



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 526 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

ISAAC GAKUA MWANGI.....CLAIMANT/RESPONDENT

VERSUS

CHIEF EXECUTIVE OFFICER WOMEN

ENTERPRISE FUND.....RESPONDENT/APPLICANT

RULING

By an application dated 19th March 2018 the applicant/respondent seeks to dismiss the claim herein for want of prosecution on grounds that the applicant has taken no action to fix the case for hearing from 11th May 2016 when the applicant filed defence to 21st March 2018 when this application was filed.

The claimant filed a replying affidavit in which he stated that he filed the claim in person and out of lack of legal knowledge was not able to undertake procedural steps leading to the hearing of the case, that the delay is not inordinate and that he has now engaged counsel and is desirous to have the suit prosecuted.

The claimant further avers that the delay was not intentional, that no prejudice will be suffered by the respondent/applicant and that the interest of justice dictates the lenient exercise of discretion of the court in conformity with the overriding objectives of Article 159 of the Constitution.

The application was disposed of by way of written submissions.

Applicant's Submissions

In its submissions the applicant states that more than 12 months have lapsed since the defence was filed on 11th May 2016 and the claimant has not taken any steps to set down the suit for hearing, that under Order 17, Rule 2(1) and (3) of the Civil Procedure Rules the courts have discretion to give parties notice to show cause why the suit should not be dismissed for want of prosecution if no step is taken by either party for one year, that Article 159 of the Constitution provides that justice shall not be delayed, that Section 3A of the Civil Procedure Act gives the court unlimited powers to make orders necessary for the ends of justice to be met while Section 1A(3) imposes a duty on parties to prosecute cases expeditiously.

The applicant refers to the decision in **ALLEN -V- SIR ALFRED MC ALPHINE AND SONS** in which Lord Denning stated the fundamental reason why courts dismiss cases for want of prosecution as follows –

“The delay of justice is a denial of justice...”

To no one will we deny or delay right or justice. All through the years men have protested at the law's delay and counted it as grievous wrong, hard to bear.

... When delay in the conduct of an action is prolonged or inordinate and inexcusable (as per SALMON L. J) the natural interference in the absence of a credible excuse and there is substantial risk by reason of the delay that a fair trial of the issues will no longer be possible or that grave injustice will be done to one party or the other or to both parties the court may in its discretion dismiss the action straight away...”

The applicant further relies on the case of **ET MONKS AND COMPANY LIMITED -V- EVANS** where the court stated that public policy demands that the business of the court be conducted with expedition. That in **DICKSON MIRITI KAMONDE -V- KENYA COMMERCIAL BANK** the court stated –

“...The delay cannot be excused and an indolent party must reckon with consequences of inaction. I am persuaded that I should look with favour towards the Respondent and I am satisfied that this is one case that must be dismissed for want of prosecution...”

The applicant also relied on the case of **FITZPATRICK VS. BATGER AND COMPANY LIMITED (1967) 2 ALL E.R** at page 657 where the Court held:

“I have great sympathy with many solicitors in the difficulties which they have to face in litigation of this kind: but grossly inordinate delay of the kind which has occurred in this case is quite inexcusable and ought not to be tolerated. It is of the greatest importance in the interest of justice that these actions should be brought to trial with reasonable expedition. It is not only in the interest of the Defendants that this should be done, but it is perhaps even in the interest of the Plaintiffs themselves.”

The applicant also relied in the case of **GIDEON SITELU KONCHELLA -VS- DAIMA BANK LIMITED (2013) eKLR** where the court while citing the case of **MOBIL KITALE SERVICE LIMITED -VS- MOBIL OIL KENYA LIMITED** held that –

“It is the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice by delay would be a thing of the past. Justice would be better served if we dispose of matters expeditiously... the overriding objective of this Act and the Rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.”

The applicant further avers that the conduct of the claimant/respondent is an abuse of Court process and a hindrance to the delivery of justice as was held in the case of **CATHERINE WANJIKU NDUATI -VS- JOANNE BAKERY AND ANOTHER (1999) eKLR** that:-

“In the instant suit the parties have already caused injustice to themselves by leaving it here unprosecuted for ten or so years unless justice delayed is not justice denied... These are parties who could still go back to sleep if their suit is restored.”

The applicant claims that the actions of appointing the firm of Ombati Otieno and Opondo Advocates was an afterthought on the part of the claimant after being caught napping on his suit and was evidently jolted by the applicant’s application to have this suit dismissed.

The applicant submits that the pendency of this suit has subjected it to unwarranted anxiety and aggravated expenses and thus is prejudicial to the respondent, that the delay is inordinate, inexcusable and an abuse of court process, that litigation must come to an end and it is just and fair to dismiss the suit for want of prosecution.

Claimant’s Submissions

It is submitted for the claimant that in exercising its jurisdiction whether or not to dismiss the suit for want of prosecution, the court should be guided by the well developed principles for the exercise of discretion as set out in the case of **IVITA -V- KYUMBA** as follows –

“The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, 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 of and in the discretion of the court.”

