



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 11 OF 2018

PETER MAGONGWE MUGOMI.....PLAINTIFF/RESPONDENT

-VERSUS-

ALBERT MUGUMBI KAZUNGU.....1ST DEFENDANT/APPLICANT

SIMEON NGOWA TABU KIRAO.....2ND DEFENDANT/APPLICANT

RICHARD PREMCHARD RAMA.....3RD DEFENDANT/APPLICANT

RULING

This ruling is in respect of Application dated 6th October 2021 by the 1st Defendant/Applicant **seeking** the following prayers; -

a. THAT this Honourable Court be pleased to dismiss the Plaintiff's/Respondent's suit against the 1st Defendant/Applicant for want of prosecution.

b. THAT costs of this Application be borne by the Plaintiff/Respondent.

Counsel agreed to canvas the application vide written submissions which were duly filed.

Mr. Wanga counsel for the Applicant submitted that on the issues for determination as follows; -

a. Whether or not the application dated 6th October 2021 seeking to have the suit dismissed for want of prosecution satisfies the thresholds set by the creeds of Civil Procedure, and the relevant laws of Kenya;

b. Whether or not the Plaintiff took obligatory steps to ensure the matter was determined judiciously and whether the delay by the plaintiff was inordinate and inexcusable;

c. Whether or not it is the duty of Defendant(s) to set down the Plaintiff's case for hearing; and

d. Whether or not the Plaintiff stands to suffer injustice should the suit be dismissed.

Counsel relied on the case of *Sospeter Omariba Mogere v Mex Logistics Africa Limited [2021] eKLR* where the court cited the

case of Utalii *Transport Company Limited & 3 others v NIC Bank Limited & another [2014] eKLR* where the court stated that:

“Accordingly, 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:

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.

Counsel further relied on the case of *Mukavi Ways Co Limited v Family Bank Limited [2020] eKLR* where the court referred to the case of *George Gatere Kibata v George Kuria Mwaura & another [2019] eKLR* and stated that a suit qualifies to be dismissed for want of prosecution if no step has been taken in the suit by either party for at least one year. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the Defendant is likely to be prejudiced by such delay.

Counsel also submitted that the court has discretion under Order 17 Rule 2(1) of the Civil Procedure Rules to 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 in any suit in which no application has been made or step taken by either party for one year.

It was counsel’s submission that the Plaintiff has failed to prosecute this matter within a reasonable timeframe and is therefore inordinate. Counsel relied on the case of *Eldoret Express Co Ltd & another v Angela Nyaboke Tinaga [2021] eKLR* where the court addressed the issue of delay while citing the case of *Ikta v Kyumbu [1984] KLR 441* which laid down the test to be applied. The court stated that the test to be applied in application for dismissal for want of prosecution is whether the delay is prolonged and inexcusable, and whether justice can still be done despite the delay. Further 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.

Mr. Wanga submitted that the Plaintiff’s replying affidavit at paragraph 10 is misleading by stating that he could not locate the Defendants while deliberately ignoring that the Defendants were represented by counsel. Additionally, counsel submitted that it is legally unsound for the Plaintiff to state that they did not take necessary arrangements to prosecute the matter because the 1st Defendant did not attempt to have the matter listed for pre-trial.

Counsel therefore urged the court to allow the application and dismiss the Plaintiff ‘s suit against the 1st Defendant with costs for want of prosecution.

The 3rd Defendant filed a replying affidavit dated 4th January 2022 in support of the application for dismissal of the Plaintiff’s suit for want of prosecution and gave a chronology of events.

PLAINTIFFS SUBMISSIONS

Counsel for the Plaintiff gave a brief background to the case and the service process and the documentation filed in response to the

case by the Defendants. Counsel submitted that it is clear from the records and from the Supporting Affidavit filed by the 1st Defendant now Applicant that their application filed on 28th May, 2018 was frustrated due to the fact that it was difficult to effect service upon the Defendants.

Mr. Omwancha submitted that the 1st Defendant changed representation from the firm of *George Wakahiu & Njenga Advocates* to the current Advocates on record and also there was an uphill task in effecting service upon the Interested Party whose whereabouts were unknown.

Counsel submitted on the threshold for dismissal for want of prosecution and admitted that indeed the period of one year had lapsed at the time the 1st Defendant filed his application but explained that the delay was not inordinate and inexcusable as the Plaintiff embarked on the process of locating the Defendants and managed to locate the 1st Defendant and later managed to serve the rest of the Defendants who instructed advocates to represent them except the Interested Party.

Counsel cited the case of *Ivita -Vs- Kyumbu (1994) KLR 441 (Supra)* on the test whether the delay is prolonged and inexcusable and, if it is, can justice be done despite such delay. Counsel blamed Covid 19 as contributory to the delay in fixing the matter for hearing.

Mr. Omwancha therefore urged the court to exercise its discretion and set down the case for hearing in the interest of justice.

ANALYSIS AND DETERMINATION

This is an application by the 1st Defendant/Applicant for dismissal of the Plaintiff's suit for want of prosecution. The issue for determination in this application is whether the Plaintiff's suit should be dismissed for want of prosecution.

Order 17 Rule 2(1), which governs dismissal of suits for want of prosecution, 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.”

Further Order 17 Rule 2(3) states thus:

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

The Applicant has opted to apply the provisions of Order 17 Rule 2(3) where any party may apply for dismissal. The Applicant is within his right to make such application but the court while exercising its discretion must look at the circumstances of the case.

If the Respondents give a satisfactory explanation why there was a delay in fixing the matter for hearing, then the court would spare such party and fix the matter for hearing.

The Plaintiff has given explanation for the delay as to service and change of counsel for the Defendants together with the Interested Party. Counsel has also alluded to the Covid -19 pandemic which ravaged the world from 2019 and is still with us.

In the case of *Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v M.D. Popat and others & another [2016] eKLR*, the court stated as follows: -

“Nonetheless, Article 159 of the Constitution and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay.”

This matter was last in court on 29th October 2020 when an application dated 28th May 2018 was withdrawn as it had been overtaken by events. This is the time when most registries were not operating optimally due to scaling down of staff as a result of Covid -19 pandemic. This was further complicated with the new e-filing system and virtual hearings. This should not be taken as a blanket excuse for not fixing matters for hearing to be expeditiously determined. The circumstances surrounding each case must be looked individually.

I have considered the Application and find that it lacks merit and it is dismissed with no orders as to costs. The Plaintiff to fix this matter for hearing within 30 days' failure to which the suit stands dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF MARCH, 2022

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.



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