



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC NO. 812 OF 2012

ELIAZER KIPRUGUT KOSGEI.....1ST PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....1ST DEFENDANT

DALALI TRADERS LIMITED.....2ND DEFENDANTS

RULING

Introduction:

This is the ruling in respect of an application dated 10.11.2016 brought by Defendant/Applicant under order 17 rule 2(1) of the Civil Procedure Rules seeking for the plaintiff's suit to be dismissed for want of prosecution.

The application is based on the grounds on the face of the application and the supporting affidavit of one Lucas Gikungu.

Mr. Okara counsel for the defendant submitted that the provisions of Order 17 Rule 2 of the Civil Procedure Rules contemplate that if no steps are taken by either party within 1 year then either party may apply to the court for the dismissal of the suit. He stated that this suit was filed on 14.12.2012 alongside a Chamber Summons seeking for injunctive orders which were subsequently issued and the last time this matter was in court was on 25.11.2014.

Mr. Okara submitted that this matter has never taken off for hearing and it is now more than 1 year since the matter was in court. He further stated that the application is well grounded in law and proper before the court. He relied on the case of Ivita -vs- Kyumbu KLR 1984 which laid down the test that can be followed in matters of this nature.

Counsel submitted that the delay is inordinate and cannot be excused. The defendants are being prejudiced by the continued existence of a stagnant suit. Further he stated that from the replying affidavit of the plaintiff, the delay has not been explained and that the court has the jurisdiction to strike out such dormant suits. He urged the court to allow the application, strike out the suit with costs to the defendant.

Plaintiff's counsel's submission

The application was opposed by the plaintiff's counsel who relied on the replying affidavit filed in court.

Mr. Chemwok submitted that counsel for the defendant did not point out that there was a Notice of Appeal filed in respect of the ruling on 23.7.2015. He submitted that there are weighty triable issues in this case which should be heard on merit.

Mr. Chemwok further submitted that the plaintiff is still interested in prosecuting this matter and that both parties are under an obligation to fix the matter for hearing. He urged the court to give the parties an opportunity to be heard.

In reply to the plaintiff's counsel's submissions, Mr. Okara for the defendant reiterated his earlier submissions and stated that no explanation has been given why the plaintiff has not prosecuted the case.

He submitted that a change of advocate does not stop a party from prosecuting the case. He further submitted that the application is provided for under the law and therefore is not a technicality. He prayed that the application be allowed.

Analysis and Determination

The application which is brought under order 17 Rules 2 (11) of the Civil Procedure Rules is very clear. The said order 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.”

Order 17 Rule (2) 3 provides as follows:

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

The defendant has exercised its right under this order to approach the court to dismiss the plaintiff's suit for want of prosecution.

When the order provides that any party to the suit may apply for its dismissal as provided for in sub-rule 1, I take it to mean that a plaintiff cannot apply for the dismissal of his/her own suit. In such a case, it would be the defendant to approach the court unless the plaintiff is applying for the dismissal of the defendant's counter claim. I have not seen instances where the plaintiff is applying to court to dismiss his/her own suit.

The issues that must be determined in such an application are as developed by the law after a long period of time are namely;

1. Whether there has been inordinate delay on the part of the plaintiff in prosecuting the case,
2. Whether the delay is intentional, contumelious and therefore inexcusable,
3. Whether the delay is an abuse of the court process,
4. Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the defendant.
5. What prejudice will the dismissal occasion to the plaintiff?
6. Whether the plaintiff has offered a reasonable explanation for the delay.
7. Even if there has been delay, what does the interest of justice dictate; lenient exercise of discretion by the court?

When the court answers these questions either in the affirmative or negative then it is able to come up with a just decision in respect of the application before it. Chesoni J (as he then was) Chesoni, J. stated in the case of Ivita Vs. Kyumbu 1984 KLR at page 441 that:

“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. Thus, even if delay is prolonged if the court is satisfied with the plaintiff’s excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”

The above test summarizes the issues in this application and I need not delve much into other issues. From the submissions of counsel for the plaintiff I find that no reasonable explanation has been offered for the delay in prosecuting this case. Counsel just stated that both parties are under an obligation to fix the case for hearing. In this instant case, the defendant took the step by filing an application for dismissal of the plaintiff’s suit for want of prosecution.

The plaintiff obtained injunctive orders against the defendant in 2015 and went to sleep. Would the delay or pendency of this suit cause substantial risk to fair trial or prejudice to the defendant? I would answer this question in the affirmative as the defendant being a bank and in business would continue to suffer loss during the pendency of the suit. Would the dismissal of the suit prejudice the plaintiff? It is the plaintiff who brought the defendant to court and should always be desirous of prosecuting his/her case. This matter was filed in 2012 contemporaneously with an application for injunction which was granted and the plaintiff went to sleep. It seems the urgency ceased to exist as the delay in hearing the case has not been sufficiently explained. Cases should be heard expeditiously to enable justice to be done for the parties seeking it and to decongest the court system.

Mr. Chemwok submitted that there was an Appeal which was lodged in respect of the ruling granting the injunction against the defendant. I notice that there was no stay pending appeal granted and therefore there was no reason stopping the plaintiff from fixing the case for hearing. The status of the said Appeal has also not been mentioned whether it was finalized or not.

From the forgoing, I find that the plaintiff has not given sufficient reasons for the delay in prosecuting this case. Accordingly, I allow the defendants’ application and dismiss the plaintiff’s suit for want of prosecution with costs to the defendants.

Dated and delivered at Eldoret on this 27th day of September, 2017.

M. A ODENY

JUDGE

Read in open court in the presence of:

Mr. Mitei holding brief for Chemwok for Plaintiff/Respondent

Mohamed Mwigai for defendant – absent.

Koech – Court Assistant.