



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 455 OF 2011

CANUK HOLDINGS LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

PRAMOD PATEL

^T/A PRAMOD PATEL ADVOCATE.....DEFENDANT/APPLICANT

RULING

1. The application dated 13th January, 2016. Seeks orders that this suit be dismissed with costs for want of prosecution.
2. It is stated in the affidavit in support that this suit was filed over five (5) years ago. That the last step was taken on the 28th November, 2014 and since then, no other step has been taken to prosecute the same. The Applicant has lamented that the suit weighs heavily on his mind.
3. The application is opposed. According to the replying affidavit the Respondent blames the delay in this case on the applications filed by the Applicant first seeking the dismissal of the suit then thereafter seeking a review of the ruling delivered. That following the delivery of the ruling in the latter application the Applicant filed a notice of appeal. The Respondent's contention is that they did not proceed to fix this case for hearing as they were waiting for the Applicant to prosecute the appeal but instead of being served with the appeal documents they were served with the application under consideration.
4. The application was heard before Hon. Ombija, J on 23rd February, 2016. The file was subsequently allocated to this court. I have considered the application, the reply to the same and the submissions of the counsels.
5. Order 17 rule 2 Civil Procedure Rules provides for the dismissal of suits in the following terms:-
 - “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.**
 - (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 in sub-rule 1.**
 - (4) The court may dismiss the suit for non- compliance with the directions given under this**

Order.”

6. The principles governing dismissal of a suits for want of prosecution are that; delay must be inordinate, the inordinate delay is inexcusable and the Defendant is likely to be prejudiced. Chesoni, J. (as he then was) applied these principles in the case of **Ivita v. Kyumbu [1984] KLR, 441**. He stated as follows in the said case:-

“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 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.”

7. The latter decision was cited with approval in the Court of Appeal’s decision in **Moses Muriira Maingi & 2 Others v. Maingi Kamuru & Another, Nyeri Civil Appeal No. 151 of 2010** where it said:

“The power of the court to dismiss a suit for want of prosecution is discretionary power, but which should be exercised judicially.”

8. In the case at hand, the last ruling in the interlocutory application was delivered on 4th April, 2014. The Applicant then filed a notice of appeal. According to the Respondent, he has been waiting for the Applicant to prosecute the appeal. However, the filing of the appeal is not a bar to the prosecution of this case. A notice of appeal or a Memorandum of appeal does not operate as a stay of the proceedings. As posited by the Court of Appeal in the case of **Equity Bank Limited v. West Link Mbo Limited [2013] eKLR**:

“As a general principle of law an appeal being a totally distinct proceeding from the original or appellate proceedings appealed from, the institution of an appeal does not operate as a bar to execution of a sentence in criminal matters or execution of decree, in civil matters unless otherwise expressly so provided. Order 42 Rule 6 (1) Civil Procedure Rules restates that principle”

9. It is also noted that the Plaintiff filed a statement of issues on 24th November, 2014. This was subsequent to the filing of the notice of appeal. The Plaintiff went further to invite the Defendant to fix a hearing date in this matter case on 28th November, 2014. This demonstrates that the filing of the notice of appeal did not impede the Plaintiff in taking steps to prosecute his case. The delay has not been satisfactorily explained.

10. Be as it may, this court’s view is that justice can still be done between the parties herein. The case can be heard on priority basis to oblivate any further prejudice to the Defendant. Consequently, the application is dismissed. Costs to the Applicant in any event. Parties to comply with order 11 and the Respondent to set the suit down for a pre-trial conference within 30 days from today.

Dated, signed and delivered at Nairobi this 15th day of Nov., 2016

B THURANIRA JADEN

JUDGE