



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 133 OF 2019

NARBOTH OMWAKE MBALANYA.....CLAIMANT

VERSUS

PREMIUM HYGIENE PRODUCTS LIMITED.....RESPONDENT

RULING

1. The Respondent/Applicant filed a Notice of Motion Application dated 18th January 2021 seeking the dismissal of the suit for want of prosecution and the costs of the application abide the result thereof. The motion was premised on the grounds on the face of the motion and was supported by the affidavit of Rajiv K. Joshi. In brief, the Respondent/Applicant asserts the Claimant filed the claim in March 2019 and upon filing of the response by the Respondent no steps have been taken since 29th March 2019 which is over 21 months since the inception of the suit. The Respondent asserts that its advocates wrote to the Claimant's advocates informing them that a year had passed since the institution of the suit and inquiring whether the Claimant was desirous of pursuing the claim. It was asserted this letter did not elicit any response from them. The Respondent/Applicant asserts therefore that it is in the interests of justice to have the suit dismissed for want of prosecution.

2. The Claimant on his part filed a replying affidavit sworn on 23rd February 2021 in which he deponed that he was desirous of pursuing his case and that failure to take a date was on account of the fact that priority has been given to matters that were filed in 2018 and prior. He asserted that he had not been complacent in pursuing his claim as alleged by the Respondent and that his advocate had informed the Respondent's advocate via email of predicament of fixing a hearing date. He asserted that dismissal of the suit without affording him an opportunity to prosecute his case is draconian. He deponed that he would suffer irreparable loss if the motion by the Respondent was granted. He urged the dismissal of the application and direction that the suit be set down for hearing.

3. The motion before me is one that seeks the dismissal of the suit for want of prosecution. The Court must of necessity consider the factors which would lead to the draconian step of dismissal for want of prosecution as the order of dismissal drives a party away from the seat of justice. No case law was cited by the parties on the subject and the Court therefore determines the matter on the basis of judicial precedence of which there is judicial notice.

4. In the case of **Ivita v Kyumbu [1975] eKLR** the test the Court has to apply or the issues the Court has to consider were summarized as follows:

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

Additionally, in the case of **Mwangi S. Kimenyi v Attorney General & Another [2014] eKLR** the Court held that:-

When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.

Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues;

1) whether the delay has been intentional and contumelious;

2) whether the delay or the conduct of the Plaintiff amounts to an abuse of the court;

3) whether the delay is inordinate and inexcusable;

4) 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 issues in action or causes or likely to cause serious prejudice to the Defendant; and

5) what prejudice will the dismissal cause to the Plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.”

5. This Court is in agreement that where the delay in prosecuting a case is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the suit straight away. It should always be remembered that to deny the subject a hearing should be the last resort of a Court. In this case it does not seem that the delay has been contumelious or intentional. The motion by the Respondent thus stands dismissed albeit with no order as to costs. Directions on the hearing of the suit shall be issued immediately upon the delivery of this Ruling.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF APRIL 2021

Nzioki wa Makau

JUDGE