



**International Air Transport Association –I.A.T.A(Suing by its Attorney Mohamed Hassim Pondor & another v Resident Travel Limited & 3 others (Civil Case 240 of 2013) [2022] KEHC 14169 (KLR) (Civ) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 14169 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL**  
**CIVIL CASE 240 OF 2013**  
**DO CHEPKWONY, J**  
**SEPTEMBER 23, 2022**

**BETWEEN**

**INTERNATIONAL AIR TRANSPORT ASSOCIATION –I.A.T.A(SUING BY ITS ATTORNEY MOHAMED HASSIM PONDOR ..... 1<sup>ST</sup> PLAINTIFF**

**MOHAMED HASSIM PONDOR ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**RESIDENT TRAVEL LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**JIMMY RAYANI ..... 2<sup>ND</sup> DEFENDANT**

**PARVEZ JIMMY RAYANI ..... 3<sup>RD</sup> DEFENDANT**

**SALIMAH AMEEN PIRPHAI ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. The application subject of this ruling is dated May 20, 2021 and is seeking for orders that;
  - a. Spent;
  - b. Spent;
  - c. Spent;
  - d. Spent;
  - e) This honorable court be pleased to set aside its order on October 4, 2018 dismissing the plaintiff's/applicant suit for want of prosecution;



- f) This honorable court be pleased to reinstate the plaintiffs/applicants suit for immediate prosecution to its final determination;
  - g) This honorable court be pleased to allow the plaintiff's/ applicant's suit to proceed and be determined on its merits as the plaintiffs/applicant's suit against the defendants for a colossal sum of money which is truly and duly owing by the defendants;
  - h) Costs of this application be provided for.2.
2. The application is premised on the grounds on the face of it and in the supporting affidavit of Jacqueline M Tindi sworn on May 20, 2021. It is stated that the plaintiffs instructed the Firm of Guram & Company Advocates to file and prosecute the present suit against the defendants for recovery of Kshs 6,282,958.73 and USD\$27,307.99. That the said firm was solely run and managed by the late Mukesh Billing who passed on in 2015 and the firm of Billing & Company Advocates was nominated to deal with the winding up. That the plaintiffs were never informed of any progress of this matter and only came to learn the current position on March 24, 2021 when they were served with a hearing notice together with the 2<sup>nd</sup> defendant's bill of costs on the March 23, 2021. That consequently, the plaintiffs instructed the Firm of Tindi Munyasi & Company Advocates to peruse the court file which they did and found out that the matter was dismissed on October 4, 2018 with costs to the 2<sup>nd</sup> defendant for want of prosecution. The plaintiffs further came to learn that the suit was dismissed on the grounds that the plaintiffs had lost interest in the suit after R Billing Advocates acting on behalf of Guram & Company, Advocates told the court that they had written several unanswered letters to the plaintiff and sought to cease acting. According to plaintiff's advocate, the allegation by R Billing advocate to the effect that there were letters sent to the plaintiffs is not true and or substantiated. That the plaintiffs have greatly been prejudiced by the dismissal order based on the unsubstantiated allegations, as such, they are seeking the indulgence of this court in the interest of justice to reinstate this suit and allow the same to be heard on merit to its logical conclusion. That the plaintiffs are desirous of prosecuting their suit once reinstated.
3. The application is opposed vide the replying affidavit of Jimmy Rayani, the 2<sup>nd</sup> defendant herein, sworn on July 8, 2021. It is stated that the applicant's suit against the defendants was commenced by a plaintiff dated March 31, 2005 vide case number 169 of 2005 - Abdulrazak Khalfan (suing on behalf of the International Air Transport Association - IATA and another) versus the defendants herein. That the said suit was vehemently defended by the defendants and the court on the May 30, 2013, upheld the defendants preliminary objection and dismissed the plaintiff's suit. That in the said ruling, the court allowed the applicants to file a fresh suit on the same facts on account of the dictates of justice and the inherent and discretionary powers of the court, notwithstanding the lapse of the statutory and contractual limitation periods provided. Consequently, the applicants filed the present suit vide a plaint dated June 12, 2013 and filed on even date. That the plaint was served on the second defendant/ respondent on the June 13, 2014 who filed his defence dated July 8, 2014 on the July 9, 2014 and served Guram and Company Advocates on the same date. That the applicants filed their joint reply to defence dated and filed on July 15, 2014 signifying the close of pleadings. That the applicants did not prosecute its case up until the court, on its own motion issued a dismissal notice to the parties dated September 20, 2018. That on the October 4, 2018, when the matter came up for hearing, counsel for the applicants informed the court that he was not able to file a response from the applicants despite several attempts and that it seems the applicants were disinterested in the suit. That the court on October 4, 2018, dismissed the suit with costs to the 2<sup>nd</sup> defendant. Subsequently, the defendant's party and party bill of costs was filed and has since been determined. It is admitted that the applicant's advocate passed on in 2015 and that the applicants took no action in this matter since then. That the applicants cannot claim that they were not served yet their advocate on record did indicate that they had be sought



