



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 608 OF 2010

JENNIFER SIPHOSAMI NKOMO.....PLAINTIFF

VERSUS

JAMES BODO.....1ST DEFENDANT

M.P SHAH HOSPITAL.....2ND DEFENDANT

AGA KHAN HEALTH SERVICE, KENYA

T/A AGA KHAN HOSPITAL.....3RD DEFENDANT

RULING

INTRODUCTION

1. The 3rd Defendant's Notice of Motion application dated on 8th March 2018 and filed on 22nd March 2018 was filed pursuant to the provisions of Order 17 r.2 (a)(sic) of the Civil Procedure Rules Section 3A of the Civil Procedure Act and all other enabling provisions of the law. It sought the following orders:-

- 1. THAT this suit be dismissed for want of prosecution.**
- 2. THAT the 3rd Defendant be granted the costs of this suit.**
- 3. THAT the costs of this application and other costs incidental thereto be granted to the 3rd Defendant.**
- 4. THAT such further orders be made as may be deemed just and reasonable to this Honourable Court.**

2. The 3rd Defendant's Written Submissions were dated and filed on 24th May 2018 and filed on 25th May 2018. The Plaintiff's Written Submissions were dated and filed on 14th June 2018. The 1st Defendant was not party to the proceedings herein. The 2nd Defendant did not file any Written Submissions because it was supporting the 3rd Defendant's present application.

3. When the matter came before the court on 27th June 2018, the parties requested that the court deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE 3RD DEFENDANT'S

4. The 3rd Defendant pointed out that on 22nd July 2015, it filed a similar application for dismissal of the Plaintiff's case but the court dismissed the same and ordered the Plaintiff to fix a hearing date at the Registry on a priority basis. However, the Plaintiff had not taken any hearing date

5. Its contention was that there had been inordinate delay in the Plaintiff prosecuting her case and because she had shown total lack of interest in prosecuting the same, then it was reasonable and in the interests of justice that the case be dismissed with costs to it.

6. It therefore urged this court to dismiss the Plaintiff's case.

THE PLAINTIFF'S CASE

7. In response to the said application, the Plaintiff's advocate, Collins Namachanja, swore a Replying Affidavit on 17th May 2018. The same was filed on 18th May 2018.

8. He stated that the Plaintiff initiated negotiations to settle this matter out of court but that the 3rd Respondent said it could only engage in the same if the Plaintiff paid costs of Kshs 10,000/= that had been awarded to it. He said that although she paid the 3rd Defendant the costs, it did not respond to her overtures to settle the case out of court.

9. He added that his firm had invited the Defendants to fix a hearing date at the Registry but because the invitation letter dated 21st June 2017 was not stamped by the 3rd Defendant, no date could be fixed at the Registry. He also averred that his firm invited the Defendants to fix a hearing date vide its letter of 21st February 2018 but a date could not be taken because the court file was missing.

10. It was his contention that they had been unable to have the matter heard due to lack of co-operation from the 2nd and 3rd Defendants. He pointed out that the Plaintiff has always been keen to prosecute her application and urged this court to dismiss the 3rd Defendant's present application.

LEGAL ANALYSIS

11. The 3rd Defendant submitted that the Plaintiff had demonstrated lethargy in prosecuting her case and that her two (2) attempts fix a hearing date could not be said to have been done on a priority basis because the same were attempted on 21st June 2017 and 21st June 2018 and that she had not demonstrated that the court file could not be traced. Further, it stated that the Plaintiff ought to have initiated out of court negotiation. It argued that this was a clear case where litigation had to come to an end.

12. In her submissions, the Plaintiff was emphatic that invitations to fix a hearing date at the Registry were indeed steps taken to prosecute the matter. She relied on the case of Simon Kihohia & 100 Others vs Abdi Sheikh Ahmed & Others [2017] eKLR where it was held that drafting and service of draft statement was a "step" in the prosecution of a case and that there had been no inordinate delay in prosecuting her claim.

13. This court perused the court record and noted that the Plaintiff filed her suit dated 9th December 2010 on 10th December 2010. The Defendants filed their respective Statements of Defence in 2011. The Plaintiff did not appear to have attached her Witness Statement or documents to her Plaintiff.

14. If one was to assume that Civil Procedure Rules were amended in 2010 and the suit may have been filed before the said amendment, there was no plausible explanation why the Plaintiff did not file the said documentation subsequently.

15. Notably, the 3rd Defendant filed its List and Bundle of Documents dated 10th April 2012 on 11th April 2012. It also filed its Issues dated 7th August 2012 on 10th August 2012. There were no issues filed by the Plaintiff. The 2nd Defendant filed its List and Bundle of Documents dated 5th February 2013 on 28th February 2013.

16. It was evident from the proceedings that the 3rd Defendant always invited the Plaintiff and the other parties to fix a date at the Registry. However, it was not clear to this court why the suit was never listed for hearing. Suffice it to state that the Plaintiff did not fix a hearing date after Serگون J dismissed the 3rd Defendant's application to dismiss her suit for want of prosecution on 10th October 2016. What the record showed was that it was the 3rd Defendant's advocates who had in fact invited parties to fix a hearing date for the present application.

17. This court agreed with the 3rd Defendant that the Plaintiff had not been keen in prosecuting her case as none of the minutes on the court file show her as having invited the Defendants to fix a hearing date. It was her case but it was the Defendants who were driving it, particularly the 3rd Defendant herein. She did not need the co-operation of the Defendants to fix the matter for hearing. In the event the Defendants' advocates refused to attend the Registry to fix a hearing date, her advocates had every right to fix an *ex parte* date and serve the Defendants.

18. Further, Order 12 Rule (2) (a) of the Civil Procedure Rules was very clear that in the event the Defendants did not attend court after being served with a Hearing Notice, the court could proceed to hear her case *ex parte*. If the Defendants were not keen on negotiating this matter out of court, she was under an obligation to expeditiously list the matter for hearing as mandated in Section 1A (1) of the Civil Procedure Act. It was not obligatory on the part of the Defendants to arrive at an out of court settlement.

19. The said Section 1A (1) of the Civil Procedure Act provides as follows:-

“The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act”.

20. Whereas no party should be shut out from prosecuting its case and each party has a right to have his or her dispute heard and determined by a court or tribunal as enshrined in Article 50 of the Constitution of Kenya, 2010, defendants also have a right to have their cases determined expeditiously. Indeed, Article 159 (2) (b) of the Constitution of Kenya stipulates that justice shall not be delayed. This is because **“justice delayed is justice denied”**.

21. The Plaintiff may have wished to have had her case heard and determined by the court but clearly eight (8) years is an inordinately long time for a matter to be in the court system without being prosecuted. Notably, she had also not complied with Order 11 of the Civil Procedure Rules.

22. Accordingly, having considered the affidavit evidence, the Written Submissions and the case law that was relied upon by the Plaintiff, this court came to the firm conclusion that the Plaintiff had lost interest in prosecuting her case because despite having been directed by Seron J to fix a hearing date on a priority basis, she had not done so thus wasting the life line that he had handed to her.

DISPOSITION

23. For the foregoing reasons, the upshot of this court's decision was that the 3rd Defendant's Notice of Motion application that was dated 8th March 2018 and filed on 22nd March 2018 was merited and the same is hereby allowed with costs to the 3rd Defendant. The Plaintiff's suit that was filed on 10th December 2010 is hereby dismissed with costs to the 2nd and 3rd Defendants.

24. It is so ordered.

DATED and DELIVERED at NAIROBI this 18th day of October 2018

J. KAMAU

JUDGE