



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HCC NO. 33 OF 2009 (OS)

TERESIA WACEKE MUNYAKA.....PLAINTIFF

VERSUS

STANLEY MUNYAKA KAMAU.....DEFENDANT

RULING

1. By a notice of motion dated 1st August 2018 and filed on 22nd April 2019, the defendant sought orders dismissing the plaintiff's case for want of prosecution pursuant to Order 17 rule 2 (1) and (3) of the Civil Procedure Rules. The Application is predicated upon grounds set out on the face of it and an affidavit sworn on the same day by Sammy Kariuki Muturi counsel for the applicant.
2. The applicant's case is to the effect that the suit herein has been lying dormant since 16th March 2017 due to the plaintiff's failure to set it down for hearing. That due to inactivity of the plaintiff which is inexcusable, fragrant and culpable, it is over one year now since last action was taken. That it is apparent from the said conduct that she has lost interest in the suit.
3. During the hearing, M/s Maina for the applicant submitted that, this is the second time the defendant is applying for dismissal of the suit for want of prosecution. She averred that sometime 2016 they had the same suit dismissed for want of prosecution. That later it was reinstated vide the court's ruling delivered on 16th March 2017 wherein the plaintiff was given an opportunity to prosecute the suit. That since that date no action has been taken hence the instant application.
4. In reply, the respondent filed a replying affidavit sworn by her counsel Mr. George Kithi and filed on 4th April 2019. Mr. Kithi averred that on 2nd March 2018, the plaintiff had expressed her predicament in prosecuting the suit herein given that she was an asylee in USA. That due to her status coupled with sickness, she was unable to attend court in May 2018 as earlier on anticipated and intimated to the court vide the application of 2nd March 2018. He urged the court not to dismiss the suit in the interest of justice as the plaintiff is now in the country up to the end of May 2019 hence ready to prosecute the matter.
5. Mr. Macharia holding brief for Mr. Kithi submitted that the matter was last before court on 1st July 2018 for mention of the plaintiff's application dated 2nd March 2018. He stated that there will be no prejudice suffered if the matter was to proceed immediately or any time before end of May 2019 when the plaintiff is expected to go back to USA.
6. I have considered the application herein, affidavit in support, replying affidavit and oral submissions by both counsel. I have carefully perused the court record. It is clear that the suit was last mentioned before court on 16th March 2017 when a ruling reinstating the suit earlier on dismissed for want of prosecution was delivered. Since then, no action has been taken. It is therefore over one year since the last action was taken on this file.
7. Is there justification for dismissal? The power to dismiss a suit under such a situation is purely discretionary depending on the circumstances of each case. The allegation by Macharia that the file was last mentioned in court on 1st March 2018 is not true as there is no record or evidence to confirm that assertion. Even the alleged application dated 2nd February 2018 is not in the court file nor was it attached to the respondent's replying affidavit although referred to as Annexure GK.2.
8. This being a court of record, I find Mr. Macharia's submission not sustainable. As regards his client being held in USA as an Asylee, this is not the first time this excuse is being tendered. Litigation must come to an end. Where the delay is prolonged for a factor beyond the control of the plaintiff, the suit can be withdrawn and then filed later subject to limitation of time provisions and the exceptions attendant thereto.
9. However, on 16th March 2016, the court considered and took into account the element of Asylum status of the plaintiff as reasonable cause for her failure to prosecute the suit. The same situation is still prevailing. Although it appears to be a complex situation, there must be a solution to bring the matter to an end within the parameters of substantive justice.

10. I am alive to the fact that before a court could dismiss a suit for want of prosecution, there must be extremely good reasons to justify the dismissal more especially when a litigant presents himself or herself in court and promises to prosecute the case immediately. In the instant case, the plaintiff is ready anytime to prosecute her case before end of May 2019.

11. I am persuaded by the enthusiasm with which the plaintiff is willing to prosecute the case. Considering that the matter has been lying idle for two years and the reasons advanced for the delay, I am convinced that the plaintiff was incapacitated by factors beyond her control. There will be no prejudice suffered if the plaintiff is given an opportunity to ventilate her case as soon as possible now that she is in the country.

12. It is trite that substantive justice is the ultimate test of any sound and working legal system. The test therefore applicable is whether justice can be done even with the alleged delay. In the case of **Ivita vs Kyumbu (1984) KLR 441**, it was held that:

“the test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and, if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff’s excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter in the discretion of the court”.

13. For the above reasons stated, the application herein is hereby dismissed and the suit shall be set down for hearing on apriority basis. However, the plaintiff is condemned to pay costs of this application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF APRIL, 2019.

J.N. ONYIEGO

JUDGE