REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL CASE NO. 154 OF 2004

IAN KEINO……PLAINTIFF

VERSUS

ISAIAH KIPLAGAT……..……..1ST DEFENDANT

STANDARD LIMITED……..……..……2ND DEFENDANT

CHRIS MBAISI……..……3RD DEFENDANT

RULING

1. What is before me for determination is the Notice of Motion dated 30th October, 2012 filed by *Ms Makecha & Gitonga Advocates* on behalf of the 2nd and 3rd defendants. The motion is premised on ***Order 17 Rule 2*** and ***Order 51 Rule 1*** of the ***Civil Procedure Rules 2010 (CPR)*** seeking that the plaintiff's suit be dismissed against them for want of prosecution.

2. The main grounds supporting the application are that over one year has passed since 9th March, 2011 when the case was last before the court and that since then, the plaintiff has failed to set down the suit for hearing; that the plaintiff is not interested in prosecuting the suit and that therefore the suit should be dismissed for want of prosecution with costs to the 2nd and 3rd defendants. The application is also supported by an affidavit sworn by *Miss Nelly Matheka*, the 2nd defendants Assistant Legal Director in which she by and large replicated the grounds anchoring the motion.

3. The application is opposed through a replying affidavit sworn by the plaintiff on 4th April 2016. In the affidavit, the plaintiff deposes that she has always been ready to proceed with the hearing of this case but that the hearing has never taken off due to several applications for adjournment made by the defendants; that the application is belated as at the time it was filed, the plaintiff had previously set down the suit for hearing on several occasions; that parties have already filed a list of agreed issues; that it was the duty of all parties to a suit to set it down for hearing and that the defendants have never attempted to fix either hearing date or a mention date for purpose of fixing a hearing date and lastly, that it was a cardinal principle of law that whenever possible, courts should lean more towards a policy of hearing and determining suits on their merits rather than terminating them summarily.

4. The application was prosecuted by way of written submissions; those of the 2nd and 3rd defendants (the applicants) were filed on 7th October, 2015 while those of the plaintiff were filed on 6th April, 2016. From the court record, it is apparent that the applicant's filed their written submissions without any direction or leave of the court since by the time they were filed, the plaintiff had not filed his response and the court had not given any directions regarding the manner in which their application was to be disposed

off. Be that as it may, that being a procedural irregularity, I will disregard it and proceed to consider the submissions made by both parties.

5. It was submitted on behalf of the appellants that the plaintiff has unduly delayed the hearing of the suit and that he has not given any explanation for the inordinate delay; that the delay has prejudiced and continues to prejudice the applicants since the cause of action arose over eight years ago and besides subjecting the applicants to huge costs, the delay may affect their ability to properly defend the suit as the nature of the suit requires that it be prosecuted expeditiously when the applicants have a clear recollection of the events leading to the institution of the suit; that the delay of over one year shows that the plaintiff has lost interest in the suit and the same should be dismissed for want of prosecution with costs.

In support of their submissions, the applicants relied on the following authorities: ***Ivita V Kyumbu (1984) KLR 441***; ***Concorde Contained Services Ltd V Joseph Muthika Kago & another (Civil Apeal No. 737 of 2002*** and ***Jairus Lichongo V Nzoia Sugar Company Ltd*** HCC HNO. 354 of 1990).

6. On behalf of the plaintiff, it was submitted that there was no evidence to demonstrate that he is not interested in prosecuting the suit; that he has severally fixed the suit for hearing even after the filing of the instant application; that the applicants have contributed to the delay by occasioning several adjournments; that the plaintiff has taken all steps required for prosecution of the suit and all that remains is for him to attend the court to give evidence. He urged the court to dismiss the application.

7. I have carefully considered the rival submissions made by both parties and the authorities cited by the applicants. I have also perused the court record. The application is premised on ***Order 17 Rule 2*** of the CPR which is in the following terms;

> ***Rule 2 (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".***
>
> ***Rule (2) –" If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit".***
>
> ***Order 17 Rule 3*** is also relevant. It allows any party to a suit to apply for its dismissal as provided in sub-rule 1 which is what the applicants have done.

