



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 954 OF 2013

FERDINAND ANGA'NYA YATOLI .....CLAIMANT/RESPONDENT

AND

THE HENNESIS HOTEL .....RESPONDENT/APPLICANT

RULING

1. The application before me is the Respondent/Applicant's notice of motion application dated 10<sup>th</sup> December 2015. It seeks the dismissal of the suit for want of prosecution. The application is supported by the affidavit of John Maina Mburu and the grounds on the face of the motion. The application was unopposed.
2. The Respondent/Applicant's counsel Mr. Wamae on 20<sup>th</sup> June 2016. He submitted that the suit should be dismissed for want of prosecution as the Claimant/Respondent had been inactive for over 2 years. He submitted that it was in line with the Constitution and relied on the case of **Caroline Kinyua v Susan Wanjiku [2015] eKLR** and **Patrick Ayisi v Madhav Bhalla [2014] eKLR**. He urged the Court to grant the application with costs to the Applicant.
3. The case was last fixed for hearing on 19<sup>th</sup> May 2014 and the suit was stood over generally as parties were absent. The Respondent/Applicant seeks to have the suit dismissed for want of prosecution. The Respondent/Applicant relies on the cases of **Caroline Wambui Kinyua v Susan Wanjiku Kariuki** (*supra*) where Njuguna J. citing with approval the case of **Ivita v Kyumbu (1984) KLR 441** held that *the test to be applied by the courts in an 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 if the delay is prolonged, if the Court is satisfied with the plaintiff's excuse for the delay and that justice can be done to the parties, the action will not be dismissed but will be ordered that it be set down for hearing at the earliest time.* Also relied on was the case of **Patrick Ayisi Ingoi & another v Madhav Bhalla t/a Taibjee & Bhalla Advocates & 2 Others [2014] eKLR** where Gikonyo J. citing his own decision in **Jimmy Wafula Simiyu v Fidelity Commercial Bank Limited [2014] eKLR** held that *'No doubt the court has discretion to excuse a delay as long as it has been explained to the satisfaction of the Court. The satisfaction will come from the explanation given and the fact that the delay causes no substantial prejudice to fair trial or one of the parties or other or both. Therefore, the fact of delay per se does not seal the fate of the case. Other factors should be considered by the Court such as; whether the delay 1) is inordinate and inexcusable; and 2) will cause substantial prejudice to the fair trial of the case. The latter involves a delicate balancing act of the prejudice the dismissal of the case would cause on the plaintiff on the one hand, and real hardships to the Defendant on the other. The Court will be interested in the nature and importance of the case, the right of the Plaintiff to be heard and the fact that summary dismissal of a suit drives away the Plaintiff from the seat of judgment; an arbitrary and draconian act comparable only to the proverbial 'sword of the Damocles''. And, for the Defendant, in order to complete the balancing, the Court will seek to be told of the actual hardships, loss and prejudice the defendant has suffered and will suffer by the delay; here it will be incumbent upon the Defendant to show the prejudice is substantial and results to, impediment of fair trial, aggravated costs, or specific hardships. There must be some additional prejudice that has worsened the position of the*

*Defendant. These factors answer to a higher constitutional principle of justice to serve substantive justice and Articles 48, 50 and 159 of the Constitution are the relevant guide here. Ultimately, as Chesoni J (as he then was) stated in the case of Ivita v Kyumbu, the Court should ask itself, whether, despite the delay, it is still possible to do justice for all the parties.*

4. The Court has to consider whether as my learned sister Njuguna J. and Chesoni J. (as he then was) stated, whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus if the delay is prolonged, if the Court is satisfied with the plaintiff's excuse for the delay and that justice can be done to the parties, the action will not be dismissed but will be ordered that it be set down for hearing at the earliest time. In this case, there is no reason or excuse proffered by the Claimant for the delay. The Claimant has been mute in spite of proper service of the motion and hearing notices for the application. The Court is therefore unable to grant him the benefit of doubt as discretion permits. In the application before me, it is clear that as Gikonyo J. stated the sword of Damocles should not hang over a party incessantly. The Respondent has sought the dismissal of the suit for want of prosecution and the Court finds merit in the motion. The suit is dismissed with costs to the Respondent.

Orders accordingly.

**Dated and delivered at Nairobi this 24<sup>th</sup> day of June 2016**

**Nzioki wa Makau**

**JUDGE**