



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 422 OF 2012**

**JACK & JILL SUPERMARKETS LTD .....PLAINTIFF**

**-V E R S U S -**

**VIKTAR MAINA NGUNJIRI.....RESPONDENT**

**RULING**

1) Viktar Maina Ngunjiri, the applicant/respondent herein took out the motion dated 21<sup>st</sup> April, 2017, the subject matter of this ruling, which he sought for the following orders:

***a) That this honourable court be pleased to dismiss this suit for want of prosecution.***

***b) That the costs of this application and the suit be borne by the plaintiff.***

2) The motion is supported by the affidavit of Viktar Maina Ngunjiri. When served with the motion, the respondent filed the replying affidavit of Schon Noorani to oppose the same.

3) I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the application. The motion by the applicant on the face of it is asking for dismissal of this suit for want of prosecution and secondly that the costs of this application and the suit be borne by the plaintiff.

4) The applicant/defendant avers that the cause of action arose on or about 21<sup>st</sup> August 2012, about 5 years ago. He argues that the pendency of this matter in court without prosecution by the plaintiff has greatly prejudiced him, since with the passage of time, his witnesses' recollection of the events leading up to the plaintiff's cause of action have been lost to his detriment. The applicant goes ahead to state that since 14<sup>th</sup> June 2013, the plaintiff has not taken any steps to fix the matter for hearing. For this reason, the applicant submits that the plaintiff has lost interest in pursuing its case against the defendant and apparently the plaintiff has no intention of further pursuing this suit. Finally, it is the defendant/applicant's averments that it is fair that this suit be dismissed for want of prosecution as the plaintiff has clearly lost interest in prosecuting the matter.

5) The respondent on the other hand is saying that the applicants application is frivolous, vexatious and an abuse of the court process and devoid of merit. That there have been pending in the suit applications which are yet to be determined by the court. The defendant avers that he has valid reasons as to why they have delayed the prosecution of the suit.

6) The power to dismiss a suit for want of prosecution is donated by Order 17 Rule 2 of the Civil Procedure (where no action or step is taken over one year and no cause is shown) Sections 1A, 1B, 3A of

the Civil Procedure Act and Article 159(2)(b) of the constitution, which provisions all abhor delayed justice and command that justice shall be done without undue delay. Where there is delay, undoubtedly delay defeats equity and prejudices a party's legitimate expectation that the dispute shall be heard and determined expeditiously. The power to dismiss a suit for want of prosecution is a discretionary power which should be exercised judiciously.

7) The decision whether a suit should be reinstated for trial is a matter of justice and it depends on the facts of the case. **Ivita –vs- Kyumbu (1984) KLR 441**, Chesoni, J (as he then was) that:

**“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 the defendant; so with parties for the suit must be considered and the position of the judge too, because it is no easy task for the documents, 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 event 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 plaintiff before the court will exercise its discretion in his failure 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.”**

8) Dismissal of suit for want of prosecution is intended to prevent delayed justice or injustice and/or abuse of court process. It is also trite law that in any civil suit, it is the plaintiff who is in pursuit of a remedy that he should take steps at his disposal to achieve an expeditious determination of his claim. On the other hand, when the plaintiff fails to bring his claim to a speedy conclusion, a defendant ought to invoke the process of court towards that end as soon as is convenient; by either applying for its dismissal or setting it down for hearing.

9) In the case of **Nilan –vs- Pater (1969) EA 341** it was held *inter alia* that

**It is also trite that every year that passes prejudices the fair trial as witnesses may have died, documents mislaid, lost destroyed and the memory tends to fade.**

10) The test therefore is if the delay is prolonged and inexcusable.

11) The applicant is saying that the delay by the plaintiff is of about 4 years in prosecuting this case, to the applicant this delay is long and inexcusable in the circumstances. The respondent/plaintiff on the other hand is saying that it contends the delay is long and prolonged. However, he has valid reasons/explanation for the delay, which are, mistake of counsel not diligently pursuing the matter and failing to update the plaintiff; there are pending applications before court which are; yet to be determined; the suit's substratum was extinguished by the defendant which interference is a kin to obstruction of justice which reasons were beyond its control.

12) In light of the above, I am satisfied that the respondent/plaintiff has explained to this court satisfactorily as to why this suit has not been prosecuted. This motion is therefore found to be unmeritorious. It is dismissed with costs abiding the outcome of the suit.

Dated, Signed and Delivered in open court this 20<sup>th</sup> day of July, 2017.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Applicant

..... for the Respondent