8. There is a plethora of case law on the subject of dismissal of suits for want of prosecution which includes the authorities relied upon by the applicants. The test to be applied in determining whether a suit should be dismissed for want of prosecution was laid down in the celebrated case of ***Ivita V Kyumbu (1984) KLR 441*** where Chesoni J (as he then was) held as follows:-

> ***"The test applied by the courts in an application for the dismissal of suit for want of prosecution is whether the delay is prolonged and inexcusable, and, if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time. It is a matter in the discretion of the court".***

9. Turning to the instant case, my perusal of the court record reveals that the plaintiff has made considerable effort in seeking to facilitate the hearing of the suit. The record shows that several hearing dates were fixed at the instance of the plaintiff before and after the filing of the instant application. The earliest date taken was on 25th January, 2006 followed by 20th September, 2006; 14th February, 2007, 30th May, 2007; 9th October, 2007; 22nd April, 2009, 14th July, 2010; 1st December, 2015 and lastly on 2nd March, 2016. On three of the above dates namely on 14th February, 2007; 30th May, 2007 and 9th October, 2007 hearing did not proceed as the 1st defendant successfully applied for adjournment while on 22nd April, 2009, hearing of the suit was taken out by consent of the parties. The record does not show

that the case was before the court on 9th March, 2011 for hearing as alleged by the applicants. That date had been fixed for hearing of an application dated 17th February, 2010 also filed by the applicants in which they sought the dismissal of the plaintiff's suit for want of prosecution. That application appears to have been abandoned as it had not been prosecuted by the time the instant application was filed.

10. In view of the foregoing, I find that there is no basis for the submission that the plaintiff has not taken any step towards progressing the hearing of this matter and that he has lost interest in prosecuting the suit. As recently as 28th July, 2015, and 6th October, 2015, the case was mentioned before the Hon. Deputy Registrar for purposes of ascertaining whether the parties had complied with the provisions of ***Order 11*** of the ***Civil Procedure Rules*** after which the suit was set down for hearing on 1st December, 2015 and subsequently on 2nd March 2016.

Though I appreciate that there has been prolonged delay in the hearing and determination of this suit given its age (filed on 22nd December, 2004), as demonstrated above, the delay cannot in all fairness be solely attributed to the plaintiff. The filing of the instant application has in a sense contributed to further delay of the matter since it is the reason that hearing could not take off on 2nd March, 2016. The defendants do not also appear to have fully complied with the pre-trial processes under

Order 11 of the ***Civil Procedure Rules.***

In the circumstances, the applicants cannot validly claim that the continued pendency of the suit is occasioning them prejudice when they have themselves failed to attend court on some hearing dates for instance on 14th February, 2007; 30th May, 2007 and 22nd April, 2009 and also failed to comply fully with pre-trial procedures. The court record shows that the plaintiff has fully complied with order 11 CPR and that parties have filed a list of agreed issues but the defendants are yet to file their witness statements and a list of documents they intend to rely on in the trial if any.

11. For all the foregoing reasons, I have come to the inescapable conclusion that this is not a suitable case for dismissal for want of prosecution. The plaintiff has ably demonstrated that he still has interest and willing and ready to prosecute the suit. The interests of justice dictates that he be given an opportunity to do so.

Consequently, I do not find merit in the application dated 30th October, 2012. The same is accordingly dismissed with no orders as to costs.

12. Given the age of this suit and in order to facilitate its expeditious disposal, I direct that each of the defendants do file and serve a list of their witness statements and documents they may need to rely on in support of their case if any within the next 60 days and upon expiration of that period, any party shall be at liberty to fix the case for hearing.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 12th day of May, 2016

In the presence of:

Mr. Melly holding brief for Mr. Chebii for the Plaintiff/Respondent

No appearance for all the defendants

Naomi Chonde – court clerk