



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CAUSE NO 525 OF 2007
SUSAN LOVE-KAZI AND JAMES BILL T/A ISANA SCHOOL.....PLAINTIFF
VERSUS
REV. HUMPHREY WAINAINA MUNGA.....DEFENDANT

RULING

1. Before me is a Motion of Notice dated 18th July, 2013. The same is brought under Order 17 Rule 2(3) of the Civil Procedure Rules. It seeks the dismissal of the suit for want of prosecution. The grounds upon which the application was brought were set out in the body of the Motion and the Supporting Affidavit of Milly Jalega Odari sworn on 18th July, 2013.

2. The grounds were that the Plaintiff had not taken any steps to set down the suit for hearing since it was last scheduled for hearing on 24th January, 2012 which was well over a year; that the delay in prosecuting the suit was inordinate and inexcusable under the provisions of Order 17 Rule 2 of the Civil Procedure Rules; that since the suit was filed in 2006, nearly ten (10) years ago it is prejudicial to leave the same to continue to hang over the Plaintiff's head. Ms. Odari for the Applicant submitted that there was no explanation that had been offered in the Replying Affidavit filed on behalf of the Plaintiff for the delay. She urged that the application be allowed.

3. The application was opposed vide the Replying Affidavit of Flavia Kalande sworn on 12th February, 2014. It was contended that the adjournment of 24th January, 2014 was occasioned by the Defendant who applied for an adjournment to enable him go through the Plaintiffs documents and file his own; that the Plaintiff had on various occasions invited the Defendant's Advocates to fix the matter for hearing vide letters dated 25th January 2012, 23/2/2012, 30/3/2012, 12/03/2012 and 3/12/2012, respectively. That as regards the fixing of 3/12/2012, the deponent's Court Clerk informed her that no hearing dates could be assigned to the case as the parties had not yet fully complied with pre-trials. That when the diary for 2014 was opened in November, 2013, an invitation letter was issued on 22/11/2013 which was almost immediately. It was therefore urged that the Defendant's application was premature and should be dismissed.

4. At the hearing of the application, there was no appearance on behalf of the Plaintiff and I heard the Defendant's counsel ex-parte. I have already set out her submissions hereinabove which I have considered together with the Affidavits on record. This is an application for dismissal of the suit for want of prosecution. The principles applicable were set out in the Court of Appeal decision of **Ivita Vs Kyumbu (1994) KLR 441**. These are that, the Defendant must establish that there has been delay; the delay should be inordinate or inexcusable and that the Defendant has suffered or is likely to suffer

prejudice as a result of the delay.

5. It is not in dispute that the last time the matter was due to come up for hearing was 24th January 2012. The record shows that on that day nothing happened as there are no minutes to show what happened. The file did not reach court from the registry. This is contrary to the allegations by the Plaintiff that the Defendant caused an adjournment. From the said date until 23rd July 2013 when the current application was filed, no action seems to have been taken on record regarding this suit. The period between 24th January 2012 and 23rd July 2013 was 18 months. In my view there was a delay in terms of Order 17 Rule 2 of the Civil Procedure Rules.

6. Was that delay inordinate or excusable? Counsel for the Plaintiff filed a detailed Affidavit wherein she produced letters inviting the Defendant's Advocates for fixing the suit for hearing. These letters were duly received by the Defendants as follows:

- a. Letter dated 25th January 2012 was received 25th January, 2012
- b. Letter dated 23rd February 2012 was received 1st March, 2012
- c. Letter dated 12th March 2012 was received 14th March, 2012
- d. Letter dated 30th March 2012 was received 4th April, 2012
- e. Letter dated 3rd December 2012 was received 3rd December 2012

7. The letters in a, b, c, and d above were never received by the court registry. But the one of 3rd December 2012 was received in court as it has the court's stamp of 13th December, 2013. It is endorsed that the parties had not complied with the filing of list of witnesses and Witness Statements. To my mind, the delay had been explained on two grounds; Firstly, since the Defendant's Advocates had clearly received these letters of invitation, the Defendant cannot argue that he did not know that the Plaintiffs were making any efforts to prosecute the suit. Secondly, the fact that on 13th December, 2012 the parties attended the registry and the court declined to give the dates for reasons stated, is to my mind a good and adequate explanation. A step in the proceeding includes, listing the suit for hearing, mentioning the suit for directions or inviting the opposite party to take a date with evidence that such a letter is received either by the court or the opposite party. In the premises, although there has been delay, I am satisfied that the same has been adequately explained. I need not therefore consider if the Defendant has suffered or will suffer any prejudice as a result of the delay.

8. In view of the foregoing, I find the application to be without merit and the same is hereby dismissed. Since the suit has been in the court corridors since 2007, I will not make orders as to costs. However, I direct that the Plaintiff do take pretrial steps with a view to concluding the same within 60 days of the date of this ruling.

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

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A. MABEYA

JUDGE