



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 595 OF 2011

ALSHABAI HASSAN T/A

SETLACK TWO THOUSAND.....PLAINTIFF

VERSUS

JASWINDER BHABRA.....DEFENDANT

RULING

1. On 23rd June 2016, the defendant (the **applicant**) brought a Notice of Motion dated 22nd June, 2016 seeking an order dismissing this suit on ground of want of prosecution. In the alternative, and without prejudice to the plea for a dismissal order, the applicant sought an order vacating and/or varying the interim injunctive order granted to the plaintiff on 15th May, 2013. The application is supported by the defendant's affidavit sworn on 22nd June, 2016.
2. The applicant's case is that the suit herein was filed on 1st November, 2011. He subsequently filed his defence on 6th December, 2012. On 15th May, 2013 Waweru J granted the Plaintiff an interim injunctive order pending the hearing and determination of the suit. Since 5th November, 2013 the plaintiff has not taken any step to prosecute this suit.
3. The Plaintiff did not file a response to the application despite service. At the hearing, Mr. Kipngeno, counsel for the defendant/applicant, submitted that the last date when the plaintiff took a step to prosecute this suit was on 31st July, 2013 when the matter was fixed for hearing on 5th November, 2013. On 5th November, 2013 the matter was taken out of the hearing list. Since then, no action had been taken by the plaintiff to set down the suit for hearing. He added that pendency of this suit is prejudicial to the defendant because the plaintiff continues to enjoy the injunctive order issued to him on 15th May, 2013 and extended on 16th July, 2013. In conclusion, he submitted that no explanation had been tendered to explain the inordinate inaction on part of the plaintiff. He urged the court to grant the plea.
4. Mr. Athman, counsel for the plaintiff submitted that they were unable to file a response to the application because the plaintiff had failed to give them instructions despite notifying him about the application. He urged the court to exercise its discretion as it deems fit.
5. I have considered the application together with the brief oral submissions tendered by the parties. The first question to be answered in the application is whether the criteria for grant of an order of dismissal of suit for want of prosecution has been satisfied. The second question is whether the alternative plea for an order vacating the interim injunction order would satisfy the ends of justice and be appropriate in the circumstances of this suit.
6. The legal framework on dismissal of suits on ground of want of prosecution is set out under Order 17

rule 2 of the Civil Procedure Rules which provides as follows:

Order 17 rule 2

Notice to show Cause why suit should not be dismissed.

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 dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

2) I cause is shown to the satisfaction of the court it 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..."

7. The jurisprudential principle upon while the jurisdiction to dismiss a suit for want of prosecution is exercised was outlined in the case of **Ivita v. Kyumbu (1984) KLR 441** as follows:

"The test is whether the delay is prolonged and inexcusable and, if it is, can justice be done despite such delay."

8. In **Mwangi S. Kimenyi V. Attorney General and Another, Misc. Civil Application No. 720 of 2009** the court observed that when the delay is prolonged and inexcusable to the extent that it would cause grave injustice to one side or to both, the court is obliged to dismiss the suit. The court further observed that the focus of the court should be to serve substantive justice. To this extent, the court is to consider whether the delay has been intentional and contumelious, whether the delay or conduct of the plaintiff amounts to an abuse of the court process, whether the delay is inordinate and inexcusable, whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of the issues before the court.

9. In the present suit, the plaintiff elected not to respond to the application. Consequently, the court is not seized of any explanation, or mitigation from the plaintiff. At the hearing of the application, counsel for the plaintiff left the matter to the court and urged the court to exercise its discretion in the manner it considers just.

10. In the absence of any explanation justifying the delay or mitigation or urgings from the plaintiff craving for preservation of this suit, the court has no basis for sustaining the suit. The court is therefore satisfied that both the legal framework in Order 17 rule 2 of the Civil Procedure Rules and the established jurisprudential criteria for dismissal of suit on ground of want of prosecution have been satisfied.

11. The upshot of the foregoing is that the defendant's Notice of Motion dated 22nd June, 2016 succeeds in terms of prayers 1 and 3.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF SEPTEMBER 2018.

B M EBOSO

JUDGE

In the presence of:-

Mr Kahura holding brief for Mr Kipngeno Advocate for the Defendant. No appearance for the plaintiff

June Nafula - Court Clerk