



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CIVIL SUIT NO. 231 OF 2014

NATIONAL COUNCIL OF

NON-GOVERNMENTAL ORGANISATIONS.....PLAINTIFF/RESPONDENT

VERSUS

1. WILSON KIPKAZI.....1ST DEFENDANT/APPLICANT

2. KEVINNAH LOYATUM.....2ND DEFENDANTS/APPLICANT

RULING

1. The defendants have filed a notice of motion dated 24th November, 2016 seeking that this suit be dismissed for want of prosecution with costs. The motion is supported by the affidavit of Mwang'ombe J. learned counsel in conduct of this matter on behalf of the defendants. It is brought under Order 17 rule 2 (1) and (3) and Order 51 rule 14 of the Civil Procedure Rules.

2. The plaintiff was served with the motion and a hearing notice but failed to respond to the motion or appear for hearing. The motion was dispensed with by way of oral submissions.

3. Mr. Mwang'ombe stated that this suit was filed on 3^{1st} July, 2014 together with a notice of motion seeking injunctive orders against the defendants. That before the application could be heard, the plaintiff amended the said motion on 2nd December, 2014. That since then, the plaintiff has failed to take any steps to prosecute the said motion or set down this suit for hearing. That due to the aforesaid, it was inferred that the plaintiff is not interested in prosecuting this suit.

4. I have taken the liberty to peruse the record. It is clear from the record and as rightly submitted by counsel that this suit was filed together with a notice of motion on 29th July, 2014.

5. The last time the plaintiff took action in this suit was on 28th October, 2014 that is about two years of inaction in this suit. The decision whether or not to dismiss a suit for want of prosecution is a matter of judicial discretion. Each case is therefore determined on its unique circumstances. The particular tests, which have been vastly applied by our courts, were well discussed by Chesoni J., (*as he then was*) in the case of **Ivita v. Kyumba [1984] KLR 44**. He stated as follows:

“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 the 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."

6. This matter has been pending in court for about two (2) years from the time directions were given by Judge Onyancha. Before then, the plaintiff filed an application which it in fact never prosecuted. Further, the plaintiff despite being served has not bothered to furnish an explanation for its delay in prosecuting this matter. Considering that the plaintiff has not bothered to explain the delay, I find that it is inordinate. Whether it is excusable, in my view depends on whether or not the defendant shall suffer prejudice. The plaintiff has not availed itself to offer an explanation yet it has not taken steps in the matter for two years. There is therefore uncertainty as to how much time the defendant shall be kept on hold. The rules provide that an application for dismissal of a suit may be made after the lapse of three months from the date when either the pleadings are closed, or the suit is removed from the hearing list, or the suit is adjourned indefinitely. I hold the view that a state of inactivity for a period of more than two years is inordinate, especially when no explanation is tendered for the said delay.

7. In the circumstances aforesaid, I find and hold that the application dated 21/11/2016 has merits and it is hereby granted as prayed. The suit herein is dismissed for want of prosecution with cost to the defendant.

Dated, signed and delivered at Nairobi this 2nd March, 2017.

.....

L. NJUGUNA

JUDGE

In the Presence of

.....For the Plaintiff/Respondent

..... For the 1st Defendant/Applicant

.....For the 2nd Defendant/Applicant