



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 346 OF 2012

PATRICK EKODERE.....PLAINTIFF

VERSUS

ABDI ADAN SULEIMAN.....1ST DEFENDANT

THE KENYA MEAT COMMISSION.....2ND DEFENDANT

BARAZA LIMITED T/A KENYA

TELEVISION NETWORK.....3RD DEFENDANT

THE STANDARD LIMITED.....4TH DEFENDANT

RULING

1. The Notice of Motion dated 22nd January, 2018 was taken out by the 1st Defendant/Applicant pursuant to Section 3A of the Civil Procedure Act and Order 17 Rule 2 (3) of the Civil Procedure Rules whereof he sought for the following orders inter alia:

i. That this suit be dismissed with costs for want of prosecution.

ii. That the costs of this application be paid by the Plaintiff.

2. The Motion was supported by the affidavit of Purity Mbabu, learned advocate for the 1st Defendant and the plaintiff motion by filing the replying affidavit of Chumba Ntuli Sichale, advocate for the Plaintiff. The parties agreed to dispense with the application vide written submissions.

3. In his submissions, the 1st Defendant argued that the Plaintiff had not taken steps to prosecute the suit for a period of 12 months. The 1st Defendant argued that the Plaintiff vide his replying affidavit was a party to only Suit No. 347 of 2012 with regard to the preliminary objection filed by the 3rd and 4th Defendants dated 9/8/2012 which was dismissed for want of prosecution on 17/4/2018.

4. The appeal on the preliminary objection was dismissed on 25/11/2016. He argued that there was no excuse in the delay in prosecuting the suit and that the Plaintiff had taken no steps to prosecute the suit since he was served with this application on 31/1/2018. Reference was made to the Plaintiff's replying affidavit paragraphs 15 and 16 wherein he admits that there was no stay of proceedings. It was argued that the 1st Defendant stood to suffer prejudice and urged this court to allow the application with costs as the delay in prosecuting the suit was unexplained.

5. In his submissions, the Plaintiff relied on the case of **Ivita v Kyumbu (1975) eKLR** which laid down the test for

dismissal of a suit. He argued that there was no delay on his part in prosecuting the suit. He provided a chronology of events since the commencement of the suit. He submitted that the delay was not intentional as the suit could not be prosecuted pending the determination of Civil Appeal No. 187 of 2013 which he was not a party to. He averred that he was not aware that the Court of Appeal had determined the appeal case as progress of the same was not shared by counsels for the 3rd and 4th Defendants. He stated that he had opposed the preliminary objection but the application was never determined by the court. He argued that the 1st Defendant had failed to establish that the delay in prosecuting the suit had given rise to any substantial risk to a fair trial or grave injustice on his part. He argued that he stood to suffer more prejudice that the 1st Defendant in the event that the application is allowed.

6. I have considered the grounds stated on the face of the Motion and the facts deponed in support and against the Motion plus the written submissions. This court finds the only issue for determination is whether the suit ought to be dismissed for want of prosecution. This court takes into account the principles for dismissal of suit set out in the case of **Ivita V. Kyumbu** (supra). In that case, two things must be found for consideration before a matter can be dismissed for want of prosecution namely; whether the delay was prolonged and inexcusable and whether justice could be done despite such delay.

7. The Plaintiff in his submissions argued that the suit could not proceed for hearing pending the Court of Appeal case which was dismissed on 25th November, 2016. He stated that he was not aware that the case in the Court of Appeal had been determined. The 1st Defendant filed this application on 22nd January, 2018 and the same was served on the Plaintiff on 31st January, 2018.

8. It is apparent that the time between when the Court of Appeal matter was determined and the time this application was filed shows that sufficient time had lapsed. The Plaintiff admits that upon being served with this application he discovered that there were no stay proceedings in the suit and that the Court of Appeal matter had been determined. The Plaintiff's explanation on lack of knowledge pertaining the stay proceedings and conclusion of the Court of Appeal matter is not convincing.

9. As officers of the court, advocates have a duty to follow up on the progress of matters concerning their clients or matters which affect the interests of their clients.

10. The plaintiff failed to give plausible explanation of the delay in prosecuting his suit. Even if he had done so, the delay is so inordinate and inexcusable. Consequently, I find the motion dated 22.1.2018 to be meritorious. It is allowed with costs to the 1st defendant.

Dated, Signed and Delivered in open court this 9th day of November, 2018.

J. K. SERGON

JUDGE

In the presence of:

.....For the Plaintiff

.....For the 1st Defendant