unsuccessfully. That it is also wrong for the applicants to accuse the advocate of making false statements yet he was not present in court to respond to the allegations. That prior to being dismissed for want of prosecution, this suit had been pending in court for over twelve years since 2005. That it is highly prejudicial and unjust to the defendant as a litigant to be bombarded by an application to reinstate this suit when it had already been dismissed three years ago, and costs taxed in his favour. That the plaintiffs have had more than their day in court having failed to prosecute their case in a decade. That the alleged cause of action took place almost 20 years ago and the witnesses the defendant intended to call are octogenarians who have mobility issues that it would be difficult to bring them to court to testify. That the plaintiffs are guilty of laches having wasted the opportunity to prosecute their case. It is the defendant's prayer that this application be dismissed with costs to the defendant in the interest of justice.

4. The applicant put in a rejoinder vide the replying affidavit of Sarah Weru sworn on July 8, 2021 which is basically an emphasis of the averments in the supporting affidavit.
5. In dealing with applications such as this, courts have the unfettered discretion guided by principles similar to those for dismissal for want of prosecution which are; the reasons for the delay; whether the delay is prolonged and inexcusable and if justice can still be done despite the delay as was set out in the case of *Ivita v Kyumbu [1984] KLR 441*. The said principles were set out thus:

' 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. The defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time

6. This matter was dismissed on October 4, 2018. The applicant claims that he came to know of the status of the matter on March 24, 2021 and filed this application in May, 2021. The delay in bringing this application is not inordinate since it is only two months from the date the applicant learnt of the status of its case. However, it is clear that the applicant had not been keen to follow up on his case after the demise of his 1<sup>st</sup> advocate and yet it is the client's duty to pursue his/her/its case to completion as was stated by the court in the case of *Savings & Loan Ltd v Susan Wanjiru Muritu, Nairobi Milimani HCCC No 397/02:-*

' A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case.'

7. In my view, the applicant ought to have constantly followed up on the progress of the matter with the advocate that took over the same. In the circumstance, the assertion by the advocate on record that he had severally written to the client without a trace cannot hold water since the same was not proved. Also, it is undoubted that the firm of R Billing & Company has never updated the applicant on the



case, the applicant was traceable, the respondents did not locate them to serve the bill of costs. This benefit of doubt goes to the applicant.

8. As to whether the respondent will be prejudiced if the case is re-instated, it is the applicant's case that the witnesses are already old with walking problems and would will be difficult to bring them to court. The court in the case of *Joshua Chelelgo Kulei -vs- Republic & 9 others [2014] eKLR*, which I entirely agree with observed that:

' Irreparable prejudice must refer to something more than the disadvantage caused by the loss of evidence that can happen in any trial. Thus irretrievable loss of some evidence, even if associated with delay, is not determinative of irreparable trial prejudice. Irreparability should not be equated with irretrievability.'

9. Consequently, I am persuaded that the prejudice to be suffered by the respondents would not be as great as the one that would be suffered by the applicant if driven out of the seat of justice without being heard. in that case, I would not give more weight to the respondent's suffering than mere disadvantage as against the right to be heard, and it is my humble opinion that the respondent can still be compensated by way of damages and costs.
10. Owing to the foregoing, and by considering the legal requirements of fair trial under article 50 of the *Constitution* alongside the mandate for the dispensation of substantive justice under article 159(2) (b) of the *Constitution*, I am inclined to allow the present application so as to accord the parties a chance to argue their respective cases on merit.
11. In the upshot, the application dated August 20, 2021 is hereby allowed subject to the following orders:-
- a) That the orders dated October 4, 2018 dismissing the plaintiff's suit for want of prosecution are hereby set aside.
  - b) That the plaintiff is directed to set down the suit for hearing within thirty (30) days from the date hereof.
  - c) The respondents are awarded throw away costs of Kshs 100,000/= to be borne by the plaintiffs/ applicants..

It is hereby so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2022.**

**DO CHEPKWONY**

**JUDGE**

**In the presence of:**

**Mr Isolio counsel holding brief for Mrs Tindi for Applicant**

**M/S Makena counsel holding brief for Mr Ojok counsel for 2<sup>nd</sup> Defendant/Respondent**

**Court Assistant - Sakina**

