



Brava Food Industries Limited v Kenya Ports Authority & another (Civil Case 63 of 2016) [2022] KEHC 11353 (KLR) (27 April 2022) (Ruling)

Neutral citation: [2022] KEHC 11353 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE 63 OF 2016
OA SEWE, J
APRIL 27, 2022**

BETWEEN

BRAVA FOOD INDUSTRIES LIMITED PLAINTIFF

AND

KENYA PORTS AUTHORITY 1ST DEFENDANT

PORTSIDE FREIGHT TERMINALS LIMITED 2ND DEFENDANT

RULING

1. There are two applications before the court that are the subject of this ruling. The first application is dated April 26, 2021 and was filed on May 20, 2021 by M/s Daly & Inamdar Advocates on behalf of the 1st defendant pursuant to article 159(2) of the *Constitution* of Kenya; sections 1A, 1B, 3A and 63 (e) of the *Civil Procedure Act* and order 17 rule 2(3) and order 51 of the *Civil Procedure Rules*, 2010 and all other enabling provisions of the law, for the orders that:
 - (a) The plaintiff's suit as against the First defendant/applicant, be dismissed for want of prosecution.
 - (b) The costs of this application be provided for.
2. The application is premised on the grounds set out on the face of it and the supporting affidavit of Stephen Kyandih sworn on the April 26, 2021. He averred that on the June 21, 2016 the plaintiff filed a suit and obtained summons to enter appearance in respect of the 1st defendant on the June 28, 2016. The 1st defendant contended that the plaintiff has never taken any steps to comply with pre-trial proceedings and has further not taken any steps to set the suit down for hearing for almost five (5) years. The 1st defendant further stated that the plaintiff has been indolent for far too long and is therefore not entitled the courts discretion.



3. Further, the 1st defendant averred that it stands to suffer grave prejudice if the orders sought herein are not granted as the delay by on the part of the plaintiff has had the effect of denying. The 1st defendant asserted that the delay is not only inordinate but it is inexcusable and unjustifiable; and therefore ought not to be countenanced; as to do so will yield a miscarriage of justice.
4. The second application dated September 3, 2021 and filed on September 6, 2021 was filed by M/s CB Gor & Gor Advocates on behalf of the 2nd defendant/applicant pursuant to section 1A, 1B(1)(d) of the Civil Procedure Act and Order 17 Rule 2(3) of the Civil Procedure Rules, 2010 for orders that: -
 - (a) The plaintiff's suit against the 2nd defendant, dated June 17, 2016, and filed in court on June 21, 2016, be struck out or in the alternative and without prejudice to the foregoing, be dismissed;
 - (b) The costs incidental to such striking out, and or alternatively and without prejudice, such dismissal as sought in prayer (a) above, be paid to the 2nd defendant by the plaintiff.
5. The application by the 2nd defendant was supported by an affidavit sworn on September 3, 2021 by Salim Juma Ali, who was described as the 2nd defendant's operations manager. The gist of the application is that the plaintiff filed a suit on the June 21, 2016; and that well over five (5) years have since elapsed since then without any action being taken towards the prosecution of the suit. The 2nd defendant indicated that it filed its memorandum of appearance and defence on the July 28, 2016 and August 8, 2016 respectively and that the plaintiff has never taken any step to comply with the requirements of order 11 of the Civil Procedure Rules, 2010 or to set down the suit for hearing.
6. Further, it was the 2nd defendant's contention that the plaintiff has not complied with the mandatory requirements of order 3 rule of the Civil Procedure Rules, 2010 that require a plaint to be filed with a list of witnesses, written statements signed by witnesses and copies of documents to be relied on at the trial; including a demand letter before action. The 2nd defendant asserted that it has been prejudiced by the inordinate delay, in that it has been unable to prepare its case for trial; and therefore that the possibility that there would be a fair trial as envisaged under article 50 (1) of the Constitution of Kenya has been greatly diminished. The 2nd defendant's pointed out that section 1B(1) (d) of the Civil Procedure Act provides for timely disposal of proceedings; and therefore that this suit ought to be dismissed for want of prosecution as provided under order 17 rule 2 (1) and (3) of the Civil Procedure Rules, on account of the inordinate delay of over five (5) years from the time it was filed before this court.
7. A look at the pleadings and the court proceedings shows that the plaintiff had retained the services of M/s Balala & Abed Advocates who filed the instant suit on its behalf on the June 21, 2016. The said law firm thereafter filed an application dated October 7, 2021 for leave to cease acting for the plaintiff. The 1st and 2nd defendant did not oppose the said application. It was consequently allowed on October 13, 2021.
8. The application herein is unopposed even after the plaintiff was personally served with the two applications herein for dismissal. The 1st and 2nd defendants filed Affidavits of Service on the October 25, 2021 and November 2, 2021 respectively, confirming service of the applications on the plaintiff.
9. The hearing of the applications herein proceeded on the November 3, 2021 and Mrs. Akwana for the 1st defendant urged the court to find that there indeed has been inordinate delay in the prosecution of this case which has not been explained; and that no step has been taken herein since the 1st defendant filed its memorandum of appearance and defence on the July 20, 2016 and July 29, 2016 respectively.
10. I have carefully considered the two applications filed herein, affidavits in support and the submissions by the 1st defendant's counsel. The sole issue that arises for determination in the two applications,



