



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CIVIL SUIT NO. 2 OF 2017

INVESCO ASSURANCE COMPANY LIMITED...PLAINTIFF/RESPONDENT

VERSUS

OYANGE BARRACK.....DEFENDANT/APPLICANT

RULING

1. The applicant, who is the defendant in this suit, seeks dismissal of the plaintiff/respondent's suit for want of prosecution. He avers that the plaintiff has not taken any steps in the last 8 months to prosecute its claim. In the application dated 4th December 2017, the applicant seeks orders that the court be pleased to dismiss the plaintiff's suit, and that the costs of the application be in the cause.

2. The application is brought under Order 17 Rule 2 (1) & (3) and Order 51 Rule 1 of the Civil Procedure Rules and is based on the following grounds:

(a) That more than 8 months have lapsed since the Defendant filed the Defence and Notice of Preliminary Objection, and the Claimant has not taken any steps to follow up to prosecute the suit or to take any directions to proceed with the hearing of the suit against the Defendant.

(b) That the continued presence of the suit in court without its prosecution is highly prejudicial to the Defendant.

(c) That in the view of the time it is in the best interest of justice that this Application be granted.

3. The application is supported by an affidavit sworn by George Ngala Awino on 4th December 2017. He deposes that the plaintiff's suit was filed on 22nd March 2017 but the plaintiff had not taken any steps to prosecute the suit. It had been 8 months since the defence was filed and no steps had been taken since, and the suit was therefore ripe for dismissal. He further deposes that it was in the interests of justice and fairness that the court invokes the overriding objective and exercises its discretion to bring the proceedings to an end.

4. In a replying affidavit sworn by Kiongo P. Murimi and filed in court on 17th January 2018, the plaintiff terms the present application wholly misconceived and an attempt to waste the court's time. Mr. Murimi deposes that the matter was filed on 22nd March 2017 and the plaintiff is in the process of setting the matter down for hearing.

5. He further deposes that for a matter to be dismissed for want of prosecution, it must have stayed for more than 12 months without being prosecuted. This was not the case with respect to the present suit as it had only stayed for 8 months before the filing of the instant application.

6. Mr. Murimi avers that he is a stranger to the allegation that a Notice of Preliminary Objection had been filed. If it had, it was his averment that the onus was on the plaintiff to prosecute it before the matter is set down for hearing. It is his deposition therefore on behalf of the plaintiff/respondent that the application is wholly misconceived and does not meet the conditions warranting dismissal for want of prosecution.

7. I have considered the application before me and the record of the court. I note that the respondent filed its suit by way of a plaint dated 22nd March 2017. The respondent, which was the applicant's insurer in respect of motor vehicle registration No. KCC 898S Isuzu Bus, sought an order that it is not bound to pay or satisfy judgment in Kericho CMCC No. 70 of 2015 and/or indemnify the defendant against any claim in respect of death, bodily injury to any person, damage to property or to satisfy any claim whatsoever arising out of the accident involving the said vehicle which allegedly occurred on 25th September 2015. The respondent also sought the costs of the suit.

8. The applicant/defendant entered appearance on 3rd April 2017. It then filed its statement of defence dated 7th April 2017 as well as a Notice of Preliminary Objection of the same date. No steps were taken in the matter thereafter until the filing of the present application.

9. In his submissions on behalf of the applicant, Learned Counsel, Mr. Koko, submitted that it had taken more than 8 months since the defence was filed and the plaintiff had not taken any steps to have the matter heard. He submitted further that order 17 provides for a party to move the court to have a matter dismissed for want of prosecution after a lapse of time. Where the court finds that there has been a lapse, it may dismiss the suit. It was his submission that the respondent had been indolent and has only been woken up by the instant application. No reason had been given in the replying affidavit of the plaintiff to explain why it had taken so long to prosecute the matter, nor had the respondent showed what prejudice it would suffer if the suit was dismissed. He prayed that the application be allowed and the suit dismissed with costs to the applicant.

10. In his submissions in response, Learned Counsel for the respondent, Mr. Karanja, submitted that the application is premature and does not meet the conditions to warrant dismissal for want of prosecution. It was his submission that under Order 17 Rule (2) (1), the court or a party can issue a notice where a matter has been inactive for over one year. He submitted further that this matter was filed on 22nd March 2017 and the present application filed on 5th December 2017, a duration of 9 months from the date the matter was filed. It was his submission therefore that the mandatory requirement under Order 17 Rule (2) (1) has not been met. He urged the court to dismiss the application with costs.

11. The sole issue for determination in this application is whether the plaintiff's suit should be dismissed for want of prosecution.

12. Order 17 Rule 2(1), which governs dismissal of suits for want of prosecution, provides as follows:

“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.”

13. Further Order 17 Rule 2(3) states thus:

“Any party to the suit may apply for its dismissal as provided in sub-rule 1”

14. There is no dispute, I believe, with respect to the law on dismissal of suits for want of prosecution. Whether to exercise the power of dismissal for want of prosecution under Order 17 is, however, a matter that is within the discretion of the court. In its decision in **Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v M.D. Popat and others & another [2016] eKLR**, the court stated as follows:

“11. Nonetheless, Article 159 of the Constitution and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay. This is what the case of *Ivita vs Kyumba [1984] KLR 441* espoused 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 of and in the discretion of the court.”

15. In **Argan Wekesa Okumu vs Dima College Limited & 2 others [2015] eKLR** the court considered the principles for dismissal of a suit for want of prosecution and stated as follows:-

“The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the Defendant is likely to be prejudiced by such delay. As such the 3rd Defendant in this case must meet the burden of proof in seeking the dismissal of the Plaintiff's case for want of prosecution see the case of *Ivita –vs-Kyumbu (1984) KLR 441*. Further to this, the decision of whether or not to dismiss a suit is discretionary and this Court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same.”

16. In **Naftali Opondo Onyango vs National Bank of Kenya Ltd [2005] eKLR**, the court noted that a court should be slow to dismiss a suit for want of prosecution if it is satisfied that the suit can proceed without further delay. The court stated as follows:-

“However, in deciding whether or not to dismiss a suit under rule 6 it is my view that a Court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay, that the Defendant will suffer no hardship and that there has been no flagrant and culpable inactivity on the part of the Plaintiff.”

... Now applying the principles enunciated in the authorities, I have found that, the delay of under one year in this case may be long but it is not inordinate.” (Emphasis added)

17. In the present case, a period of 8 months had elapsed between the filing of the defence and the filing of the present application. Order 17 Rule 2 provides that a matter should have been pending for 12 months before the court, either on its own motion or on the application of a party, makes an order for its dismissal for want of prosecution. The plaintiff/respondent latched on this provision in the rules to submit, correctly, that the period has not expired. It is evident that it has no explanation for not taking steps to prosecute its claim. Having, however, noted that the delay has not been inordinate and that it falls below the time period provided in law, I find that the interests of justice lie in allowing the plaintiff to prosecute its claim.

18. Accordingly, I decline to allow the application for dismissal of the suit, and dismiss the application dated 5th December 2017, but with no order as to costs.

19. I need not add that the plaintiff is required to expeditiously move to comply with the requirements of the law with respect to discovery and fix the matter for hearing.

Dated Delivered and Signed at Kericho this 3rd day of October 2018

MUMBI NGUGI

JUDGE