



**REPUBLIC OF KENYA**

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

**FAMILY DIVISION**

**CIVIL SUIT NO 36 OF 2012 (O.S.)**

**IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT 2013**

**AND**

**IN THE MATTER OF QUESTIONS ARISING BETWEEN A A H AND M H W**

**IN**

**A A H..... PLAINTIFF**

**VERSUS**

**M H W.....DEFENDANT**

**RULING**

1. The application dated 20<sup>th</sup> August 2013 seeks dismissal of the suit herein for want of prosecution. It is brought at the instance of the defendant in the Originating Summons dated 8<sup>th</sup> June 2012.
2. The grounds upon which the application is founded are set out on the face of the application, and on the facts deposed to in the affidavit in support sworn by the defendant. It is the defendant's case that plaintiff had failed to take active steps to fix the suit for hearing, and that the substance of the suit was prejudicing the defendant and was costly.
3. In the affidavit in support it is averred that the suit had been filed on 8<sup>th</sup> June 2012. The defendant states that since the filing of the suit one (1) year had lapsed, yet not steps had been taken by the plaintiff to fix it for hearing. He argues that the plaintiff had lost interest in the suit.
4. The plaintiff responded to the application vide her affidavit sworn on 11<sup>th</sup> November 2013. She avers that she is keen on prosecuting the instant suit. She asserts that the defendant has filed five suits against in various courts. The said suits are listed in the affidavit, being HCCC No. 538 of 2011, Misc. Application No. 14 of 2012, HCCC No. 37 of 2012, CMCCC No. 7177 of 2012 and 114 of 2013. She states that she had only filed the instant suit against the defendant to secure the interests of their children. She accuses him of harassing her. She extensively refers to the orders made by the court in HCCC No. 538 of 2011 which she accuses him of violating.
5. The application first came up for hearing on 18th September 2013, when directions were given on the filing of further affidavits. On 9<sup>th</sup> October 2014 it was directed that the application be disposed

for by way of written submissions.

6. Both sides complied with the directions on filing of written submissions. The plaintiff's submissions, dated 25<sup>th</sup> November 2014, complete with the authorities that she relied on, were filed on 26<sup>th</sup> November 2014. The defendant's submissions, dated 11<sup>th</sup> February 2015, were filed on 12<sup>th</sup> February 2015.
7. The defendant submits that after the pleadings closed, the plaintiff had failed to take steps to prosecute the suit contrary to the very strict regulations set out in the Civil Procedure Rules. He submits that the plaintiff had failed in her reply to the application to give cogent reasons for the delay in the prosecution of the suit; instead she ventured to submit evidence on the relationship between the parties.
8. On her part, the plaintiff submitted that the defendant had filed multiple suits against her, whose effect was to distract her from prosecuting the instant suit. She further submits that if there has been a delay the same has not prejudiced the defendant. In any event, she argues, directions have not been taken under Order 11 of the Civil Procedure Rules.
9. She has cited several authorities in support of her case. She submits that Visram J., in *Agip (Kenya) Limited vs. Highlands Tyres Limited* (2001) KLR 630, summarized the factors taken into account in allowing an application for want of prosecution as delay being inordinate, the inordinate delay being inexcusable and the defendant being likely to be prejudiced by the delay. She also cited *Salkas Contractors Limited vs. Kenya Petroleum Refineries* Mombasa CA No. 250 of 2003 (UR) and *Ivita vs. Kyumbu* (1984) KLR 441, where the same principles were adverted to. In the latter authority Chesoni J. had observed that the test applied by the courts in an application for dismissal of a 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.
10. The suit herein was commenced herein by way of Originating Summons on 8<sup>th</sup> June 2012. Contemporaneously with the suit, the plaintiff filed a summons in chambers under certificate of urgency. Seeking injunctive relief. The summons was placed before Mugo J. on 11<sup>th</sup> June 2012, who ordered maintenance of *status quo* in respect of a property situated at Kimathi Estate. The plaintiff was ordered to obtain a date at the registry for the hearing of the application. At the registry she was given the 5<sup>th</sup> July 2012 for hearing, the matter was listed before Mugo J., there was no appearance and it was stood over generally. Apparently, no other steps were taken in the matter until the defendant moved the court for dismissal of the suit by the application dated 20<sup>th</sup> August 2013.
11. The application dated 20<sup>th</sup> August 2013 is predicated upon Order 17 Rule 1 of the Civil Procedure Rules. The said provision states as follows:-

*'(1) Once the suit is set down for hearing, it shall not be adjourned unless a party applying for adjournment satisfies the court that it is just to grant the adjournment.*

*(2) When the court grants an adjournment it shall give a date for further hearing or directions.'*
12. There is no provision in the cited Rule which would form basis for dismissal of the suit as sought by the defendant. However, the defendant can properly seek dismissal of the suit under Order 17 Rule 2 of the Civil Procedure Rules. The said provisions states:-

*'(1) In any suit in which no application has been made or no 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.*

*(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.*

3. *Any party to the suit may apply for its dismissal as provided in sub-rule 1...'*

13. Under Rule 2 a suit is dismissable by the court where no step is taken in it for one year. The court can do it *suo moto* after notice to the parties, or either party may initiate the process for dismissal. In this case the court did not move itself under Order 17 Rule 2(1); instead it is the defendant who moved it under Rule 2(3). Clearly, the defendant was within his rights to move the court for dismissal.

14. The application dated 20th August 2013 was filed in court on 22<sup>nd</sup> August 2013. Prior to that date the plaintiff, through her advocates, had visited the court's registry on 26<sup>th</sup> June 2012 and obtained the date of 5<sup>th</sup> July 2012 for the hearing of her application dated 8<sup>th</sup> June 2012. However, come 5<sup>th</sup> July 2012 neither the plaintiff nor her advocates attended court, and the application was duly stood over generally. The plaintiff thereafter took no steps to prosecute the application or the suit.

15. Quite evidently, there was inaction by the plaintiff for over a year, and the defendant was entitled to move the court under Order 17 Rule 2(3). There was delay in the prosecution of the suit, which can be described as inordinate. Should I therefore dismiss the suit for want of prosecution?

16. The test to be applied in such cases was set in the authorities mentioned in paragraph 9 above. Having found the delay inordinate, the next thing to consider is whether the same was excusable. The excuse given by the plaintiff was that she was faced with several other suits filed by the defendant. She appears to suggest that these multiple suits distracted her. She states that the instant suit was her only suit against the defendant.

17. Am I persuaded that excuse? I am not. The instant suit is her own against the defendant. She was bound to take steps to prosecute it. It could be that there were other suits she was defending, suits by the defendant. However, she has not sought to demonstrate that she was kept busy responding to those other suits to the detriment of the instant suit. All she has done is to point the court to the existence of those other suits. I agree with the defendant that no cogent reasons have been given for the delay.

18. Having established that delay was inordinate and inexcusable, I still have to decide whether justice can be done despite the delay. The defendant has pleaded prejudice and cost as what he has suffered on account of the delay. He has not sought to establish how he has suffered prejudice and cost. I note the suit seeks division of matrimonial property. The parties are said to be in the process of dissolving their marriage. I believe justice would still be served by the plaintiff being given a chance to prosecute her case.

19. In the circumstances, I shall disallow the application dated 20<sup>th</sup> August 2013. The matter shall be set down for directions on the Originating Summons. The date for directions shall be given at the delivery of the ruling.

**DATED, SIGNED and DELIVERED at NAIROBI this 3<sup>RD</sup> DAY OF JUNE, 2016.**

**W. MUSYOKA**

**JUDGE**