



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
IN THE ENVIRONMENT AND LAND COURT

ELC.NO.249 OF 2013

JOHN BOSCO KIMANI.....PLAINTIFF/RESPONDENT

=VERSUS=

NAIROBI CITY COUNCIL.....DEFENDANT/APPLICANT

RULING

The matter for determination is Notice of Motion dated **6th November 2014**. The application is brought by Defendant /Applicant and has sought for the following orders;-

- 1. That the suit herein be dismissed for want of prosecution;***
- 2. That the costs of this application and the suit herein be borne by the plaintiff.***

The application is anchored on the grounds stated on the face of the Notice of Motion and on the supporting affidavit of **Donald B.Kipkorir** These grounds are;-

- a. That the plaintiff is yet to schedule the suit for hearing, since it was filed on 15th June 2012.***
- b. That the case is over two (2) years since it was filed.***
- c. That the continued existence and uncertainty of the suit is prejudicial to the Defendant.***

In his supporting affidavit **Donald B. Kipkorir** reiterated the averments on grounds and in support of the application and averred that the plaintiff commenced proceedings by way of petition filed on **15th June 2012** under Certificate of Urgency and that the plaintiff is yet to set the suit for hearing. The deponent deposed that the plaintiff has not taken any material steps to prosecute his claim since it was last in Court on **11th October 2012**.

The deponent further deposed that the continued existence and certainty of the suit is prejudicial to the defendant having been filed over two years ago and that it is only fair and justifiable in the circumstances for the suit to be dismissed for want of prosecution.

The Application has been opposed by the plaintiff/respondent and **Nduru Gichamba Advocate** having conduct of the suit on behalf of Plaintiff who filed his Replying Affidavit on **12th March 2015** and averred that there has been no inordinate or in excusable delay in prosecuting the matter since the last date the matter was in court on **14th November 2012**. Further that he has tried to set the matter down for

hearing with no success. The Deponent averred that the delay in proceeding with the suit has in part been occasioned by the defendant who had failed to file submissions as directed by this Honourable Court on **24th July 2012**. The deponent further deposed that on **27th September 2012**, when the matter came up for mention to confirm compliance, the plaintiff had already filed his written submissions and had served on the defendants. The counsel further deposed that on the material day to confirm compliance the defendant/ applicant had not complied and was given another opportunity to file the response and submissions on **14th November 2012**, which the defendant/applicant did not.

He further deposed that the defendants filed their replying affidavit on **18th June 2013**, after 8 months had lapsed. The deponent further deposed that several Letters were drawn seeking intervention of the court to have the matter mentioned but in vein as then file could not be traced in the Court Registry as per annexure “**NG1**”.

The plaintiff averred that they are yet to receive any positive feedback from the Office of the Deputy Registrar, High Court on the aforesaid letters. The plaintiff deposed that it is trite law that a suit can only be dismissed for want of prosecution where there has been inordinate or inexcusable delay, in prosecuting the suit and where no action has been taken to prosecute the suit for at least one year.

The plaintiff averred that he has been vigilant in prosecuting his matter and if at all there was any delay it was not deliberate nor made to frustrate the process and that it was occasioned by factors outside the control of the plaintiff. The plaintiff argued that the defendants have failed to prove to this Honourable Court in any manner how they will be prejudiced or likely to suffer. The plaintiff urged the Court that in the interest of justice, the suit be heard to its final determination.

The application was canvassed by way of written submissions. The Law Firm of **Rachier & Amollo Advocates** for the plaintiff/respondent filed their written submissions on **4th April 2016** and urged the court to disallow the defendant/applicant’s application and instead allow the plaintiff/ respondent to prosecute his suit to its logical conclusion. They relied on various decided cases among them, the case of **Allen versus Sir Alfred Macalpine & Sons (1968) ALL ER** where the court established the principles governing application for dismissal of suit for want of prosecution as being;

- 1. The delay is inordinate;**
- 2. The inordinate delay is inexcusable and;**
- 3. The defendant is likely to be prejudiced by the delay.**

The Law Firm of **KTK Advocates**, for the defendant/applicant’s filed their written submissions on **13th May 2015**, and urged the court to allow defendant/applicant’s application and dismiss the suit with costs, for want of prosecution. They relied on various decided cases among them the case of **Century Oil Trading Company Limited versus Gerald Mwaniki Mbogo & Another Milimani HCCC No.367 of 2001** where the court dismissed the plaintiff’s suit as he had failed to give a satisfactory explanation for inaction over a period in excess of one year.

The Court has now considered the pleadings in general, the Court Record, and the written submissions and renders itself as follows;

The application is brought under **Order 17 Rules 2(3) of the Civil Procedure Rules** which provides that;

“Any party to the suit may apply for its dismissal as provided in sub Rule 1”

The applicable law for dismissal of the suit for want of prosecution is **Order 17 Rule 2(1)** which provides that;

“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.”

