



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 244 OF 2016

STEFANO POLI.....PLAINTIFF

VERSUS

ASHIONO DONALD SHIBACHI..... DEFENDANT

RULING

1. By this Notice of Motion application dated 22nd August 2018, Ashiono Donald Shibachi (the Defendant) prays for Orders: -

1. That this Honourable Court be pleased to issue an Order for dismissal for want of prosecution of the suit herein; and

2. That the costs of this application be provided for.

2. The application which is supported by a short Affidavit sworn by Mr. Wafula Nyongesa Advocate for the Defendant is premised on the grounds: -

a) That the suit herein has never been set down for hearing by the Plaintiff since it was instituted;

b) That the Plaintiff has manifestly no interest in prosecuting the case; and

c) That it is in the best interest of justice that the matter be dismissed for want of prosecution.

3. The application is opposed by the Plaintiff. In an equally short Replying Affidavit sworn on his behalf by his Advocate Mr. Kazungu Lughanje, the Plaintiff asserts that he has not deliberately refused to set up this matter for hearing but offers that he had some personal problems that militated against his active involvement in the matter.

4. Counsel for the Plaintiff avers that his client who is an Italian National was in February 2017 arrested by Interpol Police Officers and was thereafter deported to Italy where he was prosecuted and jailed. Counsel accordingly pleads for time to allow the Plaintiff organize himself and grant a Power of Attorney to allow a representative to pursue these proceedings on his behalf.

5. I have perused and considered the application as well as the response thereto. Order 17 Rule 2(1) which governs dismissal of suits for want of prosecution, provides as follows: -

“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.”

6. Further Order 17 Rule 2(3) states that: -

“Any party to the suit may apply for its dismissal as provided in sub-rule (1).”

7. Whether or not the Court should exercise the power of dismissal for want of prosecution under Order 17 is a matter of the Courts discretion. In *Argan Wekesa Okumu –vs- Dima College Ltd & 2 Others (2015) eKLR*, the Court considering a similar application for dismissal observed as follows: -

“The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the Defendant is likely to be prejudiced by such delay.”

8. In the matter before me, it is not denied that the Plaintiff has failed to fix this suit for hearing in the last one year before the application for dismissal was preferred.

9. I have considered the subject matter of this dispute as well as the explanation given by Counsel for the Plaintiff to the effect that his client was arrested and has been in jail in Italy since February 2017.

10. In the circumstances of this case, I think it is fair and just that the Plaintiff be afforded a little time to put his affairs in order. Accordingly, I will decline to grant the orders sought before me but on condition that the Plaintiff organizes his affairs and proceeds to prosecute this suit within 90 days from today.

11. In the event of default this suit shall stand dismissed as sought in the application herein.

12. The cost of the Defendant’s application shall be in the cause.

Dated, signed and delivered at Malindi this 8th day of October, 2019.

J.O. OLOLA

JUDGE