

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 391 OF 2015

MAURICE MWANDE OKOTH.....PLAINTIFF/RESPONDENT

VERSUS

ALEX APOKO alias RINGTONE.....DEFENDANT/APPLICANT

RULING

1. The application dated 22nd January, 2018 seeks orders that the suit against the Defendant/ Applicant herein be dismissed for want of prosecution.

2. It is stated in the grounds and the affidavit in support of the application that in the year 2016 a maintenance of *status quo* order was made by the court and parties directed to fix a hearing date in the registry. That since then the Plaintiff/Respondent has not taken any steps to prosecute the case. It is averred that the delay amounts to abuse of court process.

3. The application is opposed as per the grounds of opposition dated 19th February, 2018. It is stated in the said grounds that the delay is not inordinate and that the Plaintiff is keen in having the suit determined. That the Defendant will not suffer any prejudice if the suit proceeds on merits and that the application is an abuse of the court process.

4. I have considered the application, the response to the same and the submissions made by the counsels for the respective parties.

5. Order 17 rule 2(1) Civil Procedure Rules provides as follow:

(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.

6. The principles governing dismissal of a suit for want of prosecution are that delay must be inordinate, the inordinate delay is inexcusable and the Defendant is likely to be prejudiced. Chesoni, J. (as he then was) applied these principles in the case of **Ivita v. Kyumbu [1984] KLR, 441**. He stated as follows in the said case:-

“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 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 disappearance of human memory resulting from lapse of time. The Defendant must however 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 before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the Plaintiff’s excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”

7. A perusal of the court record reflects that a consent order was recorded herein on 27th July, 2016 for the maintenance of *status quo*. The parties were then to carry out the pre-trial procedures. The court records does not reflect any steps taken by the Plaintiff thereafter until the application at hand was filed. On 1st March, 2018 is why the Plaintiff filed a statement of issues and a pre-trial questionnaire. The Plaintiff has also not given any explanation for the delay. There is no affidavit filed in response to the application. The Plaintiff’s suit had been dormant for about 1 1/2 years and is therefore ripe for dismissal. Be as it may, this court will exercise discretion and give the Plaintiff a chance to ventilate his case on merits.

8. With the foregoing, I dismiss the application with costs to the Defendant/Applicant. The parties to comply with Order 11 Civil Procedure Rules. The Plaintiff to fix the case for pre- trial directions within 90 days from date hereof. In default the suit stand as dismissed with costs.

Date, signed and delivered at Nairobi this 18th day of Oct., 2018

B. THURANIRA JADEN

JUDGE