



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NYERI**

**E.L.C CASE NO. 289 OF 2014**

**(Formerly HIGH COURT CIVIL CASE NO. 92 OF 2012)**

**MWANGI KAIRU (Suing As The Personal Representative**

**of ESTHER NJOKI MWANGI) ..... RESPONDENT**

**-VERSUS-**

**MUREBU MWANGI KIMOTHO ..... APPLICANT**

**RULING**

1. On **4<sup>th</sup> February, 2016**, The defendant/applicant filed a notice of motion dated 15th January 2016, seeking to dismiss the suit herein for want of prosecution.
2. The application is premised on the grounds on the face of the application and the affidavit of the applicant sworn on **15<sup>th</sup> January, 2016**. In those grounds and the affidavit, it is pointed out that the suit herein was filed on **23rd April, 2012** by the plaintiff. The defendant/applicant filed a replying affidavit on 25th June, 2012 and directions were taken on 17th October, 2013.
3. It is the applicant's contention that two and a half years having lapsed without action being taken is a clear indication that the plaintiff is disinterested in the suit; that no prejudice will be occasioned to the plaintiff and that if the orders sought are granted this will put to an end the endless and expensive litigation forced upon the applicant.
4. The application is opposed through grounds of opposition dated **3rd May, 2016**. It is contended that the delay in setting down the matter for hearing was occasioned by loss of contact between the counsel and his client whom he later learnt had been unwell. He urges the court not to dismiss the suit as the plaintiff is now ready and willing to prosecute the matter within the time lines set by the court. To prove that he is ready to prosecute the matter, he filed his witness statement on 3rd May, 2016.
5. It is not in dispute that since directions were taken on 17th October, 2013 the suit has not been set down for hearing as required by law.
6. *The principles governing dismissal of a suit for want of prosecution were stated in the case of Agip (KENYA) Limited -VS- Highlands Tyres Limited (2001) KLR 630 as follows:*

(i) delay must be inordinate

(ii) the inordinate delay is inexcusable and

(iii) the Defendant is likely to be prejudiced by the law.

7. In the case of *Mwangi S.Kimenyi v Attorney General & another* [2014] eKLR, Gikonyo J, enumerated the aforesaid principles as follows: “I will discern the principles which the law has developed to guide the exercise of discretion by court in an application for dismissal of suit for want of prosecution. These principles are:

- a). Whether there has been inordinate delay on the part of the Plaintiffs in prosecuting the case;
- b). Whether the delay is intentional, contumelious and, therefore, inexcusable;
- c). Whether the delay is an abuse of the court process;
- d). causes serious prejudice to the Defendant;
- e). What prejudice will the dismissal occasion to the plaintiff?
- f). Whether the plaintiff has offered a reasonable explanation for the delay;
- g). Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the court?

8. In applying the above principles to the circumstances of the instant case, this court finds that the delay of two and half years was inordinate. On whether the delay was intentional, the plaintiff's counsel has stated that the delay was caused by loss of contact with his client whom he later discovered had been unwell all along. On this ground the court finds that the delay may not have been intentional.

9. On whether the excuse offered is reasonable in the circumstances, I hold that although no evidence was provided to proof that indeed the plaintiff has been unwell, the explanation offered is reasonable. Further, the plaintiff has now filed a witness statement which demonstrates that he is willing to have the matter heard and determined.

10. Since the overriding objective of the court is to render justice by hearing and determining matters rather than dismissing them as held in the case of *Irata vs Kyumbu* (1984) KLR, 441, that “***even if the delay is prolonged, if the court is satisfied with the Plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter in the discretion of the court***”, I decline to dismiss the suit and direct that the plaintiff sets down the originating summons for hearing within the next 45 days from the date hereof, failure of which the suit shall stand dismissed.

11. Costs of the application are awarded to the applicant.

**Dated, signed and delivered at Nyeri this 12th day of July, 2016.**

**L N WAITHAKA**

**JUDGE.**

In the presence of:

Mr. Karweri h/b for Ms Kimani for the defendant/applicant

N/A for the plaintiff/respondent

Court assistant - Lydia