From the above provisions of the law, Courts have power to dismiss a suit for want of prosecution. However the said discretion must be exercised judicially, see the case of **Moses Muriira Maingi & 2 Others v. Maingi Kamuru & Another - Nyeri Civil Appeal No. 151 OF 2010**. Where the Court of Appeal cited Chesoni, J. in **Ivita v. Kyumbu**, and said:-

“The power of the court to dismiss a suit for want of prosecution is a discretionary power, but which should be exercised judicially.”

The Court has combed through the court record and indeed confirmed that the suit was filed in Court vide a Petition dated **18th June 2012**, as Constitutional Petition. However this matter was transferred to **ELC** on **11th October 2012** and from the court record, it was mentioned in the **ELC on 21 November 2012** but none of the parties were present. The plaintiff/ Applicant did not take any action on the matter from **11th October 2012** until when the defendant filed this Notice of Motion as provided by **Order 17 Rule 2(3)** which states that;

“Any party to the suit may apply for its dismissal as provided in sub-rule 1 Sub Rule 1 applies where no step has been taken by either party for one year.....”

It is evident that from **11th November 2012**, the plaintiff/respondent herein took no action or step on this matter. The court did not give **Notice** in writing to the parties to show cause why this suit should not be dismissed for want of prosecution but the defendant did so vide the instant application dated **6th April 2014**.

The application is opposed. The issue now for determination is whether the same is merited. The test to be applied in determining this application was the one set out in the case of **Ivita vs. Kyumbu [1984] KLR 441**, where Chesoni, J. (as he then was) held that;

“So the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution.”

It is not in doubt that after **11th November 2012**, the plaintiff/respondent did not take any action on the matter. The plaintiff/respondent through his Advocate averred that they tried to set the matter down for mention vide their several letters to the Deputy Registrar, of ELC Registry, but there was no positive feedback from that office. This Court has seen the letters from **Rachier & Amollo Advocates** dated **17th June 2013**, **18th March 2013** and **19th March 2013**, to the Deputy Registrar of the High Court of Kenya, Milimani Law Courts. From the court record, I have not seen any dates issued by the Court between **11th October 2012**, and **6th April 2014**, despite the said letters having been received in the Registry. It is therefore evident that the plaintiff had attempted on several occasions to have the matter mentioned in court but without positive feedback. The plaintiff having tried to set the matter down for mention and then facing frustrations cannot be blamed on him. In the case of **Meru Medical Stores CO.LTD versus Stanley Kariba Mwithimbu & 2 others [2011] eKLR. Civil Case No. 9 of 1997**

“The failure by the court registry to avail the court file affected the plaintiff’s constitutional rights in that justice was not done and justice was delayed on his part by the registry’s failure to avail court file for setting suit down for hearing. It would therefore be wrong to hold the delay

against the plaintiff. The plaintiff was denied his rights of setting the action in motion. He could not take any step to have suit heard as such.”

Similarly in this matter without any positive feedback from the Deputy Registrar’s office given that the file had been transferred from the Constitutional Division, the plaintiff could not set any action in motion and it would be wrong to blame him for the delay. The court cannot find and hold that as at **6th April 2014** when the instant application was filed, the plaintiff has lost interest in this suit. Indeed there was delay in setting the matter down for hearing but that delay has been explained by the plaintiff/respondent herein.

The applicant also needed to satisfy the court that it will be prejudiced by the delay and that justice will not be done in the case if there is prolonged delay on the part of the plaintiff.

The applicant herein has not explained how the delay would prejudice it and how justice will not be done due to the delay. The plaintiff/respondent has come to court seeking protection of its fundamental Rights such as Right to housing. If the suit is dismissed for want of prosecution, then the court will have removed the plaintiff/respondent from the seat of justice prematurely. The court will concur with the findings of Odunga. J in the case of **Cyrus Stanslaus Muasa Muli v Wilfred Njoka Murithi [2012] eKLR**. Where he stated that;

“The decision whether or not to dismiss a suit is purely discretionary. However, like any other exercise of discretion, the same must be based on reason and should neither be based on sympathy nor exercised capriciously. Each case must ultimately be decided on its own facts and it must always be kept in mind the court should strive to sustain the suit where possible rather than prematurely terminating the same.”

Equally in this matter, the Court finds that the order that commends is to sustain the suit rather than terminate it prematurely. However this should not be a blank cheque for further delay in prosecution of this suit. The plaintiff is put on Notice that this Court shall not entertain any further delay in the prosecution of this matter. The upshot of the foregoing is that the defendant/applicants Notice of Motion dated **6th April 2014**, is disallowed with costs being in cause.

Further plaintiff is directed to set down the suit for hearing within a period of **30 days** from the date of this ruling. Failure to do so, the suit will stand dismissed automatically for want of prosecution.

It is so ordered.

Dated, Signed and Delivered at **Nairobi** this **24th** day of **February 2017**.

L. GACHERU

JUDGE

In the presence of;

M/s Busima holding brief Mr Kipkorir for the Defendant/Applicant

None attendance for the Plaintiff/Respondent

Hilda :Court Clerk

Court:

Ruling read in open Court in the presence of M/s Busima holding brief for Mr Kpkorir for the Defendant/Applicant and absence of advocates for the Plaintiff/Respondent though served with the

Ruling Notice.

L. GACHERU

JUDGE