which in my view are similar in all respects, is whether the suit herein ought to be dismissed for want of prosecution. In this respect order 17 rule 2 of the Civil Procedure Rules provides that: -

- (1) 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.
- (2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.
- (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.
- (4) The court may dismiss the suit for non-compliance with any direction given under this Order.

11. Thus, the exercise of the power to dismiss a suit for want of prosecution under order 17 of the Civil Procedure Rules is a matter that is within the discretion of the court. To guide the exercise of such discretion, the following principles as restated in Ivita v Kyumbu [1984] KLR 441 are pertinent:

“...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...”

12. Further, in the case of Naftali Opondo Onyango v National Bank of Kenya Ltd [2005] eKLR, hon Azangalala, J (as he then was) restated the pre-requisites thus: -

“....The defendant must show:

- i. That there had been inordinate delay. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case but it should not be too difficult to recognize inordinate delay when it occurs.
- ii. That the inordinate delay is inexcusable. As a rule until a credible excuse is made out the natural inference would be that it is inexcusable.
- iii. That the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff or between themselves and the plaintiff or between each other or between themselves and third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule the longer the delay the greater the likelihood of prejudice at trial...”

13. The plaint herein is dated June 17, 2016 and was filed on the June 21, 2016. The plaintiff’s claim against the defendants was for negligence that caused damage to the plaintiff’s cargo and resulted in patent damage of unit SBO 14 Universal Sidel-Blowing Wheel. The plaintiff, thus prayed for the following reliefs: -

- (a) Damages of € 632, 200.00 (approx @ the rate of Ksh. 112) Kshs 70, 806, 400/= being the cost of the proposed replacement of the Sidel-Blowing Wheel.



- (b) Kshs 1,028,883/= for intervention and inspection of the damage done on diverse dates as follows:
 - (i) Kshs 818, 496/= cost for cleaning, lubrication and dismantling of the machine on diverse dates.
 - (ii) Kshs 210,387/= cost of travel expenses for inspection by plaintiffs and Engineers.
 - (c) Damages for loss of profit and business.
 - (d) Cost of this suit.
 - (e) Interest on (a) and (b) above.
 - (f) Any other or further relief as this Honourable court may deem fit and just to grant.
14. The summons for the suit herein were prepared on the June 28, 2016 and it is clear that the 1st and 2nd defendants filed memorandum of appearance on the July 20, 2016 and July 26, 2016 respectively. Thereafter, the 1st defendant filed its statement of defence on the July 29, 2016 while the 2nd defendant filed on the August 8, 2016.
15. The last document filed on record was on December 20, 2017, wherein M/s Daly & Inamdar Advocates filed a notice to change of advocates to come on record for the 1st defendant. From then, no action was taken in the suit until May 20, 2021 when the 1st defendant filed its application for the dismissal of the suit for want of prosecution; which application was set for hearing on the September 20, 2021.
16. It is manifest therefore that a period of over five (5) years has elapsed since the last step was taken in this matter after the close of pleadings for purposes of order 2 rule 13 of the Civil Procedure Rules. The plaintiff has not filed any response to this application explaining the reasons for its inaction. That being the case, the inference to drawn is that the plaintiff has lost interest in the suit.
17. The plaintiff's indolence is, no doubt, prejudicial to the defendants who have been in a state of uncertainty and anxiety in that they may not be able to trace some of their witnesses as well as the necessary documentary evidence. In Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v MD Popat and others & another [2016] eKLR, the point was made 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....”
18. Thus, balancing the interests of the two parties, I take the view that the delay of five (5) years in prosecuting a matter is not only inordinate and unreasonable, but is also inexcusable. Accordingly, the application dated April 26, 2021 by the 1st defendant and that of the 2nd defendant dated September 3, 2021 are hereby allowed. The suit filed herein vide the plaint dated June 17, 2016 is hereby dismissed with costs for want of prosecution.

It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 27TH DAY OF APRIL 2022.



**OLGA SEWE
JUDGE**

