



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO. 1539 OF 2000

JANET WAMUYU MBAO.....PLAINTIFF

VERSUS

THE AGA KHAN HEALTH SERVICES LIMITED T/A

THE AGA KHAN HOSPITAL, NAIROBI.....DEFENDANT

RULING

The application before the court is the Notice of Motion dated 10th April 2013 brought under Order 17 rule 2(3) of the Civil procedure Rules, 2010. The Applicant/Defendant is seeking to dismiss the suit for want of prosecution. The Applicant claims the suit was filed on 18th September 2000 and the defence was entered on 2nd November 2000. That the matter was fixed for hearing on 22nd March 2011 but was not in the hearing list. The Respondent/Plaintiff did not thereafter take any step to refile the suit for hearing. The Applicant accordingly claims that it is over 12 years since the matter was filed in court and that the Respondent/Plaintiff has clearly lost interest in the matter.

The application is opposed. The Respondent filed a replying affidavit dated 12th September 2013 sworn by Patriciah Muthoni Ndingu, Counsel for the Respondent. She avers that the court gave an order on 23rd September 2010 allowing the Plaintiff 21 days to fix the matter for hearing and 15 days to exchange final document. She claims that they invited the Defendant/ Applicant on 24th September 2010 to attend the registry on 4th October 2010 to fix a hearing date but no date was taken because the parties did not agree on the issues. The Defendant/Applicant's advocate wrote to the court on 11th October 2010 stating that no date should be taken. The Respondent filed the statement of agreed issues and supplementary bundle of documents on 13th October 2010 and re-invited the Defendant/Applicant's advocates on 1st October 2010 to fix a hearing date on 14th October 2010 which they declined to attend.

The Respondent/Plaintiff also stated they invited the Applicant/Defendant's advocates on 18th October 2010 with the aim of fixing a hearing date; again there was no attendance from the Defendant/Applicant firm. The hearing date of 22nd March 2011 was taken ex parte and hearing Notice served on 3rd November 2011. The matter was not listed in call over to confirm the matter for hearing.

The Respondent/Plaintiff alleged that the court file went missing and could not be traced in 2011, 2012 and early 2013. She stated that failure to take a hearing date was caused by the confusion as to whether the case had been dismissed and failure to trace the file. She further stated that the apparent confusion should not be visited on an innocent Plaintiff who has waited for justices this long.

During the oral canvassing of the application, Mr. Saeni, counsel for the Applicant/ Defendant, told the

court that the last time the matter was in court was on 23rd March 2011. The matter was taken out of the hearing list but the Plaintiff did not make any efforts to take fresh hearing date. The Plaintiff/ Respondent only replied to this application without explaining why she did not take a hearing date. He explained that a similar application to dismiss the suit for want of prosecution was dismissed on condition that the matter is fixed for hearing within 21 days. Mr. Saeni also stated that the Respondent/ Plaintiff did not comply with the time given. They fixed it after two months but the matter was not listed. He submitted that the Respondent/Plaintiff went to sleep until the application to dismiss the suit again was filed. He also stated that the case is 14 years old and no proper explanation for the delay was given.

Mrs. Ndungu, counsel for the Respondent/Plaintiff in opposing the application submitted that the deputy Registrar directed compliance with Order 11 which was effected by October 2010. She was ordered by the court to fix the matter for hearing within 21 days and she invited the Respondent /Defendant. She stated further that she thought the case had been dismissed. The file went missing and it was not clear whether the matter was still alive. Mrs. Ndungu submitted that her client was still interested in the matter and all her witnesses are still available and they were ready to prosecute the matter.

In a rejoinder, Mr. Saeni submitted that the Respondent/Plaintiff had failed to explain the delay. The file was not missing otherwise they would have not obtained proceedings and they could have also lodged a complaint with the court. He stated that justice has been delayed and no fair trial will be obtained by his client.

Having set out the respective parties' positions as above, I am of the view that the only issue for determination is ***whether on the facts and circumstances of this case the Applicant is entitled to the orders sought.***

The law on dismissal of a suit for want of prosecution is set out in **Order 17 Rule 2 of the Civil Procedure Rules** which provides as follows:

“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 as provided in sub-rule 1.

(4) The court may dismiss the suit for non-compliance with any direction given under this Order.”

From the above provision of the law, there are two tests to be satisfied for the dismissal of a suit for want of prosecution. The first one is whether the threshold of one year's delay in prosecuting a suit has been met. The second test is that the delay must be inexcusable.

In the instant case, there is no doubt that the matter has been delayed over a year. It is not disputed that the last time the matter was in court was 23rd September 2010 when the parties were prosecuting a similar application. According to the Applicant the Respondent slept until the current application to dismiss the matter for want of prosecution was filed a second time. In my view the threshold for one year's delay has been met.

In applying the second test, the Respondent/ Plaintiff narrated her efforts to have the matter fixed for hearing in vain. She also stated that the file went missing and during that time she thought the matter had been dismissed. I find the explanation given by the Respondent/Plaintiff not credible. The Respondent/Plaintiff was given a second chance to prosecute the matter but she failed the order by not fixing the matter within the required time. Even with the thought that the file was missing or that the matter had been dismissed, the Respondent ought to have made adequate efforts, bearing in mind the

interest of her client. She failed to do so giving room to the conclusion that the Plaintiff had lost interest in the matter.

The Respondent/Plaintiff's counsel stated that notwithstanding counsel's conduct, the Plaintiff still has an interest to prosecute the suit. She also averred that her conduct should not be interpreted against the interest of client.

I have considered all relevant issues. As already stated above the Plaintiff's counsel Mrs. Ndung'u failed to persuade the court that she did enough to obtain a suitable or any hearing date. She indeed also failed to comply with the court order which gave the Plaintiff a further chance to obtain a hearing date. In this court's view, she knew or ought to have known that the court may not indulge the Plaintiff's apparent indolence and indilligence.

This court is conscious of the fact that a court's purpose is as much as possible, to sustain a suit as opposed to dismiss it, so as to give parties a chance to be heard to have suits disposed on merit rather than on technicalities. On that basis and on the basis of the alleged allegation that the Plaintiff is still interested in the suit, this court will for the last time sustain this suit on the following grounds: -

- a. **The suit must be prosecuted within 12 months or the suit shall automatically stand dismissed without more.**
- b. **The Plaintiff shall bear the throw-away costs inclusive of instructions fees incurred by the Defendant until now, in any event, the same to be agreed upon or be taxed.**
- c. **The throw-away costs in (b) above shall be borne by the Plaintiff's present counsel personally under any circumstances.**
- d. **A hearing date shall be fixed within 30 days.**
- e. **This application is accordingly compromised but costs thereof shall be payable by the Plaintiff's counsel as well.**

Dated and delivered at Nairobi this 5th day of March, 2015.

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D A ONYANCHA

JUDGE