosecution of the suit within six months in default of which it will stand dismissed will not apply. Put another way and for purposes of clarity, the above order will apply whether or not the moratorium is in force if it does not order stay of proceedings of the suit.

It is so ordered.

**DATED, DELIVERED and SIGNED at NAIROBI this 13<sup>th</sup> day of March, 2019.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Ms Marienga for the plaintiff

Ms Kenya for Mr. Ombati for the defendants

Mr. Salach: Court Assistant