



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL SUIT NO. 467 OF 2012

EVANS KIDEROPLAINTIFF

VERSUS

ANDREW OKIYA OMTATAH DEFENDANT

RULING

1. On 25th February, 2015, the Defendant took out a Motion on Notice expressed to be brought under, the provisions of, inter alia, Order 17 Rule 2 of the Civil Procedure Act. The Motion sought the dismissal of the suit for want of prosecution. The grounds upon which he brought the application were contained on the body of the Motion as well as his own Affidavit sworn on 25th February, 2015.
2. The grounds were that since the close of pleadings on 18th February, 2013, is was over 36 (thirty six) months since the Plaintiff/Respondent set down the suit for hearing; that the Plaintiff had been guilty of prolonged, inordinate and inexcusable delay in proceeding with the suit making the fair trial of the suit difficult; that the conduct of the Plaintiff showed that he is no longer interested in prosecuting the suit and that the continued maintenance of the suit without any action amounts to abuse of court process.
3. Mr. Anyona held brief for Mr. Kanjama, Learned Counsel for the Defendant and relied on the written submissions on record. It was submitted on behalf of the Defendant; that the one year (1) contemplated under Order 17 Rule 2 of the Civil Procedure Rules is one year after close of pleadings; that pleadings closed on 3rd March, 2013; that it was therefore one year and eleven months (1 year 11 months) that had lapsed between close of pleadings and the date of the application. Counsel relied on the case of **Allen Vs Sir Alfred McAlpine and Sons Ltd (1968) 1 All ER 543** for the burden of proof the Defendant must discharge to succeed in an application such as this one. Counsel further submitted that the same principles were followed by our own Court of Appeal in the case of **Ivita Vs Kyumbu (1984) KLR 441**. Counsel further relied on the case of **Anthony Kaburi Kario & 2 others Vs Ragati Tea Factory Co. Ltd & 10 others 2014 eKLR** where Gikonyo J held that 14 months was inordinate delay. It was further submitted that the Plaintiff was in breach of Section 1A(3) of the Civil Procedure Act and Article 159(2) of the Constitution of Kenya and that the delay had kept the Defendant in a perpetual state of anxiety. The case of **Agnes Wekesa Okumu Vs Dima College Ltd and 2 others (2015) eKLR** was relied in support of that proposition. Counsel urged that the application be allowed.
4. The application was opposed vide a Replying Affidavit of Kamina Kyalo sworn on 9th June, 2015. In it, Mr. Kyalo, a process server in the firm of Prof. Tom Ojiambo & Associates narrated the steps taken from the filing of the suit on 21/9/12 until the filing of the Reply to Defence on 20th February, 2013; it was deponed that the Defendants advocates invited the Plaintiff's advocates for fixing a hearing date on

25/9/14 vide a letter dated 8/09/14 but the registry informed the parties on that date that the court diary was already full. That there was yet another invitation of the Defendant's Advocates for fixing of a hearing date vide a letter dated 23/2/15. It was deponed that both letters were received by the Defendant's Advocates and that the fixing of the hearing date slated for 4/3/15 could not be proceeded with because the current application had been filed.

5. Ms. Said appeared for the Plaintiff and relied on the written submissions on record. She submitted on behalf of the Plaintiff that the law prohibits the court from impulsive inclination as dismissal of a suit without hearing the parties is draconian; that the court should consider if the delay is prolonged and inexcusable and even though, the court should consider whether it can still do justice to the parties. The case of **Ibrahim Mohammed & Anor vs Alphonse Lwanga Owour (2015) eKLR** was relied on for that proposition. It was further submitted that there has been no delay in the prosecution of the case in that there had been two attempts to fix the suit for hearing on 25/9/14 and 23/2/15, respectively. The case of **Mwangi S. Kaimenyi vs Attorney General & Anor (2014) eKLR** was cited in support of the proposition that the explanation given for the delay should be properly evaluated. Finally, it was submitted on the authority of **Ivita Vs Kyumbu (1984) KLR 44** that the Defendant must satisfy the court that he will be prejudiced by the delay which the Defendant had allegedly not done in this case. The court was therefore urged to dismiss the application.

6. I have carefully considered the Affidavits on record and the submissions of counsel. I have also reviewed the authorities relied on by the respective parties and I agree with the principles enunciated or espoused therein. Each case however, has to be decided on its one peculiar circumstances. This is an application for dismissal of a suit for want of prosecution. The principles applicable were set out by the Court of Appeal in the case of **Ivita Vs Kyumbu (1984) KLR 44** to be that there has to be prolonged delay, that the delay must be inexcusable or unexplained and that the same has caused or is likely to cause prejudice.

7. The Defendant submitted that the one (1) year contemplated under Order 17 rule 2 is from the date of close of pleadings and that for that reason, since pleadings closed on 18/2/2013, there had been inaction for thirty six (36) months. Order 17 Rule 2 provides:-

“(a) In any suit in which no action 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 satisfactions, may dismiss the suit.

(b)

(c) Any party to the suit may apply for its dismissal s provided under sub rule 1”

8. From the reading of Rule 2(a), the rule does not specify, when the time starts to run. It only states that where no action or step has been taken for one year. In my view, the drafters of the rule contemplated, one year from the last time a step is taken to prosecute the suit. Time therefore starts to run from when the last step is taken in a suit and not close of pleadings as submitted by the Defendant.

9. Has there been delay and if so, is it inordinate? Having held that time under Order 17 Rule 2 starts to run from the last time a step is taken to prosecute a suit, the Plaintiff produced in his Replying Affidavit two letters dated 8/9/14 and 25/2/15, respectively. Those letters were inviting the firm of Mumma & Kanjama Advocates for the Defendant to attend court on 25/9/14 and 4/3/15 respectively to fix a date for the hearing of this suit. To my mind, the letter of 25/2/15 is inconsequential as the present application was filed on the same day. the relevant letter would be the one dated 8/9/14.

10. It was sworn on behalf of the Plaintiff that the letter of invitation dated 8/9/14 was received by the Defendant's Advocates; that when the Plaintiff's court clerk attended the court registry on 25/9/14 to fix the matter for trial, he was informed that there were no dates as the court diary was the full. This piece of evidence was not denied or controverted. I have on my part seen a copy of that letter produced as “KK5”

to the Replying Affidavit of Kamina Kyalo. It has a stamp of receipt of Mumma & Kanjama Advocate. The Defendant cannot therefore state that he was not aware of that action on the part of the Plaintiff.

11. In this regard, it is clear that the last time a step was taken to prosecute this suit was 8/9/14. Between that date and the date of the present application is five (5) months. That cannot be a delay in terms of Order 17 Rule 2 of the Civil Procedure Rules. Had the present application been made before 8/9/14, I would not have hesitated to dismiss the suit since the period between 18/2/13 and 8/9/14 would have been way beyond the one (1) year given by the law for which period a suit should remain unprosecuted. That not being the case; I am not satisfied that the application satisfies the criterion for dismissal of suits for want of prosecution. I do not need to consider the other two principles the first one having not been satisfied.

12. In the premises, I find the application to be without merit and I dismiss the same. I make no order as to costs as the suit seems to have stayed in limbo between 18/2/13 and 8/9/14. I direct however that the Plaintiff does take steps to list the matter for pre-trial directions within 45 days of the date of this ruling.

13. It is so ordered.

DATED and DELIVERED at Nairobi this 10th day of July, 2015.

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A. MABEYA

JUDGE