That the discretion must be exercised judiciously as stated in the case of **NAFTALI ONYANGO -V- NATIONAL BANK OF KENYA**, that the burden of proof lies with the defendant seeking the dismissal of the suit as stated in **ALLAN -V- SIR ALFRED MC ALPHINE AND SONS LIMITED** and reiterated in **MWANGI S. KIMENYI -V- THE HON. ATTORNEY GENERAL AND ANOTHER** being –

- 1) *Whether there has been inordinate delay on the part of the Plaintiffs 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 ”*

It is submitted that each case must be decided on a case by case basis as stated by Visram J. (as he then was) in **AGIP (K) LIMITED –V- HIGHLANDS TYRES LIMITED** as follows –

"It is clear that the process of the judicial system requires that all parties before the court should be given an opportunity to present their cases before a decision is given. It is, therefore, not possible that the rules Committee intended to leave the plaintiff without a remedy and to take away the authority of the court when it made Order IV1 Rule 5 of Civil Procedure Rule.

Delay is a matter of fact to be decided on the circumstances of each case. Where a reason for the delay is offered, the court should be lenient and allow the Plaintiff an opportunity to have his case determined on merit. The court must also consider whether the Defendant has been prejudiced by the delay."

The claimant submits that the decision of Visram J. espouses the provisions under Article 48 that access to justice should not be impeded and Article 50(1) on the right to a fair hearing. That Article 159 of Constitution and Order 17, Rule 2(3) gives the court discretion which "must be exercised on the basis that it is in the interest of justice" only where the party instituting the suit has lost interest in it, or where delay in prosecuting the suit is inordinate, unreasonable, inexcusable and is likely to cause serious prejudice to the defendant on account of that delay. The claimant relied on the case of **UTALII TRANSPORT COMPANY LIMITED AND 3 OTHERS -V- NIC BANK AND ANOTHER** as quoted by Gikonyo J. in the case of **MOSES MWANGI KIMANI -V- SHAMII KANJIRAPPARAMBIL THOMAS AND 2 OTHERS** that –

"The first intuitive feeling one gets is that the offending proceeding should quickly be removed out of the way of the innocent party. But, the law prohibits a court of law from such impulsive inclination, and requires it to make further enquiries into the matter under the guide of defined legal principles on the subject of dismissal of cases for want of prosecution; a view which is undergirded by the fact that dismissal of a suit without hearing the merits is draconian act which drives the plaintiff from the judgment-seat. It is, therefore, a matter of discretion by the court."

It is submitted that the respondent has not proved any prejudice suffered or that it will suffer as a result of the delay, that it is the claimant who will suffer prejudice as dismissing the suit will forever banish him from court, that it is in the interest of justice to give the claimant an opportunity to have his claim decided on the merits as was held in the case of **DANIEL NJIRU NGAI -V- FOUNTAIN CREDIT SERVICES LIMITED**. The claimant prays that the case be fixed for hearing on priority basis.

Determination

I have considered the application and arguments for and against granting the prayers sought. I have further considered the reasons given by the claimant for the delay in fixing his claim for hearing.

I take note that the claimant has been acting in person and only sought the services of counsel upon being served with the instant application. I further take judicial notice that unrepresented litigants may well find the processes and procedures in court registries incomprehensible and daunting. I further take note of the fact that the claimant came to court very soon after his employment was terminated, the termination having occurred on 16th March 2016 (as pleaded in the claim) and the suit filed less than one month later, on 4th April 2016. This is a demonstration of the enthusiasm with which the claimant came to court. As he has stated in the replying affidavit, he was not able to undertake the procedural steps leading to the hearing of his case out of lack of legal knowledge and not knowing that he could be confronted with an application for dismissal once his case was in court. He has stated that he is still interested in prosecuting the case and has accordingly obtained the services of his advocates currently on record.

The court further takes judicial notice of the difficulty to obtain hearing dates at the court's registry in Nairobi and that the court diary was closed in the year 2017 only two months after the diary was opened.

I am satisfied that it would not be in the interest of justice to dismiss this case for want of prosecution in the circumstances that the respondent will not suffer substantial prejudice if the case is fixed for hearing while the dismissal of the case would completely banish the claimant from having his case decided on the merits.

It is a cardinal rule of justice that dismissal of cases should be resorted to by courts sparingly and only in cases where the delay is inordinate and there is no justifiable explanation of the same, or if the suit is an abuse of court process or where the interest of justice dictates so. I do not find the delay herein inordinate or inexcusable. I do not find any evidence of abuse of court process and I am satisfied that the claimant has satisfactorily demonstrated his interest to prosecute the case.

In the circumstances, I exercise my discretion in favour of the claimant and decline the application of the respondent to dismiss the case for want of prosecution. There shall be no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF OCTOBER 2018

MAUREEN ONYANGO

JUDGE