

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 89 OF 2013

WILLIAM MUGA AKETCH.....PLAINTIFF

-VERSUS-

TAILORS AND TEXTILES WORKERS UNION.....DEFENDANT

RULING

1. On 5th March, 2018, this Court issued a notice to the parties in this suit to show cause why the suit should not be dismissed for want of prosecution. The said notice was issued under the provisions of Order 17 rule 2 of the Civil Procedure Rules, 2010 which provides that, “(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.*”

2. When the notice came up for hearing on 13th April, 2018, the Plaintiff filed a Replying Affidavit to the Notice explaining why the matter has not been prosecuted. The Defendant did not appear in Court. In the Replying Affidavit dated 10th April, 2018 and sworn by **EVANS OCHIENG**, the Plaintiffs’ Counsel, it was deponed that the plaintiff has never lost interest in prosecuting the suit and he seeks time to expedite its resolution and determination. Rather than that, the Plaintiff deponed that the suit is a defamation claim and that the defamatory statements are still in circulation. That the Plaintiff claims relief for the losses suffered as he cannot secure another job and he is ready to abide by such terms as the court may impose.

3. The last time this matter was in court was on 15th March, 2013 which is more than 5 years ago with no step having being taken thereafter, to prosecute the suit. That being a long period of time, I expected the Plaintiff to explain the reasons why he has not been able to prosecute the suit but he has dwelt on explaining the contents of the suit and how the Plaintiff was defamed. The Plaintiff has told this court that he has not lost interest in the suit and he seeks indulgence of the Court to have the matter determined on merits. It was not enough for the Plaintiff to tell the court that he has not lost interest in the suit. At this stage, the plaintiff was expected to give reasons why the court should exercise its discretion in his favour and such reasons should be derived from a satisfactory explanation for the delay in prosecuting the case. Order 17 Rule 2 is quite clear that *if cause is not shown to its satisfaction, the court may dismiss the suit.*

4. The test for dismissal of a suit for want of prosecution is stated in the case of **Ivita -v- Kyumba (1984) KLR 441**. The test was expressed as follows:

“The test is whether the delay 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, because it is no easy task for the documents and or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time; the defendant must satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced; he must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff.”

5. On whether the delay was prolonged and inexcusable and whether justice can still be done despite the delay, it is my position that the delay is long and the same has not been explained. The Plaintiff’s Replying Affidavit does not give sufficient reasons why the suit should not be dismissed. This suit was instituted more than 5 years ago.

6. The test in the case of Ivita (supra) was applied by the Court of appeal in the case of **Rajesh Rughani v Fifty Investments Limited & another [2016] eKLR** when it held that, “*in the persuasive decision of Ivita -v- Kyumba Civil Appeal No. 340 of 1971 Chesoni J. dismissed a suit for want of prosecution due to a 4 ½ year delay and stated that where an action has been dormant for twelve months or more, a defendant is entitled to dismissal of the suit for want of prosecution unless the plaintiff shows sufficient reasons for non-dismissal. In Paxton -v- Allsopp (1971) 3 All ER 370 at 371 it was reiterated that when the delay is prolonged and inexcusable, and is such as to do grave injustice to one side or the other or to both, the court may in its discretion dismiss the action straight away.*”

7. I find that the delay in prosecuting this case has not been explained which delay is inexcusable. The suit is therefore dismissed, with costs.

Dated, Signed and Delivered at Nairobi this 3rd Day of May 2018.

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L. NJUGUNA

JUDGE

In the Presence of

.....*For the Applicant*

.....*For the Respondent*