



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NUMBER 228 OF 2011

GEORGE KIARIE NG'ANG'A.....PLAINTIFF

VERUS

SAMWEL WAIHAKA KARIUKI.....1ST DEFENDANT/APPLICANT

WINFRED MUTHONI KARIUKI.....2ND DEFENDANT/APPLICANT

JOHN MUTHEE NGUNJIRI t/a

TANGO AUCTIONEERS & GENERAL MERCHANTS.....3RD DEFENDANT

RULING

1. There are two applications before me. The plaintiffs application is dated 30th July 2015. He seeks stay of the ex-parte proceedings and orders made on the 29th July 2015 discharging the order of injunction issued on the 22nd February 2012 pending hearing of the application interpartes. He further seeks leave to file a replying affidavit and grounds of opposition to the defendants application dated 5th March 2015.
2. The grounds in support of the application are that the orders of injunction were set aside in the absence of the plaintiffs advocate. It is deponed that the plaintiff was not informed by his advocate that the case was coming up for hearing of their application for dismissal of suit for want of prosecution on the 6th March 2015 and the advocates did not attend court to discharge the temporary orders of injunction. He prays for reinstatement of the injunction orders.
3. The defendants application is dated 6th March 2015, and seeks discharge of the injunctive orders issued to the plaintiff on the 22nd February 2012 and for dismissal of the suit for want of prosecution. It is stated that since the orders of injunction were granted, a period of three years have lapsed and the plaintiff has not taken any step to fix the case for hearing and that the continued dependency of the orders and suit on record has caused hardship and prejudice to the defendant.
4. The defendants state that long before the discharge of the injunction order, the plaintiff had left the suit premises and has never returned to the said premises and has constructed other premises where he operates his business at Viewers Park Hotels and so no hardship at all was caused to him due to the discharge of the injunction order.
5. **Order 17 rule 2(3) of the Civil Procedure Rules** empowers a party to apply for dismissal of a suit if after one year if no action is taken to prosecute it unless it is shown that the delay is not inordinate, that it can be explained and if the delay has not caused hardship or prejudice to the defendant.

6. In response to the application by a replying affidavit sworn on the 18th November 2015, the plaintiff attributes the delay to his previous advocates who he says failed to take steps in setting the suit down for hearing and seeks to be allowed to prosecute the case.

7. The Defendants in their submissions are adamant that the delay is inordinate inexcusable and the plaintiff was riding on the injunction orders to further delay the suit and only moved the court when the orders were discharged. On the other hand the plaintiff too attributes the delay to the multiple applications filed by both parties.

8. I have considered circumstances of the case in its totality. There is no dispute that there has been inordinate delay. None of the parties took a step for over three years to prosecute the case. But a case belongs to the plaintiff, not the defendant. It is the plaintiff who dragged the Defendants to court. It is the plaintiff's duty to progress with his case and to push his advocates to take steps. He is not allowed to hide behind the Advocates inactivity.

I have noted that none of the parties have complied with the provisions of **Order II of the Civil Procedure Rules**. This is however not a ground to persuade the court not to dismiss the suit for want of prosecution.

9. The plaintiff has relied on two authorities **Joseph Kamuya -vs- Elizabeth Kamene Ndolo (2006) e KLR and Kipketer Arap Ruto vs Kiptarus Torich & two Others** where the Judges stated that the duty to make discovery and frame issues was much the plaintiff and defendants duty, and that despite delay, in such circumstances, a suit should not be dismissed.

Rival arguments by the defendant are that by an order of the court dated 12th May 2014, the plaintiff was granted time to set down the case for hearing upon an application dated 2nd December 2013. Despite the order, no action was taken.

The application under consideration and dated 6th March 2015 was prompted by the delay that as I have stated has not been sufficiently explained.

10. In the case **Ivita -vs- Kyumbu (1984) e KLR 441** the court while stating the principles to be applied in determining an application for dismissal of suit, which principles are also set out in many other decisions added that Justice must be done to both parties and the prejudices to each party by the delay must be considered, including the court's position.

See **AGIP (K) Ltd -vs- Highlands Tyres Ltd (2001) e KLR**.

If the delay is prolonged and justice can still be done to both parties, the court will not order a dismissal but will direct that the suit be set down for hearing.

11. This is what Justice A Mshila J did in her ruling dated 12th May 2014 when the parties were directed to take a hearing date. Orders of court are not made in vain. They ought to be obeyed to uphold the dignity of the court.

I do not think the plaintiff is at all interested in the progression of its case. I have not heard any mention or submission by the plaintiff of why court orders dated the 12th May 2014 have not been complied with.

The court record bears witness that no action has been taken by the plaintiff to set the suit down for hearing, not even compliance with **Order II of the Civil Procedure Rules**.

12. I do not think allowing the plaintiff more time to comply with **Order II of Civil Procedure Rules** and to set the suit down for hearing will be doing justice any of the parties. The Defendants have lived with this case hanging on their necks for now over 6 years.

I see no prejudice that will be caused to the plaintiff if the suit is dismissed as he has already moved out of the suit down premises and constructed his own business premises from where he operates.

13. For those reasons, the defendants application dated 6th March 2015 is allowed. The plaintiffs suit is hereby dismissed with costs for want of prosecution.

Having made the above order, it follows that the plaintiffs application dated 30th July 2015 is now of no consequence and is over taken by events. Each party shall bear their own costs of this application.

It is so ordered.

Dated, signed and delivered this 16th Day of February 2017.

J.N. MULWA

JUDGE