Ibrahim Sheikh Abdulla T/A Gulshan Restaurant v Karimjee (Civil Case 78 of 2013) [2022] KEHC 12149 (KLR) (24 May 2022) (Ruling)

Neutral citation: [2022] KEHC 12149 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE 78 OF 2013

OA SEWE, J

MAY 24, 2022

BETWEEN

IBRAHIM SHEIKH ABDULLA T/A GULSHAN RESTAURANT ..... PLAINTIFF

AND

ZAFFER IBRAHIM TAYABALI KARIMJEE ..... DEFENDANT

RULING

1. Before the court for determination is the Notice of Motion dated April 1, 2021. It was filed by defendant/applicant pursuant to sections 3A of the *Civil Procedure Act* and order 17 rule 2(3) and order 51 rule 1 of the *Civil Procedure Rules*, 2010 and all enabling provisions of the Law, for the following orders: -

   (a) That the plaintiff's suit herein dated June 22, 2013 be dismissed with costs for want of prosecution; and,

   (b) That the costs of this application be borne by the plaintiff.

2. It was predicated on the grounds that the matter was last scheduled for hearing on October 23, 2013; and therefore that the delay of over 8 years is inordinate, unreasonable and inexcusable. The defendant further contended that all indications are that the plaintiff has lost interest in the suit; and therefore that its continued pendency is not only prejudicial to the defendant, but is also an abuse of the process of the court. He accordingly prayed that the suit be dismissed for want of prosecution.

3. The application was premised on the affidavit of Mr. Peter Omwenga, annexed thereto, in which the grounds aforementioned were reiterated. There appears to be no response to the application. The record however shows that the application was variously fixed hearing unsuccessfully. Ultimately, it was thereafter canvassed by way of written submissions. Mr. Omwenga for the defendant relied on his written submissions dated November 17, 2021 in which he restated his averments in the supporting

affidavit to demonstrate that, no action has been taken the plaintiff to progress the suit since November 27, 2013 when the last step was taken herein.

4. Counsel relied on *Paxton v All Sopp* [1971] AllER 370 to support his argument that the delay of over 8 years is inexcusable. He likewise referred the court to *Tirth Construction Limited v Orion Hotels Limited* in which a delay of 4 years was found to be prejudicial to the defendant; and *Kestem Company Limited v Ndala Ship Limited & 2 others* in which there was a delay of 10 years. In both instances the delay was found to be inexcusable and therefore an infringement of Article 159(2)(a) of *the Constitution* which stipulates that justice be administered without undue delay.

5. Counsel for the plaintiff, on his part sought to explain, in his written submissions filed on January 17, 2022 that, while this matter was pending, the plaintiff filed ELC No. 6 of 2017: *Ibrahim Sheikh Abdulla v Zaffer Ibrahim Tayabli Karimjee & 6 others* on the advice of his erstwhile advocate, seeking to be declared the owner of the suit property by way of adverse possession. He explained that the plaintiff therefore concentrated his efforts on prosecuting that other suit in the belief that it would result in a lasting solution to the dispute between the parties and resolve this suit as well. Counsel made reference to the overriding objective as captured under section 1A and 1B of the *Civil Procedure Act*, chapter 21 of the Laws of Kenya, and urged the Court to bear in mind the plaintiff's fundamental right to fair hearing as enshrined in article 50 of *the Constitution*. He likewise cited HCCA No. 31 of 2014: *Joel Phineas Nyaga & Another v Aloysius Nyaga Kanyua & another* and High Court Criminal Revision No. 4 of 2020: *DPP v Perry Mansukh Kansagara & others* in urging the court to dismiss the instant application with a view of having the suit fixed for hearing and determination on the merits.

6. The application was brought under order 17 rule 2 of the *Civil Procedure Rules*, which 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.

7. While it is entirely in the discretion of the court to dismiss a suit for want of prosecution or not, a balanced approach is that which was applied in *Ivita v Kyumbu* [1975] eKLR in which it was held that:

> " ... the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time."

8. With the foregoing in mind, I have perused the court record. It confirms that this suit was filed by the plaintiff on June 24, 2013. He described himself as a tenant of the defendant's; and averred that they had a longstanding dispute over rent in respect of the business premises on Mombasa Block XVI/137 situated on Jomo Kenyatta Avneue in Mombasa Island. The dispute was referred to the Business Premises Rent Tribunal (PBRT) in accordance with the provisions of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, chapter 301 of the Laws of Kenya. The plaintiff complained, at paragraph 9 of his Plaint that, without notice to him, the BPRT made an order setting aside a consent order that had earlier been recorded by the parties and ordered the release of sums of money deposited

as rent pending the resolution of the dispute. Being aggrieved by that order, the plaintiff filed this suit seeking orders, inter alia, that the impugned order of the BPRT made on May 31, 2013 be declared null and void pursuant to the supervisory jurisdiction of this court.

9. The record further shows that the defendant was duly served and a Defence filed on his behalf on July 16, 2013 by M/s Mogaka Omwenga & Mabeya Advocates; and that the last step taken herein was on November 27, 2013 when Hon. Kasango, J. made an order for adjournment and directed the parties to take fresh dates for hearing. I therefore have no hesitation in holding that the delay in prosecuting this suit is indeed inordinate; for it is now over 8 years since. The plaintiff had an opportunity to explain the delay but opted to file no replying affidavit. Thus counsel invited the court to accept his representations in the written submissions filed herein on behalf of the plaintiff that the delay was warranted; and that the plaintiff was, in the meantime pursuing a suit before the Environment and Land Court for adverse possession. There is however no proof to back up those submissions.

10. It is now trite that submissions cannot plug the gap created by failure by a party to adduce evidence in proof of matters in issue. In *Daniel Toroitich Moi v Stephen Muriithi & another* [2014] eKLR, for instance, the Court of Appeal held that:

> " ...Submissions cannot take the place of evidence. The 1st Respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all."

11. It is therefore my finding that, since no attempt at all was made by the plaintiff to justify the delay herein, the delay is inexcusable. I am further satisfied that the delay is prejudicial to the defendant. As was well elucidated by Lord Denning MR in the case of *Allen vs. Sir Alfred McAlpine* [1968] All E.R 543 at 546, any delay in the administration of justice is to be deprecated. He stated thus:

> " The delay of justice is a denial of justice...all through the years men have protested at the law's delay and counted it as a grievous wrong, hard to bear...To put right this wrong, we will in this court do all in our power to enforce expedition; and if need be, we will strike out actions when there has been excessive delay. This is a stern measure; but it is within the inherent jurisdiction of the court, and the rules of court expressly permit it."

12. And, in *Fitzpatrick vs. Batger & Co. Ltd* [1967] 2 All ER 657, it was held that:

> " ...it is the duty of the plaintiff's advisers to get on with the case. Public policy demands that the business of the courts should be conducted with expedition...The delay [of two years] is far beyond anything we can excuse...It is impossible to have a fair trial after so long a time..."

13. In the result, I find merit in the application dated 1st April 2021. It is accordingly hereby ordered that this suit be and is hereby dismissed with costs for want of prosecution.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 24TH DAY OF MAY 2022.

OLGA SEWE

JUDGE